THE FEDERAL COURT OF APPEAL OF CANADA: A VIEW FROM THE INSIDE OF A BIJURAL AND BILINGUAL COURT

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INTRODUCTION

Canada and Mexico share the continent of North America and are important trading partners. Our countries have strong cultural ties that have been forged through immigration and tourism. In addition, our legal and political systems share a degree of commonality. Against this background, I will provide an overview of the Federal Court of Appeal of Canada with a focus on its bijural and bilingual aspects and with a view to providing an understanding of the specificity of the Canadian judicial landscape.

FEDERAL COURTS IN CANADA

From the outset, some context regarding the creation of the Federal Courts of Canada is required. Canada's original constitution, which created the federal dominion of Canada over 150 years ago, in 1867, provides under section 101 that Parliament may establish Courts for the better administration of the laws of Canada.[1] Under this provision, the predecessor of the Federal Courts, the Exchequer Court of Canada, was created in 1875.[2] The Supreme Court of Canada was created at the same time via the same legislation.[3]

Given that the Exchequer Court was created by statute, it did not have inherent jurisdiction, meaning that it did not have the power to decide just any case; it could only decide cases where jurisdiction had been granted to it by Parliament. While the jurisdiction of the Federal Courts has changed over time, the Exchequer Court's jurisdiction came to include matters such as actions and revenue cases against the Crown, as well as admiralty, intellectual property, and citizenship matters, just like the jurisdiction of the Federal Courts today. In 1971, the Federal Court, which was

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[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

[2] See *The Supreme and Exchequer Court Act*, SC 1875, c 11.

[3] *Ibid*.

comprised of a trial division and an appeal division, succeeded the Exchequer Court, principally for the purpose of addressing confusion regarding judicial review.[4]

What is meant by judicial review in Canada? It consists of reviewing the decisions of government boards, commissions, tribunals, and other governmental decision makers. In the years of the Exchequer Court, jurisdiction was shared with other courts, which created confusion in the jurisprudence and some ambiguity regarding the territorial scope of the application of provincial decisions across the country. Initially, the newly created Federal Court was therefore granted exclusive jurisdiction over federal judicial review. Later, in 2003, the Appeal Division became a separate Court rather than a division of the Federal Court.[5] Since then, there have been two courts: the Federal Court, as well as the Federal Court of Appeal, where I now sit as a judge.

How does the Federal Court of Appeal operate? It can likely be compared in Mexico to *los Tribunales colegiados de circuito.* Like those Courts, the Federal Court of Appeal is a circuit court where judges sit in panels of three across Canada to rule upon matters of federal jurisdiction. All cases that come through the federal system are appealed to the Federal Court of Appeal. The only further appeal from our decisions is to the Supreme Court of Canada and parties must be granted leave by the Supreme Court in order for their appeal to be heard. The Supreme Court only hears a limited number of cases per year, usually between 60 and 70 since 2015.[6] It follows that in practice, approximately 98% of our decisions are final.

There are 17 justices at the Federal Court of Appeal[7] and roughly 500 proceedings are commenced before the Court every year. The judges appointed to the Federal Court of Appeal are representative of Canada's geography and can be composed, from time to time, of judges coming from six different legal backgrounds representing the two legal systems, in French and in English. It follows that a judge may be as follows:

- Anglophone with a common law legal training;
- Francophone with a common law legal training;
- Anglophone with a civilian legal training;
- Francophone with a civilian legal training;
- Anglophone with a common law and civilian legal training; and
- Francophone with a civilian and common law legal training.

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[4] See *Federal Court Act*, SC 1970-72, c 1.

[5] See *Courts Administration Service Act*, SC 2002, c 8.

[6] See "2018: Year in Review" (2019) at 1, 9, 13, online (pdf): *Supreme Court of Canada* <scc-csc.ca/review-revue/2018/yr-ra2018-eng.pdf>; "2019: Year in Review" (2020) at 1, 25, 27, 32, online (pdf): *Supreme Court of Canada* <scc-csc.ca/review-revue/2019/yr-ra2019-eng.pdf>.

[7] There are currently 13 full-time Judges that sit on the Federal Court of Appeal, including the Chief Justice, while four of the 17 Judges are supernumerary.

The Court's geographic jurisdiction covers all 10 provinces and three territories. As judges of a national court, we are required by law to be based out of Canada's national capital, Ottawa, but we all travel across the country to hear cases, from Vancouver in the west, to Halifax in the east, and occasionally far up north to Whitehorse or Yellowknife. From their creation, the Federal Courts have therefore been providing access to justice in allowing litigants to appear before a national court in their home province or territory. This is a unique feature of the Federal Courts, compared to any other courts in Canada.

In addition, at the Federal Court of Appeal, as is the case throughout the federal judiciary in Canada, the justices were formerly members of a provincial bar prior to being appointed to the bench, meaning that they used to be lawyers. Indeed, unlike many countries, Canada selects and appoints its judges from the practice of law, as opposed to training jurists to become judges from the outset. Personally, I view this as a particular strength of the Canadian judiciary, which is composed of highly accomplished lawyers with extensive experience prior to joining the bench.

THE JURISDICTION OF THE FEDERAL COURT OF APPEAL

So, what do we do at the Federal Court of Appeal? Our jurisdiction is broad and varied. For instance, we hear cases pertaining to administrative law, prison law, tax law, labour law, constitutional law, intellectual property law, and maritime law. Much of our docket is dedicated to hearing appeals of applications for judicial review of decisions from federal boards, commissions or tribunals. As noted earlier, a judicial review is when an affected person asks the Court to review the decision of an administrative decision maker, i.e. a decision that was made by a bureaucrat or a public servant, or by a federally created board, but was not decided in a court of law. Courts will show deference to administrative decision makers, given the executive's prerogative to make these administrative decisions, provided such decisions are not unreasonable or arbitrary and remain within the bounds of legality. Otherwise, judicial intervention is required.

One area of the Federal Court of Appeal's jurisdiction of interest, given that Mexico and Canada are both parties to NAFTA/USMCA, is over the Canadian International Trade Tribunal (the CITT). The CITT is one of the select administrative tribunals from which affected parties have direct access to judicial review at the Federal Court of Appeal and do not first have to apply for judicial review at the Federal Court. While pure NAFTA issues are not adjudicated by the CITT, many types of trade matters are. Many of the cases in front of the CITT are (1) unfair trading practice cases, i.e., dumping cases, where foreign manufacturers sell their products in Canada for less than the price for which they could sell the products in their home country, and (2) subsidy cases, where the CITT determines whether a given subsidy unfairly distorts trade.

The specificity of Canada in this regard is that jurisdiction over such unfair practice cases is split between two bodies, rather than one. These include the Canada Border Services Agency (the CBSA), which is the agency responsible in Canada for facilitating the flow of both persons and goods and enforcing related legislation, i.e., border enforcement. The CBSA decides whether goods have been dumped or subsidized. In parallel, the CITT determines whether the dumping or subsidizing has injured Canadian producers or threatens to harm them in the future. In other words, the CBSA looks at what occurred, while the CITT looks at the effect of what occurred. If either the CBSA or the CITT reaches a negative determination, the inquiries of both bodies end immediately.[8]

In coming to its decisions, the CITT considers relevant decisions of the World Trade Organization (the WTO). While WTO decisions are not binding on the CITT, they are persuasive authority and are regularly argued by parties and relied upon by the CITT.

The CITT also has jurisdiction to inquire into issues that are referred to it by the government and to make recommendations. These inquiries notably include what are called "safeguard inquiries", which allow the CITT to recommend that Canada temporarily restrict imports to allow Canadian producers to adapt. For example, in April 2019, in the context of the changing international trading environment regarding steel, the CITT recommended that a tariff rate quota be placed on two classes of steel goods because they were "being imported in such increased quantities and under such conditions as to be a principal cause of a threat of serious injury to the domestic industry."[9]

Another area of interest is the jurisdiction of the Federal Courts over immigration law matters, more specifically the Immigration and Refugee Board. This is a wide area of jurisdiction for the Federal Court, which is the court of first instance. Immigration matters often make up more than half of all matters that the Federal Court considers in a year.[10] A large part of these matters consists of applications for judicial review of refugee decisions.

The context for refugee decisions is usually as follows. When someone comes to Canada and files a claim for asylum, their file is handled by the Refugee Protection Division of the Immigration and Refugee Board. They have a hearing in front of one of the members of the Board, during which the Board member asks the claimant

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[8] See Canadian International Trade Tribunal, *Anti-Dumping Injury Inquiries - Guide* (26 January 2017), online (pdf): *Government of Canada* <www.citt-tcce.gc.ca/en/collections/anti-dumping-injury-inquiries/documents/anti-dumping_injury_inquiries_guide.pdf>.

[9] *Safeguard Inquiry into the Importation of Certain Steel Goods: Inquiry No GC-2018-001* (Ottawa: Canadian International Trade Tribunal, 3 April 2019), online: *Government of Canada* <decisions.citt-tcce.gc.ca/citt-tcce/s/en/item/418294/index.do?q=GC-2018-001>.

[10] See "Statistics" (last modified 31 December 2019), online: *Federal Court* <www.fct-cf.gc.ca/en/pages/about-the-court/reports-and-statistics/statistics#cont>.

questions about their case in order to determine whether they should be granted refugee status. Once the hearing is concluded, depending on the circumstances, the Board will either issue the decision immediately or issue a written decision at a later date. If the refugee claimant receives a negative decision, in most cases they can appeal to the Refugee Appeal Division of the Board in writing. If the appeal also results in the rejection of their claim, it is at this point that the claimant can apply for judicial review at the Federal Court. If the application for judicial review is accepted by the Federal Court, the usual remedy is to send the case back to the Immigration and Refugee Board to be re-decided in accordance with the Federal Court's reasons.

In most cases, the Federal Court is the last stop for immigration matters, including refugee cases. Federal Court decisions on immigration matters can be appealed to the Federal Court of Appeal, but only where the Federal Court has certified the case to move forward because it raises a "serious question of general importance", i.e., the case will have implications that will extend beyond the confines of the particular facts of the case. Given this requirement, the amount of immigration cases heard by the Federal Court of Appeal is lower than at the Federal Court level, but the cases that we do see often raise interesting, new, and important issues. In addition to refugee issues, these cases concern other immigration matters such as sponsorship applications, inadmissibility to Canada, and deportation.

Another important area of the Federal Court and the Federal Court of Appeal's jurisdiction is national security. While the Federal Courts have had jurisdiction over this domain for a very long time, national security cases have taken more prominence and have attracted more interest since the events of September 11th, 2001, which had a serious impact on the way that the Canadian government and society view security and approach security issues.

Jurisdiction in this regard largely stems from the *Canadian Security Intelligence Service Act*,[11] which sets out the law regarding Canada's intelligence agency (that goes by the name "Canadian Security Intelligence Service", or "CSIS" for short), as well as the *Canada Evidence Act*[12] and the *Immigration and Refugee Protection Act*.[13] National security cases may, for example, concern whether the government has to disclose information in an individual's file to that individual, usually in criminal or immigration proceedings where the government has chosen to redact the file for security purposes. There is therefore a need to balance fairness concerns and individual rights with the interests of state security.

[11] *Canadian Security Intelligence Service Act*, RSC 1985, c C-23.

[12] *Canada Evidence Act*, RSC 1985, c C-5.

[13] *Immigration and Refugee Protection Act*, SC 2001, c 27.

BIJURALISM AT THE FEDERAL COURT OF APPEAL

A unique feature of Canada's legal system, dating back to the *Québec Act* of 1774,[14] is bijuralism. Indeed, two systems of law have coexisted and still coexist in Canada: common law and civil law. Most lawyers are only trained in the legal tradition of their home province, but some lawyers are trained in both civil and common law. In Québec, the French majority-speaking province in Canada that was historically colonized by France, the law is based on the civilian tradition. Therefore, Québec, like Mexico, has a civil code and emphasizes the primacy of written laws. The *Civil Code of Québec* (CCQ), which was adopted in its original form in 1866,[15] is inspired by the 1804 French *Code Napoléon*. The CCQ serves as a cornerstone of the legal system in Québec. It is noteworthy that the *Federal Courts Act* provides that at least five judges from the Federal Court of Appeal and 10 judges from the Federal Court must be from Québec, thus ensuring that a reasonable proportion of judges within the Federal Courts have been trained in the civil law tradition.[16] The *Supreme Court Act* also provides that at the Supreme Court of Canada, a statutory Court created at the same time as the Exchequer Court (the ancestor of the Federal Courts) under the same constitutional provision, at least three of the nine judges be appointed from Québec.[17] Hence, the *Supreme Court Act* ensures, in the same way as the *Federal Courts Act*, that a third of its judges will be civilians, thus recognizing the importance of bijuralism at the federal level.

The remaining Canadian provinces follow a common law system that is based on the common law tradition of the other historical colonial power in Canada, namely England. This system, like in the United States, emphasizes the importance of judicial precedent. Common law is built through new cases that follow, build, distinguish, and occasionally overturn, previous case law. While the Mexican system incorporates judicial precedent into its legal rule-making through the concept of *jurisprudencia,*[18] in Canada, case law is binding in a more strict and immediate sense, in that a single decision of a higher Court which articulates a legal principle is binding on decisions of lower Courts.

While federal public law matters are handled uniformly, given that Canada's national constitution allows Parliament to pass legislation that applies across the country in certain subject matters, such as criminal law, private law matters are generally handled differently depending on the province in question. Even amongst the common law provinces, at times the law can develop quite differently from one

[14] *British North America (Québec) Act, 1774*, 14 Geo III, c 83 (UK).

[15] CCLC.

[16] *Federal Courts Act*, RSC 1985, c F-7, s 5.4.

[17] *Supreme Court Act*, RSC 1985, c S-26, s 6.

[18] Similar to the French notion of *jurisprudence constante*. Among other requirements, a court must make five consecutive and uninterrupted decisions (i.e. without a decision in between going the other way) on an issue in order for the principle to become binding on lower courts.

province to another. Indeed, pursuant to section 92(13) of the *Constitution Act, 1867*,[19] provinces have exclusive legislative jurisdiction over property and civil rights.

There will thus be situations where private law, be it common law or civil law, will apply directly to federal statutes to fill the void not addressed in federal law. This is called the principle of complementarity and it was codified in 2001[20] by section 8.1 of the *Interpretation Act*:[21]

> **8.1** Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
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> **8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

Prior to the enactment of section 8.1, the principle of complementarity had been formulated and applied by courts in a number of decisions, one of the seminal decisions being *St-Hilaire v Canada (Attorney General)*.[22] This case concerned whether a Québec resident (the wife) was entitled to survivor benefits under a federal government pension plan to which her husband had contributed, in light of the fact she had pleaded guilty to manslaughter in connection with his death. The federal statute governing the pension plan was silent on eligibility requirements of surviving spouses to receive benefits. As such, the Court had to decide whether the common law or the civil law of Québec should apply to determine the wife's entitlement to benefits. Justice Décary drew upon the principle of complementarity in holding that when a federal statute refers to a private law concept without defining it, the private law of the province where the dispute arose "fills the void".[23] He also noted that Canada's Constitution enshrines "the federal principle that a federal law that resorts to an external source of private law will not necessarily apply uniformly throughout the

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[19] *Supra* note 1.

[20] See *Federal Law–Civil Law Harmonization Act, No 1*, SC 2001, c 4, s 8.

[21] *Interpretation Act*, RSC 1985, c I-21.

[22] *St-Hilaire v Canada (AG)*, 2001 FCA 63.

[23] *Ibid* at para 51, Décary JA.

country."[24] In the circumstances, the civil law of Québec was applied in determining the wife's eligibility for benefits because her civil rights were at issue. The other Justices hearing the appeal endorsed Justice Décary's reasoning on the applicability of the civil law, although they disagreed with his interpretation of the relevant legal provisions. They found that the wife was not entitled to any benefits in the circumstances.

More recently, in *Canada v Raposo*,[25] our Court reiterated the principle of complementarity involving the definition of "contract of partnership and association" pursuant to article 2186 of the CCQ. In this case, the Court had to determine whether a member of a gang that was involved in drug trafficking in Québec was jointly and severally liable for sales tax owed from drug sales. This determination turned on whether the gang was a partnership and thus how "partnership" should be defined under the *Excise Tax Act*[26] (the ETA). The parties agreed that since the ETA did not define "partnership", the principle of complementarity, enunciated in *St-Hilaire*, applied and that "partnership" had to be defined according to the CCQ. The disagreement revolved around which Code provisions applied. The appellant argued that only one provision that defined contracts of partnership applied and that in the circumstances, a partnership could be found to exist and the respondent gang member could be jointly and severally liable for the debt. The Court of Appeal preferred a broader approach, noting that provisions regarding contracts in general applied to contracts of partnership. It held that, in this case, federal law did not exclude the application of Code provisions that made void any contract whose object is contrary to law or public order. The Court of Appeal therefore upheld the lower court's finding that the contract of partnership linking the gang members in the case was void and that the respondent was not jointly and severally liable for the tax debt.

There have been attempts to harmonize the law across provinces and across legal traditions where possible and desirable, but there is also recognition that having diversity in rules across the country is one of the realities (and an acceptable reality) of belonging to a federalist state, and that this brings a sort of vibrancy to our legal system and allows provinces to learn from each other. It has been said by a former Judge of the Supreme Court of Canada that "while civil law and common law complement the private law provisions of federal legislation, at the same time, federal legislation should not be applied uniformly throughout the country in every respect".[27] This is an interesting aspect of being a judge at the federal level in Canada, as opposed to the provincial level: we can be called upon to interpret laws and decide cases based

[24] *Ibid* at para 35, Décary JA.

[25] *Canada v Raposo*, 2019 FCA 208.

[26] *Excise Tax Act*, RSC 1985, c E-15.

[27] The Honourable Mr. Justice Michel Bastarache, "Bijuralism in Canada" (delivered at the Department of Justice Lunch and Learn Workshop on Bijuralism and the Judicial Function in Ottawa, Ontario, 4 February 2000), in Department of Justice Canada, *Bijuralism and Harmonization: Genesis* (Ottawa: Department of Justice Canada, 2001) at 19, online (pdf): *Government of Canada* <justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b1-f1/bf1.pdf>.

on both common and civil law notions and understandings and try to unify the Canadian legal system as a whole, while also recognizing some necessary differences in application across the country.

In this spirit, a committee composed of members of the Québec Bar in private practice, lawyers from the Department of Justice of Canada, and members of the judiciary, including judges from the Federal Court, the Federal Court of Appeal, and the Québec provincial superior Court, recently developed a pilot project with a view to allowing lawyers from the Québec Bar to use the *Code of Civil Procedure* (CCP) in certain proceedings before the Federal Court and the Federal Court of Appeal,[28] instead of the *Federal Courts Rules*,[29] which have been drafted with common law principles in mind. This initiative is inspired by a desire for a closer connection with Québec jurists and is consistent with bijuralism. It aims to extend the existing substantive bijuralism of the Courts to include procedural bijuralism and allows members of the Québec Bar to conduct proceedings under the familiar CCP before the Federal Court and the Federal Court of Appeal.

BILINGUISM AT THE FEDERAL COURT OF APPEAL

Canada's legal and judicial system is also bilingual, reflective of the country's two official languages: English and French. At the provincial level, there are varying bilingualism policies, with most provinces being unilingual. In some provinces, laws are written in both English and French, legal services are offered in both languages, and citizens can use English or French in the Courts; in others, only English may be used. The Canadian Constitution does not explicitly or implicitly provide for the use of Indigenous languages before courts. However, in some of Canada's territories, which are located in the north of the country, some Indigenous languages are recognized territorially as official languages, such as Inuktitut, Chipewyan, and Cree.[30] Certain Indigenous languages have also been recognized in Québec.

At the federal level, the Parliament of Canada is required by section 133 of the *Constitution Act, 1867* to enact legislation in English and in French and both versions are of equal authority, meaning that neither is viewed as a translation of the "true" law—both are regarded as "true". Section 18 of the *Canadian Charter of Rights and Freedoms*[31] further provides that both versions "are equally authoritative". Hence, lawyers who appear before the Federal Court and the Federal Court of Appeal must

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[28] Federal Court & Federal Court of Appeal, *Notice to the Parties and the Profession re formal implementation of the pilot project on procedural bijuralism* (28 November 2019), online (pdf): *Federal Court* <www.fct-cf.gc.ca/content/assets/pdf/base/Notice_Parties_Pilot_projet_Bijuralism.pdf>.

[29] SOR/98-106.

[30] See e.g. *Official Languages Act*, RSNWT 1988, c O-1, s 4; *Official Languages Act*, S Nu 2008, c 10, ss 1, 3; *Inuit Language Protection Act*, S Nu 2008, c 17 s 1(2).

[31] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

provide the judges with citations in both official languages in order to allow judges of the Federal Court and the Federal Court of Appeal to take into account both linguistic versions of a statute. Judges take this very seriously. For instance, a panel of the Federal Court of Appeal has in the past disavowed a decision rendered by a different panel for lack of comparing both versions of a statute.

It is also noteworthy that decisions rendered by the Federal Court of Appeal and the Federal Court have to be translated pursuant to subsection 20(1) of the *Official Languages Act*,[32] which has been recognized by our Court as a quasi-constitutional Act.[33] In most cases, the Court's decision will be issued in one language and translated afterwards. The delay for translation is variable. Exceptionally, translations of decisions of national importance will be prioritized in order to allow the release of the decision simultaneously in both official languages. The *Federal Courts Act* also provides that "each decision reported in the official reports shall be published therein in both official languages".[34]

At the Federal Court of Appeal, we regularly hear cases in both English and French and sometimes we even hear bilingual proceedings, with translators for the parties if necessary, during which one party pleads in English and one party pleads in French. Given the protection that both French and English are offered in Canadian institutions, the Court also often hears cases about language rights, bilingualism, and official languages.

Moreover, the right to use either English or French in proceedings at the Federal Courts is a constitutionally protected language right. The Federal Court of Appeal reiterated this principle in *Industrielle Alliance, Assurance et services financiers inc v Mazraani*.[35]

In this case, language issues arose at first instance in several ways. Witnesses and counsel for the intervener expressed their preference for speaking in French. The trial judge encouraged them to speak in English because of their English language skills and the fact that one of the parties was unilingual in English. The unilingual party also said he would need an interpreter if the trial were to proceed in French, but no interpreter was provided. Parts of the testimony and counsel's argument for the intervener were ultimately delivered in French, as the witnesses and counsel struggled to speak in English at times.

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[32] *Official Languages Act*, RSC 1985, c 31 (4th Supp).

[33] See *Canada (AG) v Viola* (1990), [1991] 1 FC 373 at 386–87, 123 NR 83 (CA). See also *Mazraani v Industrial Alliance Insurance and Financial Services Inc*, 2018 SCC 50 at para 25 [*Mazraani* SCC].

[34] *Supra* note 16, s 58(4).

[35] *Industrielle Alliance, Assurance et services financiers inc v Mazraani*, 2017 FCA 80, aff'd *Mazraani* SCC, *supra* note 33.

The Federal Court of Appeal found that the trial judge had violated the language rights of the unilingual party and the intervener's witnesses and counsel. The Court emphasized that any person who appears before or submits written pleadings to a Federal Court has the constitutional right to use the official language of his or her choice and that a person's ability to use either language does not impact this right. The Court also drew upon federal legislation that requires Federal Courts to provide simultaneous interpretation to any party who requests it and to ensure that any person giving evidence before the court can be heard in the official language they choose to use. The Court found that the trial judge should have adjourned the hearing to arrange for interpretation services, instead of impinging on participants' language rights in the name of expediency. The Court ordered a new trial before a different judge.

Mr. Mazraani appealed the Federal Court of Appeal decision to the Supreme Court of Canada and leave was granted. The Supreme Court of Canada unanimously upheld the Federal Court of Appeal's decision. It emphasized that a person's choice of language before Federal Courts must be free and informed and that judges in Federal Courts are required to protect language rights. It concluded that the language rights violations in issue had clearly impacted the hearing, witnesses, and parties and had also "brought the administration of justice into disrepute."[36]

Furthermore, bilingualism amongst judges of the Federal Court of Appeal has been in constant progression in recent years. Although not all judges in our Court qualify as fluently bilingual, there has been much improvement, at least with respect to the judges' understanding of both official languages, which are both used in Court meetings.

THE FUTURE FOR INDIGENOUS LANGUAGES AND LEGAL TRADITIONS?

Bilingualism and bijuralism are well established in Canada's legal framework and are emblematic of the Federal Court and the Federal Court of Appeal. It is also fair to say that a lot has been achieved in the past decades in order to enhance these aspects of Canada's judicial system, for example, by way of the appointment of more bilingual judges to the bench.

The next challenge ahead is to find ways to include Indigenous languages and legal traditions in the judicial system and/or to assist in supporting the use of Indigenous legal systems alongside the system embodied by federal and provincial courts. The reflection has begun, as the following examples from the Federal Courts illustrate:

[36] *Mazraani* SCC, *supra* note 33 at para 78.

- The Federal Court has an Aboriginal Law Bar Liaison Committee,[37] as well as Aboriginal Practice Guidelines[38] that aim to provide more flexibility in tailoring proceedings to meet particular circumstances by addressing the use of Indigenous languages, oral history, and Elder evidence.

- A witness testified in Cree in *Benoit v Canada*.[39] A translation of his testimony was introduced into evidence. Testimony in Cree was also received in *Montana Band v Canada*.[40]

- The Federal Court has issued written and oral summaries of four decisions since May 2019 in Indigenous languages,[41] including *Whalen v Fort McMurray No 468 First Nation* (in Cree and Dené),[42] *Jim Shot Both Sides v Canada* (in Blackfoot),[43] *Thomas v One Arrow First Nation* (in Plains Cree),[44] and *Watson v Canada* (in Cree).[45]

- The Federal Court has recognized the validity of Indigenous laws upon considering custom elections referenced under the *Indian Act*.[46] The Federal Court of Appeal also recently observed that a custom election code formed part of a First Nation's law.[47]

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[37] See "Indigenous Bar Association - Aboriginal Law Bar Liaison Committee", online: *Federal Court* <www.fct-cf.gc.ca/en/pages/about-the-court/liaison-committees/indigenous-bar-association---aboriginal-law-bar-liaison-committee>.

[38] See Notice to the Profession from the Federal Court Aboriginal Law Bar Liaison Committee, *Practice Guidelines for Aboriginal Law Proceedings* (April 2016), online (pdf): *Federal Court* <www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf>.

[39] See *Benoit v Canada*, 2002 FCT 243 at paras 229–30, 309, rev'd 2003 FCA 236 (the Court of Appeal was critical of the Trial Judge's treatment of the oral history evidence presented at trial but did not appear to criticize his decision to allow for testimony in Cree).

[40] *Montana Band v Canada*, 2006 FC 261 at paras 58–59, aff'd 2007 FCA 218 (the witness identified in those paragraphs was identified as having testified in Cree in the *Practice Guidelines*, *supra* note 38 at 38).

[41] See "Webcast" (last modified 28 January 2020), online: *Federal Court* <www.fct-cf.gc.ca/en/pages/media/webcast>.

[42] *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 [*Whalen*].

[43] *Jim Shot Both Sides v Canada*, 2019 FC 789.

[44] *Thomas v One Arrow First Nation*, 2019 FC 1663.

[45] *Watson v Canada*, 2020 FC 129.

[46] *Indian Act*, RSC 1985, c I-5, s 2(1) [*Indian Act*]. See e.g. *Henry v Roseau River Anishinabe First Nation*, 2017 FC 1038 at paras 11–13; *Whalen*, *supra* note 42 at para 32; *Pastion v Dené Tha' First Nation*, 2018 FC 648 at paras 6–8, 11–14.

[47] See e.g. *Lavallee v Ferguson*, 2016 FCA 11 at para 28.

In addition, there are federal statutes that recognize the power of Indigenous Peoples to develop and implement law, including the following:

- the *First Nations Fiscal Management Act*;[48]
- the *First Nations Goods and Services Tax Act*;[49]
- the *First Nations Jurisdiction over Education in British Columbia Act*;[50]
- the *First Nations Land Management Act*;[51]
- the *First Nations Oil and Gas and Moneys Management Act*;[52]
- the *Indian Act*;[53] and
- *An Act respecting First Nations, Inuit and Métis children, youth, and families*.[54]

Of particular note is the *Indigenous Languages Act*.[55] It aims to support and promote the use of Indigenous languages, support efforts of Indigenous Peoples to reclaim, revitalize, maintain, and strengthen Indigenous languages, and facilitate funding for those efforts, and establish a framework to facilitate the effective exercise of Indigenous Peoples' rights related to languages, among other purposes.[56] It provides for access to federal government services in Indigenous languages,[57] as well as translation and interpretation by federal institutions,[58] and establishes an Office of a Commissioner of Indigenous Languages.[59] Some of these sections have already come

[48] *First Nations Fiscal Management Act*, SC 2005, c 9, ss 5, 9.

[49] *First Nations Goods and Services Tax Act*, SC 2003, c 15, ss 4, 12, 67.

[50] *First Nations Jurisdiction over Education in British Columbia Act*, SC 2006, c 10, s 9.

[51] *First Nations Land Management Act*, SC 1999, c 24, ss 6, 15–16, 20.

[52] *First Nations Oil and Gas and Moneys Management Act*, SC 2005, c 48, s 35.

[53] *Indian Act*, *supra* note 46, ss 81, 83.

[54] *An Act respecting First Nations, Inuit and Métis children, youth, and families*, SC 2019, c 24, ss 18, 20–24.

[55] *Indigenous Languages Act*, SC 2019, c 23.

[56] *Ibid*, note 55, s 5.

[57] *Ibid*, s 10.1.

[58] *Ibid*, s 11.

[59] *Ibid*, ss 12–42.

into force, while others are set to follow by October 1, 2020.[60]

CONCLUSION

Many of the Federal Courts' practices that uphold bijuralism and bilingualism in relation to the Constitution and Canada's official languages are well established and robust at an institutional level. However, practices aimed at supporting the use of Indigenous languages and legal traditions tend to be implemented on an *ad hoc* basis. Academics in the field of Aboriginal law suggest that it is important both to strengthen Indigenous methods of dispute resolution and to facilitate incorporation of Indigenous languages and legal traditions into Canadian courts.[61] Hence, although progress has been accomplished to include Indigenous languages and their legal traditions in the judicial system, it remains to be seen at this juncture how Indigenous languages and legal traditions will continue to operate alongside and within Canada's Federal Courts system.

[60] *Indigenous Languages Act: Order Fixing the Days on which Certain Sections of that Act Come into Force*, SI/2019-93, (18 September 2019) C Gaz II, vol 153, 6336.

[61] John Borrows, "The Role of Governments and Courts in Entrenching Indigenous Legal Traditions" in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) 177 at 206–18. See also Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51:1 UBC L Rev 105 at 108–09, 155.