ENGLISH TRANSLATION

SUBMISSION ON THE APPOINTMENT OF NEW BILINGUAL JUDGES TO THE COURT OF APPEAL AND THE COURT OF QUEEN'S BENCH OF MANITOBA

1) Basic Purpose

In our opinion, it is essential that Manitoba Courts have a good core or critical mass of judges with a strong command of both English and French. In our view, this is a key element in ensuring the proper administration of justice in both official languages.

We therefore urge the Government of Canada to act decisively to appoint new bilingual judges to the Court of Appeal and the Court of Queen's Bench, not only to meet immediate needs but also to create a bilingual succession in the medium and long term.

2) Current Number of Bilingual Judges

a) Court of Appeal

The following three members of the Court of Appeal are able to conduct hearings in both official languages:

- Chief Justice Richard Chartier;
- Justice Marc Monnin; and
- Justice Holly Beard.

It is therefore possible for the Court to create a panel of three bilingual judges to hear appeals in French.

However, Chief Justice Chartier has announced that he will retire next fall. For their part, both Justices Monnin and Beard are supernumerary and could stop sitting at any time.

b) Court of Queen's Bench

Currently, two judges of the General Division, namely Justices Gérald Chartier and Anne Turner, hear the majority of cases in French or in both official languages. For a number of reasons, the other bilingual judges preside over matters in French on a less frequent basis. On the one hand, given their administrative duties, Chief Justice Glenn Joyal and Associate Chief Justice Shane Perlmutter deal with a limited number of cases, regardless of language. On the other hand, Justice Brenda Keyser and Justice John Menzies have been sitting as supernumeraries for the last several years. Ultimately, we ask that the number of bilingual judges who routinely handle proceedings in French in the General Division be increased from two to three.

Moreover, since the appointment of Justice Marianne Rivoalen to the Federal Court of Appeal, none of the judges of the Family Division have sufficient knowledge of French to preside over hearings in that language. As a result, family law cases heard in French are dealt with by bilingual judges of the General Division.

3) <u>Need for Bilingual Judges in General</u>

a) <u>Institutional Bilingualism of the Courts</u>

Section 23 of the *Manitoba Act, 1870* includes constitutional guarantees of parliamentary, legislative and judicial bilingualism. In *Reference re Manitoba Language Rights*, the Supreme Court of Canada stated the following about the scope of this provision: "The purpose of section 23 of the *Manitoba Act, 1870* ... is to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike".

In *R. v. Beaulac*, the Supreme Court of Canada ruled that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

It also emphasized in the following terms the obligation of the courts to be institutionally bilingual:

> Section 530(1) [of the *Criminal Code*] creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be **institutionally bilingual** in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with. [paragraph 28]
>
> (emphasis added)

More specifically, the Court stated the following with respect to the substantive equality to be achieved through the institutional bilingualism of the courts:

> 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. [paragraph 22]
>
> (emphasis added)

Finally, the highest court in the land affirmed that the State must take proactive measures to enable the exercise of language rights in a manner consistent with the principle of substantive equality and that the exercise of these rights "must not be considered exceptional, nor as something in the nature of a request for an accommodation ". The Court's exact words on this subject are as follows:

> This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State; (…). It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [paragraph 24]

On a slightly different topic, it must be emphasized that judges who are proficient in both official languages are better able to understand the reality and issues of the official language minority in Manitoba and its needs in terms of access to justice. All of this contributes to genuine institutional bilingualism in the courts, from a holistic perspective.

b) <u>Right of Parties and Witnesses to be Understood Directly by Judges Without the Assistance of Interpreters</u>

In our view, the constitutional principle of institutional bilingualism of the courts has as its natural corollary the right of parties and witnesses to be directly understood by judges in the official language of their choice, without the assistance of interpreters. We recognize, however, that the current case law is not entirely clear on this point.

We submit that, in any event, the federal government must champion this right as part of fulfilling its general responsibility to advance the equality of status and use of English and French.

c) <u>Increase in the Supply of and Demand for Legal Services in French</u>

Over the last few decades, the social fabric of francophone minority communities has been profoundly transformed in many provinces and territories across the country.

Immigration, marriage outside the community and French immersion have combined to make for a plural Francophone identity that is very different from the one traditionally known. These changes are creating a whole new dynamic with respect to the supply of and demand for legal services in French.

We anticipate that, in the short and medium term, the following two major trends will gradually lead to a much stronger presence of French in the legal field and in the courts:

- an increase in the demand for legal services in French, due to the arrival of many French-speaking immigrants;
- an increase in the supply of legal services in French, resulting from the growing pool of immersion school graduates.

The judiciary will therefore need to have the necessary bilingual complement to meet the needs associated with this new sociolinguistic reality.

d) <u>Development of Francophone Minority Communities</u>

In addition to promoting the proper administration of justice in both official languages, appointing new bilingual judges to the Court of Appeal and the Court of Queen's Bench would contribute to the federal government's compliance with its obligations under sections 41 and 42 of the *Official Languages Act* with respect to the vitality of official language minorities.

On a broader level, we are grateful for the various positive measures that the federal government is taking to enhance the vitality of Francophone minority communities. These include support for the settlement and integration of a growing number of Francophone immigrants and the addition of language guarantees in the *Divorce Act*. However, in order to be consistent with itself, the government must ensure that the courts are well-equipped to respond to the increase in demand for French language services that stems from its own incentive measures. It is simply a matter of adhering to a well-aligned government-wide approach.

Furthermore, appointing bilingual judges would be a concrete measure that would be quite fitting with political commitments made by the government to Francophone minority communities, in the context of the modernization of the *Official Languages Act*.

e) Consistency of Francophone Presence in the Federal Judiciary in Manitoba

Since Manitoba entered Confederation in 1870, successive federal governments have consistently ensured the representation of the francophone element within the judiciary in our province. We encourage the current government to continue on the path already taken.

See the following materials on this subject:

- Jourdain, Guy; Rémillard, Rénald; (2009) *Les juges francophones, défenseurs du fait français*, Revue de la common law en français, 11, 249-261; and
- Memorable Manitobans: Judges of Manitoba.

4) Need for Bilingual Judges on the Court of Appeal

a) Ability to Create Panels of Bilingual Judges

The presence of two bilingual judges on the Court of Appeal is a vital minimum to enable this court to create panels of judges capable of understanding French-speaking litigants directly in their language, without the assistance of interpreters.

It should be noted that, in *R. v. Rémillard*, 2009 MBCA 112, the Court of Appeal created a panel of three bilingual judges, two of whom were from the Court of Queen's Bench and sat on the appeal on an *ad hoc* basis. This arrangement is perhaps suitable when the decision under appeal is from the Provincial Court. However, it would be much less appropriate in the hypothetical situation where *ad hoc* judges normally sitting on the Court of Queen's Bench would be called upon to rule on the merits of a decision rendered by one of their colleagues in that court.

b) Deficiencies of Simultaneous Interpretation

In the absence of a panel of three bilingual judges, simultaneous interpretation becomes necessary to allow communication between unilingual English-speaking judges and lawyers wishing to speak French. However, the use of interpretation in a judicial context gives rise to an array of practical problems well documented by Professor Michel Doucet in an article entitled *Le bilinguisme : une exigence raisonnable et essentielle pour la nomination des juges à la Cour suprême du Canada* [Bilingualism: A Reasonable and Essential Requirement for the Appointment of Judges to the Supreme Court of Canada]. Here is how he describes the crux of the problem insofar as the country's highest court is concerned:

> **[TRANSLATION]** While Supreme Court of Canada interpreters generally do an excellent job, it is often impossible for them to grasp all the nuances of the arguments presented and sometimes even to follow the often rapid and intense exchanges between judges and lawyers. I have personally had the opportunity to learn about the limitations of simultaneous interpretation in the Supreme Court of Canada in a case that we lost 5 to 4. Without claiming that simultaneous interpretation was the reason for this result, I must admit that, after listening to the English translation of my French oral submissions that was broadcast on the Cable Public Affairs Channel, I seriously wondered what the unilingual English-speaking judges had understood. On several

occasions, the interpreter was unable to follow the exchanges. He also referred to subsection 16(1) of the Charter when I had actually mentioned section 16.1 in my argument. I then asked myself whether I had done my client a favour by arguing the case in French: a doubt that one should never have when pleading a case before the highest court of an officially bilingual country like Canada. In fact, Peter Russell also referred to this problem in a paper for the Royal Commission on Bilingualism and Biculturalism, indicating that many French-speaking lawyers prefer to argue their cases in English in order to ensure that they are understood by the Court.

Furthermore, the difficulties raised by the inability of the Northwest Territories Court of Appeal to create a panel of three bilingual judges, requiring it to resort to simultaneous translation, will soon be the subject of an appeal before the Supreme Court of Canada in *Commission scolaire francophone des Territoires du Nord-Ouest, A.B., et al. v. Minister of Education, Culture and Employment, et al.* (Docket No. 39915).

5) Need for Bilingual Judges in the Court of Queen's Bench

a) High Level of Language Skills

Assessing the credibility of witnesses is one of the most important roles played by trial judges.

With the recent growth in francophone immigration, a broad range of regional variations and accents of French are becoming increasingly common in our community. In the context of trials where parties and witnesses testify, sometimes using very colourful expressions from all over the international French-speaking world, bilingual judges must have an excellent knowledge not only of legal French but also the various registers of French (including colloquial or popular language).

b) Mediation Role

Judges are increasingly called upon to act as mediators to help the parties reach an amicable settlement whenever possible. Therefore, it is essential that judges who are fluent in French be available to mediate at case conferences or pre-trial conferences.

Moreover, to the extent that it is necessary in some cases for more than one judge to deal with the various stages of the proceedings, the Court must all the more be able to rely on the services of a core group of judges capable of functioning effectively in both official languages.

(c) Special Considerations in Family Law

(i) Principle of Substantive Equality

In proceedings where bilingual judges of the General Division of the Court of Queen's Bench preside over hearings in French in the Family Division, French-speaking litigants are in our view treated unfairly since their cases are handled by judges who do not specialize in family law, whereas English-speaking litigants generally have access to judges specialized in this area.

In our view, this discrepancy in relation to access to judges specializing in family law is clearly contrary to the principle of substantive equality highlighted in *Beaulac*.

(ii) New Language Guarantees in the *Divorce Act*

In our opinion, the language guarantees recently included in the *Divorce Act* create an implicit obligation on the part of the federal government to ensure that a sufficient number of bilingual judges sit on trial courts dealing with divorce matters. Without proactive measures in this regard, the effective implementation of the new regime would be doomed from the outset and the clearly expressed intent of Parliament would be betrayed or evaded.

Finally, we believe that the combination in Manitoba of these new language guarantees and the existing constitutional guarantees of judicial bilingualism opens the door to various forms of synergy. In other words, our province's court system could play a leadership role across the country with regard to family justice in both official languages. That said, if our courts are to seize this unique opportunity and ensure the Francophone population enjoys its benefits, having at least one bilingual judge in the Family Division is an absolutely critical prerequisite.