THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-91 – *Indigenous Languages Act*

CANADIAN BAR ASSOCIATION
ABORIGINAL LAW SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Aboriginal Law Section, with assistance from the Advocacy Directorate at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Aboriginal Law Section.

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I. INTRODUCTION

The CBA Aboriginal Law Section (CBA Section) appreciates the opportunity to comment on Bill C-91, *An Act respecting Indigenous languages* (Bill C-91 or *ILA*). The CBA Section represents lawyers from across Canada who specialize in legal issues pertaining to Indigenous people.

The CBA Section offers one recommendation to ensure the full implementation of Indigenous language rights recognized by Bill C-91. As explained further below, we recommend that the *ILA* be made justiciable by allowing Indigenous peoples to seek out court remedies for violations of the rights it recognizes. Without this important amendment, the *ILA* risks being little more than another hollow promise.

The *ILA* is the kind of initiative required to begin remedying the lasting damage to the vitality of Indigenous languages and cultures as a result of a legacy of federal policies directly aimed at eradicating the distinct legal, social and cultural presence of Indigenous peoples in Canada. This is compounded by the subsequent failure of the federal government to correct the cultural devastation wrought by these policies.[1]

Both legislative and executive Branches of government had a role in perpetuating this crisis. Statutes enacted by Parliament outlawed Indigenous cultural practices. Access to the judicial branch was denied to Indigenous persons who opposed the government's agenda.[2] For its part, the executive branch propagated residential schools explicitly designed to "wean them by slow degrees from their nomadic habits, which have almost become an instinct, and by slow degrees absorb them or settle them on the land."[3] According to the Truth and Reconciliation Commission (TRC), "[r]esidential schools were a systematic, government-sponsored attempt to destroy Indigenous cultures and languages and to assimilate Indigenous peoples so that they no longer existed as distinct peoples".[4] Language was a particular target of the residential

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1 Truth and Reconciliation Commission of Canada, *Honoring the Truth, Reconciling for the Future*: Summary of the Final Report of the Truth and Reconciliation Commission of Canada, 2015, at 1 online: (Truth and Reconciliation Report).

2 Debates of the Senate, 42nd Parl, 1st Sess, Vol. 150 (17 November 2016) (Hon Murray Sinclair).

3 Debates of the House of Commons, 4th Parl, 2nd Sess (May 5 1880) (Rt. Hon. John A. MacDonald).

4 Truth and Reconciliation Report, at 153.

school system. In 1890, Indian Commissioner Hayter Reed suggested that the "native language is only to be used as a vehicle of teaching and should be discontinued as such as soon as practicable".[5]

Four of the TRC's 94 calls to action specifically address the denigration and suppression of Indigenous languages and cultures[6] and relate to the advancement of Indigenous languages and language rights in Canada:

13. We call upon the federal government to acknowledge that Aboriginal rights include Aboriginal language rights.

> 14. We call upon the federal government to enact an Aboriginal Languages Act that incorporates the following principles:
>
> i. Aboriginal languages are a fundamental and valued element of Canadian culture and society, and there is an urgency to preserve them.
>
> ii. Aboriginal language rights are reinforced by the Treaties.
>
> iii. The federal government has a responsibility to provide sufficient funds for Aboriginal language revitalization and preservation.
>
> iv. The preservation, revitalization, and strengthening of Aboriginal languages and cultures can best be managed by Aboriginal peoples and communities.
>
> v. Funding for Aboriginal language initiatives must reflect the diversity of Aboriginal languages.
>
> 15. We call upon the federal government to appoint, in consultation with Aboriginal groups, an Aboriginal Languages Commissioner. The commissioner should help promote Aboriginal languages and report on the adequacy of federal funding of Aboriginal-languages initiatives.
>
> 16. We call upon post-secondary institutions to create university and college degree and diploma programs in Aboriginal languages.

Bill C-91 is an opportunity to change Canada's history to instead honour, recognize and respect Indigenous rights and Indigenous language rights. Protecting and advancing Indigenous languages is crucial in efforts towards reconciliation. Bill C-91 requires careful study to ensure the ultimate success of its important goal of supporting "the efforts of Indigenous peoples to reclaim, revitalize, maintain and strengthen Indigenous languages."[7]

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5 Truth and Reconciliation Report, at 80.

6 Truth and Reconciliation Report, at 3.

7 Bill C-91, s. 5(b).

We recognize that there are many Indigenous groups in Canada and there will be many perspectives on the federal government's approach to Indigenous languages. The CBA Section has commented on one important facet of the proposed *ILA*, but we acknowledge that various Indigenous groups may construe the issues differently.

II. LANGUAGE RIGHTS

A. Domestic language rights

Since the *Official Languages Act* was enacted in 1969, Parliament has been involved in preserving and promoting minority languages. Like Bill C-91, the *Official Languages Act* was a response to a recommendation from a commission (the Royal Commission on Bilingualism and Biculturalism). Speaking in the House of Commons in 1968, Prime Minister Pierre Elliott Trudeau said:

> Many Eastern European, Asian and African states contain within a single political unit a great variety of languages, religions and cultures. In many of them this diversity is reflected in a federal system of government and in two or more official languages. In the past, multicultural states have often resulted from conquest or colonialism. In the modern world many are based on a conscious appreciation of the facts of history, geography and economics.
>
> In Canada, a country blessed with more prosperity and political stability than most, we are making our choices methodically and democratically.
>
> In all parts of the country, within both language groups, there are those who call for uniformity. It will be simpler and cheaper, they argue. In the case of the French minority, isolation is prescribed as necessary for survival. We must never underestimate the strength or the durability of these appeals to profound human emotions.
>
> Surely these arguments are based on fear, on a narrow view of human nature, on a defeatist appraisal of our capacity to adapt our society and its institutions to the demands of its citizens. Those who argue for separation, in whatever form, are prisoners of past injustice, blind to the possibilities of the future.
>
> We have rejected this view of our country. We believe in two official languages and in a pluralist society not merely as a political necessity but as an enrichment. We want to live in a country in which French Canadians can choose to live among English Canadians and English Canadians can choose to live among French Canadians without abandoning their cultural heritage.[8]

The longstanding narrative of Canada's "two founding peoples" has been displaced to recognize that Indigenous languages also deserve special status in the public sphere. Indigenous languages can also enrich the "pluralist society" that the *Official Languages Act* has promoted for fifty years.

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8 Rt. Hon. P.E. Trudeau, Statement on the introduction of the Official Languages Bill, October 17, 1968.

Language rights are fundamentally linked to culture. As former Chief Justice Dickson of the Supreme Court of Canada held in *Mahé v. Alberta* (a case concerning French and English minority language education rights under section 23 of the *Canadian Charter of Rights and Freedoms*):

> any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[9]

In 1963, the Royal Commission on Bilingualism and Biculturalism recognized the same link, stating "[l]anguage is also the key to cultural development. Language and culture are not synonymous, but the vitality of the language is a necessary condition for the complete preservation of a culture."[10]

More than French outside of Quebec or English in Quebec, Indigenous languages have been subject to assimilation, whether overt (through residential schools or policies prohibiting the use of Indigenous languages), or systemically (through a failure to take positive steps to preserve and promote Indigenous languages).

The situation is now dire for Indigenous languages in Canada. According to the TRC, "[m]any of the almost ninety surviving Indigenous languages in Canada are under serious threat of extinction."[11] The TRC highlighted the 2011 census results showing that 14.5% of the Indigenous population reported an Indigenous language as their first language. This showed a significant decrease over the previous 15 years: 18% in the 2006 census and 26% in the 1996 census.[12]

Despite this perilous situation, little government action has been taken to support and protect Indigenous languages in Canada. Nunavut,[13] the Northwest Territories,[14] and British Columbia[15] are the only jurisdictions to enact legislation aimed at protecting or promoting Indigenous languages. In contrast, minority French-language communities outside of Quebec and minority English-language communities in Quebec benefit from measures like: a constitutionally

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9 *Mahé v Alberta*, [1990] 1 SCR 342 at 362.

10 Royal Commission on Bilingualism and Biculturalism, Book II at 8.

11 Truth and Reconciliation Report, at 154.

12 *Ibid.*

13 Inuit Language Protection Act, SNu 2008, c 17.

14 *Official Languages Act*, RSNWT 1988, c O-1, ss. 30-31 (re Aboriginal Languages Revitalization Board).

15 First Peoples' Heritage, Language and Culture Act, RSBC 1996, c 147.

guaranteed primary and secondary education system;[16] constitutionally-guaranteed access to federal government services;[17] special status within the federal public service;[18] the right to be tried for criminal offences in either English or French;[19] and a quasi-constitutional commitment to advance both languages in Canada.[20]

Indigenous languages enjoy constitutional protection under section 35 of the *Constitution Act, 1982*, which "recognizes and affirms" Aboriginal and treaty rights in Canada. The Supreme Court of Canada has repeatedly confirmed that the inherent rights protected under section 35 are those integral to the distinctive cultures and practices of Indigenous groups at the time of European Contact.[21] Given that intrinsic link between language and culture, it is difficult to imagine anything more central to a group's distinct cultures and practices than its language.

Proactive measures by the federal government, such as through the *ILA,* allow Indigenous peoples to give life to their inherent language rights. Litigation to exert Indigenous rights is notoriously time-consuming and expensive, for both government and Indigenous groups, though the two are not equally resourced to afford that litigation. We suggest that time and effort is better invested in acting quickly to address the crisis facing Indigenous languages in Canada.

Proactive measures by Parliament are also consistent with the TRC's Calls to Action, and the federal government's commitments to reconciliation. When the TRC's final report was officially released, Prime Minister Justin Trudeau committed the federal government to fully implement the TRC's calls to action.[22] A year later, he addressed the Assembly of First Nations and confirmed that his government "supports the 94 calls to action of the Truth and Reconciliation Commission", stating that "[e]ach of the 94 needs to be implemented". The Prime Minister committed to "enact[ing] an Indigenous Languages Act, co-developed with Indigenous Peoples, with the goal of ensuring the preservation, protection, and revitalization of First Nations, Métis, and Inuit languages in this country", further to the TRC's Call to Action #14.[23]

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16 Canadian Charter of Rights and Freedoms, s. 23.

17 Canadian Charter of Rights and Freedoms, s. 20.

18 *Official Languages Act*, RSC 1985, c 31 (4th Supp), Part V.

19 *Criminal Code of Canada*, RSC 1985, c C-46, s. 530.

20 *Official Languages Act*, RSC 1985, c 31 (4th Supp), Part VII.

21 *R v Sappier*; *R v Gray*, 2006 SCC 54.

22 Justin Trudeau, Prime Minister of Canada, Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission, 15 December 2015, online (http://ow.ly/4eBb30ghS5c).

23 Justin Trudeau, Prime Minister of Canada, Prime Minister Justin Trudeau's Speech to the Assembly of First Nations Special Chiefs Assembly, 6 December 2016, online (http://ow.ly/DWy130ghSfI).

Bill C-91 would be a significant step toward accomplishing TRC's Call to Action #14 and the Prime Minister's promise to legislate an *Indigenous Languages Act*. It would also satisfy the TRC's thirteenth call to action, which asks that the federal government "acknowledge that Indigenous rights include Indigenous language rights",[24] given the recognition in clause 6 of Bill C-91 "that the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982* include rights related to Indigenous languages."

Bill C-91 would also be a step toward meeting Call to Action #15: that the federal government "appoint, in consultation with Indigenous groups, an Indigenous Languages Commissioner."[25] That Call to Action also specifies that the Commissioner should "help promote Indigenous languages and report on the adequacy of federal funding of Indigenous-languages initiatives."[26]

B. International law

In addition to considerations under domestic law, Indigenous cultural and language rights are recognized under international law and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[27] Cultural and language rights are central, both explicitly and implicitly to most of UNDRIP's provisions. In fact, 17 of UNDRIP's 46 articles deal with Indigenous culture, its protection and promotion, notably addressing education rights and languages rights. Language rights are explicitly mentioned in Articles 13, 14 and 16:

> Article 13
>
> 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
>
> 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.
>
> Article 14
>
> […]
>
> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their

24 Truth and Reconciliation Report, at 321.

25 *Ibid.*

26 *Ibid*.

27 Truth and Reconciliation Report, at 160.

> communities, to have access, when possible, to an education in their own culture and provided in their own language.
>
> Article 16
>
> 1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
>
> 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

More generally, Article 8 of UNDRIP states:

> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> […]
>
> (d) Any form of forced assimilation or integration;

Due to the intrinsic relationship between language and culture, UNDRIP aims to prevent and offer redress for the assimilation (both cultural and linguistic) of Indigenous peoples. Article 9 states that "[i]ndigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."[28] It is difficult to imagine Indigenous traditions and customs not including language. Article 11 of UNDRIP also constitutes a clear call for an Indigenous right to "practise and revitalize their cultural traditions and customs". These traditions and customs, as reiterated in Article 31, include performing arts and literature, and are necessarily linked to Indigenous languages.

The rights in UNDRIP must be read in the context of the more general right in Article 27 of the *International Covenant on Civil and Political Rights*:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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28 United Nations Declaration on the Rights of Indigenous Peoples Article 9.

III. RIGHTS WITHOUT A REMEDY

As currently drafted, some aspects of the *ILA* closely resemble Part VII of the *Official Languages Act* in overall intent and structure.[29] Part VII, "Advancement of English and French", sets out the federal government's commitment to:

enhancing the vitality of the English and French linguistic minority communities in Canada" by "supporting and assisting their development, and to advancing the recognition and use of both English and French in Canadian society.[30]

The clear intent of both Part VII and the *ILA* is to advance the recognition and development of the languages in question and recognize and respect language rights. That can only be achieved by imposing duties on the federal government to take certain measures to implement those stated commitments.

Unlike the *Official Languages Act*, Bill C-91 does not contemplate a court remedy for the federal government's failure to follow through on commitments in the *Act*. As the Federal Court of Appeal held in *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)* (*Forum des maires*), the purpose of the *Official Languages Act*'s remedies is "to ensure that the *Official Languages Act* has some teeth, that the rights and obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone".[31]

The initial versions of the *Official Languages Act* did not provide for the justiciability of Part VII. Part X relates to the availability of court remedies, applied only to rights and duties under portions of the *Act*:

- Sections 4 to 7 (Proceedings in Parliament and Legislative and Other Instruments);
- Sections 10 to 13 (International treaties, publication of notices and advertisements);
- Part IV (Communications with and Services to the Public);
- Part V (Language of Work); and
- Section 91 (Staffing).

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29 See, for example, Bill S-212, s. 6 and the *Official Languages Act*, RSC 1985, c 31 (4th Supp), s. 41(1) [OLA]; Bill S-212, s. 7 and OLA, s. 41(2); Bill S-212, s. 10 and OLA, s. 41(3); Bill S-212, s. 8 and OLA, s. 45; Bill S-212, s. 9 and OLA, s. 43(2); and; Bill S-212, s. 11 and OLA, s. 44.

30 OLA, s. 41(1).

31 Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), 2004 FCA 263 at para 17.

The lack of an explicit court remedy for the federal government's failure to live up to its Part VII commitments proved fatal to the justiciability of those commitments. In *Forum des maires*, the Federal Court of Appeal interpreted Part VII (as it then read) as demonstrating "the express and implied intention of Parliament to exclude these areas from judicial intervention."[32] The Federal Court of Appeal relied on several features of Part VII:[33]

i. the vague wording of the provisions (despite their use of the word "shall");

ii. the obligations in question being ill-adapted to the exercise of judicial power;

iii. the use of terms that do not evoke a legal obligation;

iv. the use of the words "government policy" in the marginal note accompanying one of Part VII's provisions; and

v. Part VII being addressed to long-term objectives, the achievement of which depend on the existence of a political will.

Ultimately, the Federal Court of Appeal was clear that, despite the importance of language rights, Parliament must be specific when it intends those rights to be enforced by the judiciary:

> It is true that the protection of language rights constitutes a fundamental constitutional objective and requires particular vigilance on the part of the courts, and that courts must generously construe the texts that confer these rights, but it is also necessary that these be rights to protect and not policies to define. […]
>
> […] it is not because a statute is characterized as quasi-constitutional that the courts must make it say what it does not say, especially when the statute, as in this case, has been careful not to say it.[34]

Parliament addressed the Federal Court of Appeal's conclusion in *Forum des maires* in short order by enacting Bill S-3, *An Act to amend the Official Languages Act (fostering of English and French)* in 2005. Senator Gauthier's bill was intended to "give some teeth to the Official Languages Act" by adding Part VII to the list of provisions in relation to which a complainant could apply for a court remedy.[35] Bill S-3 received Royal Assent in November 2005, making Part VII of the *Official Languages Act* fully justiciable under Part X of the *Official Languages Act*.

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32 Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), 2004 FCA 263 at para 38.

33 Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), 2004 FCA 263 at paras 35-37.

34 Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), 2004 FCA 263 at paras 39-40.

35 See, Senator Gauthier's speech online.

Due to this amendment, French-language communities outside of Quebec and English-language communities in Quebec can seek court remedies for violations of Part VII of the *Official Languages Act*, and so seek to advance official language rights in Canada.[36]

It bears noting, however, that even the enforceability of Part VII of the *Official Languages Act*, as amended, has been called into question.[37]

Much like today's Part VII of the *Official Languages Act*, the *ILA* must be justiciable to ensure that it is binding on the federal government. Without those amendments, the *ILA* is likely to follow the same course as Part VII prior to Parliament's 2005 amendment to the *Official Languages Act*, leaving its promise dependent on political will. We urge an amendment to the *ILA* to make it justiciable.

RECOMMENDATION

1. **The CBA Section recommends that Bill C-91 provide for the justiciability of the *Indigenous Languages Act* to allow the courts to monitor its implementation by the federal government, and ensure complainants have a means to seek remedy for violations of the *Indigenous Languages Act*.**

   We recommend that Bill C-91 be amended to add, immediately before section 49, a heading "Court Remedy" with sections relating to rights-holders' right of action, the limitation period for such claims, the right of the Commissioner to apply or appear as part of proceedings under the Part, and other necessary specifics.

IV. CONCLUSION

The CBA Section believes that Bill C-91's goals are laudable, and consistent with the TRC's Calls to Action, the constitutional rights of Indigenous Peoples in Canada, and international law. However, as drafted the Bill would deny Indigenous people a mechanism to enforce their language rights. Acting on our recommendation would ensure that Bill C-91 is not another hollow promise to Indigenous people, by ensuring independent oversight by the judiciary in preserving and promoting Indigenous language rights in Canada.

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36 Canada (Commissioner of Official Languages) v CBC, 2014 FC 849, rev'd 2015 FCA 251; Canada (Commissioner of Official Languages) v CBC/Radio-Canada, 2012 FC 650, Fédération des communautés francophones et acadienne du Canada v Canada (Attorney General), 2010 FC 999; Norton v Via Rail Canada, 2009 FC 704 at para 105.

37 The scope of Part VII was arguably curtailed by the Federal Court of Canada's interpretation in *Fédération des Francophones de la Colombie-Britannique v Canada*, 2018 FC 530, a decision that is presently under appeal to the Federal Court of Appeal (Dockets A-182-18 and A-186-18).