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ENSURING JUSTICE IS DONE IN BOTH OFFICIAL LANGUAGES

Report of the Standing Committee on Official Languages

The Honourable Denis Paradis, Chair

DECEMBER 2017
42nd PARLIAMENT, 1st SESSION

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Hon. Denis Paradis
Chair

DECEMBER 2017

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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THE STANDING COMMITTEE ON OFFICIAL LANGUAGES

has the honour to present its

EIGHTH REPORT

Pursuant to its mandate under Standing Order 108(3)(*f*), and the motion adopted by the Committee on Tuesday, January 31, 2017, the Committee has studied the full implementation of the *Official Languages Act* in the Canadian justice system and has agreed to report the following:

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LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

That the Government of Canada table a bill during the 42nd Parliament guaranteeing that bilingual judges are appointed to the Supreme Court of Canada. 13

Recommendation 2

That, pursuant to recommendation 1, the Government amend subsection 16(1) of the *Official Languages Act* so that the requirement to be able to understand both official languages also applies to judges of the Supreme Court of Canada. 13

Recommendation 3

That the Government amend the *Judges Act* by adding the following after section 3:

Bilingualism — designation of positions

4(1) A position designated bilingual by the attorney general of the province must be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak and understand both official languages in accordance with the standards to be developed by the Office of the Commissioner for Federal Judicial Affairs.

Bilingualism — appointment of bilingual judges

(2) The chief justice of the superior court of the province may ask that a position be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak and understand both official languages.

Mandate

(3) The Office of the Commissioner for Federal Judicial Affairs shall evaluate the person's level of proficiency in both official languages. 22

Recommendation 4

That the Office of the Commissioner for Federal Judicial Affairs explore existing Canadian resources, such as KortoJura, to develop a language proficiency test and a scale to evaluate the language skills of candidates for appointment to the federal judiciary and the Supreme Court. 22

Recommendation 5

That the Department of Justice implement directions 1 and 2 and the initiatives proposed by the Réseau national de formation en justice in its report, *Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages*. 32

Recommendation 6

That the Department of Justice expand the scope of its support programs for access to justice in both official languages by ensuring that Canadians who enter into divorce proceedings are heard in the official language of their choice throughout the process, regardless of the place where the proceedings take place. 33

Recommendation 7

That the Department of Justice encourage the translation of more judgments of jurisprudential interest pertaining to areas of federal law from superior courts and provincial and territorial appellate courts. 36

Recommendation 8

That the Department of Justice ensure that official language minority communities:

(a) have the capacity to intervene in matters of access to justice in both official languages in terms of both claims and legal training and information;

(b) are represented on every judicial advisory committee. 38

Recommendation 9

(a) That the Government of Canada take the necessary steps to set out the criteria for "decisions that must be made available simultaneously" within the meaning of section 20 of the *Official Languages Act* and the language obligations that apply to the language of federal court decisions posted on their websites.

(b) That the chief justices of the various jurisdictions choose what judgments to publish in both official languages based on criteria to be set out. 42

Recommendation 10

That the Government of Canada evaluate the needs of the Court Challenges Program, specifically the component on the clarification of official language rights, and increase its budget, if necessary. 44

ENSURING JUSTICE IS DONE IN BOTH OFFICIAL LANGUAGES

Introduction

In the spring of 2017, the House of Commons Standing Committee on Official Languages (hereinafter the "Committee") launched its study on access to justice in both official languages. The purpose of the study is to review this issue of major importance to Canadians, particularly members of official language minority communities (OLMCs), and, based on the evidence and briefs presented, prepare recommendations to help the Government of Canada achieve truly equal access to justice in both official languages.

1. INCREASE THE LANGUAGE PROFICIENCY OF FEDERALLY APPOINTED JUDGES

1.1 The need to interpret *Reference re Supreme Court Act, ss. 5 and 6* (2014) in terms of the bilingualism of Supreme Court justices

A great deal has been written and said about requiring Supreme Court appointees to be bilingual. Over the course of the study, the following aspect of this issue emerged: Can Parliament enact a law making bilingualism a requirement for appointment to the Supreme Court of Canada?

This question stirs up a debate that focuses mainly on the interpretation of *Reference re Supreme Court Act, ss. 5 and 6*,[1] handed down by the Supreme Court of Canada in 2014.

In *Reference re Supreme Court Act, ss. 5 and 6*, the Supreme Court held that Parliament has the authority to make administrative amendments regarding the Supreme Court, but it cannot "unilaterally modify the composition or other essential features of the Court."[2] The Court relied on such provisions as section 41(d) of the *Constitution Act, 1982*, which states that any modification to the composition of the Supreme Court requires a constitutional amendment:

> **41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of

---

1 Supreme Court of Canada, *Reference re Supreme Court Act, ss. 5 and 6,* 2014 SCC 21, [2014] 1 SCR 433.

2 Ibid.

> Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
>
> *d)* the composition of the Supreme Court of Canada.[3]

Does making bilingualism a requirement for appointment to the Supreme Court affect its composition or one of its essential features? In other words, can Parliament make bilingualism a requirement for appointment by amending an existing statute or enacting a new one, or must it initiate the formal constitutional amendment process?

The Committee had the privilege of hearing from leading constitutional authorities, who shed light on this complex issue through their insight and expertise. Benoît Pelletier is among those who believe that Parliament has the jurisdiction to unilaterally make bilingualism necessary for appointment to the Supreme Court – either by amending an existing statute or passing new legislation.

His argument is based first on the fact that section 4(1) of the *Supreme Court Act* provides for the constitution of the Supreme Court, and sections 5 and 6 deal with the eligibility requirements:

> **Constitution of Court**
>
> **4 (1)** The Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges.
>
> **Appointment of judges**
>
> **(2)** The judges shall be appointed by the Governor in Council by letters patent under the Great Seal.
>
> **Who may be appointed judges**
>
> **5** Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.
>
> **For greater certainty**
>
> **5.1** For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

3 *Constitution Act, 1982*.

> **Three judges from Quebec**
>
> **6** At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.
>
> **For greater certainty**
>
> **6.1** For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.[4]

According to Mr. Pelletier, "Subsection 4(1) and sections 5 and 6 of the Supreme Court Act do not deal with the bilingualism of judges or other qualification criteria, but rather the composition of the court. They indicate there that it is made up of nine judges and three of them must come from Quebec. They describe appointment conditions in general."[5]

Second, Mr. Pelletier stated that *Reference re Supreme Court Act* provides enough information about the essential features of the Supreme Court to conclude that Parliament has the authority to make bilingualism a requirement for appointment to the Court. According to Mr. Pelletier, these essential features "relate to the continued existence of the court; the proper functioning of the court; and the place of the court in Canada's legal and constitutional order."[6] The following excerpt from Mr. Pelletier's testimony offers further details on this subject:

> Basically, the features of the court relate to its continuity, and therefore to its very existence. Would the bilingualism of Supreme Court judges endanger the very existence of the court? No. The essential features include the proper functioning of the court. Would requiring Supreme Court judges to be bilingual compromise the proper functioning of the court? No.
>
> The other essential feature is the court's place in Canada's constitutional and legal order. Would imposing bilingualism on Supreme Court judges affect the Supreme Court's role as a last court of appeal in Canada? Again, the answer is no.[7]

---

4 *Supreme Court Act*, R.S.C. 1985, c. S-26.

5 House of Commons Standing Committee on Official Languages (LANG), *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1230 (Benoît Pelletier, Professor, Faculty of Law, University of Ottawa, As an Individual).

6 Ibid., 1205.

7 Ibid., 1210.

Mr. Pelletier strongly believes that making bilingualism an eligibility requirement would not change the composition or an essential feature of the Court; it is unilingualism that would be changed:

> First, if someone wants to convince you that mandatory bilingualism would affect an essential characteristic of the Supreme Court, turn the question around. Ask them if being unilingual is an essential feature of the Supreme Court.
>
> …
>
> So, basically, when you ask which situation would be changed, the answer is unilingualism. I will never be convinced that unilingualism is an essential feature of the Supreme Court of Canada. Believe you me, a Supreme Court judge will never be convinced of that either.[8]

Lawyer Michel Doucet supports this view. As he explained, "In this situation, we are not dealing with the composition of the Supreme Court but, rather, with the language proficiency of its judges."[9]

Professor Sébastien Grammond noted that *Reference re Supreme Court Act, ss. 5 and 6* should be read in light of the question referred to the Court regarding the appointment of Judge Marc Nadon:

> 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.[10]

Jurist Michael Bergman also believes that the decision focuses only on the question originally referred to the Supreme Court and "it does not look at the long-term policies necessary to build on the constitutional requirements of what we need for a sane and proper Supreme Court or other tribunal."[11]

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8 Ibid., 1245.

9 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1215 (Michel Doucet, Professor and Director, International Observatory on Language Rights, Université de Moncton, As an Individual).

10 LANG, *Evidence*, 1st Session, 42nd Parliament, 7 March 2017, 1205 (Sébastien Grammond, Professor, Civil Law Section, University of Ottawa, As an Individual).

11 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1135 (Michael Bergman, President, Association of English speaking Jurists of Quebec).

The Committee wishes to note that it invited a number of experts who believe *Reference re Supreme Court Act, ss. 5 and 6* has the effect of eliminating Parliament's authority to legislate the composition of the Supreme Court or to unilaterally amend its essential features. Only Professor Daniel Jutras accepted the invitation to appear.

Like other witnesses, Professor Jutras believes Supreme Court justices should be proficient in both official languages. However, he disagrees with the method of achieving this goal. He does not think that the legislative route – passing a new law or amending an existing law – is the best option: "In my opinion, the political advantages of such an initiative would be less important than the legal risks it would entail."[12]

Professor Jutras acknowledged that entrenching mandatory bilingualism in legislation would be a symbolic gain and a "gesture that would emphasize the equal importance of both official languages."[13] There would also be a "strategic" gain since a legislative amendment or repeal must go through the legislative process.[14] Professor Jutras added that, "when a requirement is enshrined in law, one can demand that it be respected."[15]

However, he believes that the risks involved in legislating bilingualism as a mandatory requirement for Supreme Court justices far outweigh the potential benefits:

> Consequently, if an act imposes bilingualism as a condition of nomination, any nomination of a justice to the Supreme Court can be challenged before the courts. Someone could in fact allege that that requirement was breached, and claim that the judge is not sufficiently bilingual in his opinion, and that that appointment should be rescinded.[16]

Professor Jutras noted that challenging a Supreme Court appointment on the basis of the judge's language skills "would contain a real risk."[17] Such a challenge could be "embarrassing for the judiciary and humiliating for the judge concerned" and would also be "complex and unpredictable on the factual and legal levels, and could as a result weaken the Supreme Court itself."[18]

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12 LANG, *Evidence*, 1st Session, 42nd Parliament, 30 May 2017, 1205 (Daniel Jutras, Professor, As an Individual).

13 Ibid.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

Unlike the other witnesses, Professor Jutras believes that a constitutional amendment is needed to make bilingualism a requirement for appointment to the Supreme Court.[19] He bases this view on paragraph 105 of *Reference re Supreme Court Act, ss. 5 and 6*:

> Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*.[20]

Professor Jutras believes the preceding paragraph clearly states that introducing a language requirement would change the general eligibility requirements and therefore necessitate a constitutional amendment:

> It cannot get any clearer than that. To say that a constitutional amendment is not required in order to achieve the objective we are talking about this morning, we have to ignore that language or, in all cases, interpret it in such a way that the important aspects are removed.[21]

In his view, if Parliament proceeded with legislation on the language proficiency of Supreme Court justices, “it is almost certain that the legislation would be challenged before the courts and … it would probably be overturned.”[22] Therefore, “the only thing gained by inserting the condition in legislation would be symbolic and, as a strategy, it is not worth it.”[23] Even though he recognizes that the existing program could be challenged in court[24], he believes that “the formal commitment of the Prime Minister as it stands [is] sufficient … to achieve the objective of the bilingualism of Supreme Court justices.”[25]

To determine whether Parliament has the authority to make bilingualism a requirement for appointment to the Supreme Court, Professor Grammond suggested that Cabinet refer the matter to the Court. A number of other witnesses shared this view, including

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19 Ibid.

20 Supreme Court of Canada, *Reference re Supreme Court Act, ss. 5 and 6,* 2014 SCC 21, [2014] 1 SCR 433, para. 105.

21 LANG, *Evidence*, 1st Session, 42nd Parliament, 30 May 2017, 1210 (Daniel Jutras, Professor, As an Individual).

22 Ibid.

23 Ibid., 1205.

24 Ibid., 1300.

25 Ibid., 1205.

Ghislaine Saikaley, Interim Commissioner of Official Languages, who called it an "excellent suggestion."[26] Lawyers Mark Power and Marc-André Roy agreed that:

> it is very possible that the imposition of a language requirement … could be implemented unilaterally by the federal Parliament. However, there is some doubt as to whether the federal Parliament may legislate alone by virtue of its power over federal courts under section 101 of the *Constitution Act, 1867*. It is also possible that this affects one of the Supreme Court's essential features, thereby requiring the assent of seven provinces representing, in the aggregate, 50% of the Canadian population.
>
> Since there is doubt, we agree with Professor Grammond that it would be very useful for the federal government to refer the matter to the Supreme Court for the final say. That would be a way of resolving the impasse. This would help prevent a situation like the case of Justice Nadon a few years ago, when the debate had been unintentionally personalized. There was in fact a challenge based on the appointment of a particular individual. So we think the way to avoid that and move forward would be to refer the matter to the Supreme Court.[27]

Officials from the Barreau du Québec also felt the matter should be referred to the Supreme Court:

> There are several schools of thought on the bilingualism issue—on whether Parliament can amend the Constitution Act or whether a constitutional amendment is required. The reference regarding the Supreme Court Act did not make it possible to make a clear decision in that case.
>
> This is a fundamental question for accessibility to justice. In fact, the Supreme Court is the court of last resort for all Canadians, including those who speak French. If it is really impossible to decide the dispute between the two schools of thought, it would be important to bring this issue before the Supreme Court of Canada, so that it can set the record straight on the matter. In other words, it should determine whether bilingualism is part of what we call the other essential characteristics that are protected by the Constitution.[28]

1.2 Amend the *Official Languages Act*

An amendment to the *Supreme Court Act* is not the only possible option to ensure bilingualism in the Supreme Court of Canada. Some witnesses raised the possibility of

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26 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1125 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

27 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1220 (Marc-André Roy, Lawyer, As an Individual).

28 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 April 2017, 1225 (Sylvie Champagne, Secretary of the Order and Director of the Legal Department, Barreau du Québec).

amending the *Official Languages Act.* Currently, subsection 16(1) excludes the Supreme Court from the language obligations to which other federal courts are subject.

> **16 (1)** Every federal court, other than the Supreme Court of Canada, has the duty to ensure that
>
> **(a)** if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
>
> **(b)** if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and;
>
> **(c)** if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.[29]

According to Mr. Pelletier, an amendment to the *Official Languages Act* would be the best way to ensure the bilingualism of the Supreme Court: “I would choose to amend the *Official Languages Act*. That seems to me to be easiest and clearest under the circumstances.”[30] Subsection 16(1) could be amended to remove the words “other than the Supreme Court of Canada”, which would eliminate the exception for the Supreme Court.[31]

While Mr. Pelletier believes that the bilingualism of Supreme Court judges can be imposed unilaterally by Parliament through an amendment to the *Official Languages Act*,[32] he acknowledges that it could be a subject of dispute:

> Some provisions of the federal Official Languages Act are quasi-constitutional, as pursuant to section 82 of this act. This is the case of the provisions in part III of the act, entitled “Administration of Justice”. However, the provisions of the *Official Languages Act* can be unilaterally amended by Parliament, on the condition, among others, that they do not affect an essential feature of the Supreme Court of Canada.[33]

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29 *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

30 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1240 (Benoît Pelletier, Professor, Faculty of Law, University of Ottawa, As an Individual).

31 Ibid., 1235.

32 Ibid., 1210.

33 Ibid., 1205.

Professor Grammond also expressed caution about the possible negative effects of amending section 16 of the *Official Languages Act*:

> 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[34].

The Committee believes that the bilingualism of Supreme Court judges is a major issue and that the federal government must take measures to ensure that litigants and their lawyers are understood and their documents are read in the official language of their choice in the highest court in the land. Therefore, the Committee recommends:

Recommendation 1

That the Government of Canada table a bill during the 42nd Parliament guaranteeing that bilingual judges are appointed to the Supreme Court of Canada.

Recommendation 2

That, pursuant to recommendation 1, the Government amend subsection 16(1) of the *Official Languages Act* so that the requirement to be able to understand both official languages also applies to judges of the Supreme Court of Canada.

1.2 The need to appoint a sufficient number of bilingual judges

1.2.1 The work of the Commissioner of Official Languages

In 2013, Graham Fraser, the former commissioner of official languages, and his Ontario and New Brunswick counterparts published a report entitled *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*.[35] The report looked at the process for appointing federal judges and the language training available to them.

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34 LANG, *Evidence*, 1st Session, 42nd Parliament, 7 March 2017, 1230 (Sébastien Grammond, Professor, Civil Law Section, University of Ottawa, As an Individual).

35 Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013.

It is important to note that the former commissioner's report focused on the superior courts – superior trial courts and provincial courts of appeal.

Mr. Fraser found that the appointment process for superior court judges "does not guarantee a sufficient number of judges with the language skills needed to hear Canadians in the official language of the linguistic minority without delays or additional costs."[36] As the Interim Commissioner told the Committee, Mr. Fraser identified two major shortcomings in the appointment process:

> First, there is no coordinated action to determine the needs of superior courts in terms of bilingual capacity or to ensure that a sufficient number of bilingual judges is appointed to these courts.
>
> Second, there is no objective evaluation of the language skills of superior court judiciary candidates. Until recently, the only criterion for the superior court judiciary was a single question on the application form asking candidates whether they were able to conduct a trial in either official language. This self-evaluation was never verified objectively.[37]

The first four recommendations in *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary* address the issue of concerted action and seek to bolster intergovernmental cooperation:

> The Commissioner of Official Languages recommends that the federal Minister of Justice:
>
> 1. Take measures, by September 1, 2014, in collaboration with his provincial and territorial counterparts, to ensure appropriate bilingual capacity in the judiciary of Canada's superior courts at all times;
>
> 2. Establish, together with the attorneys general and the chief justices of superior courts of each province and territory, a memorandum of understanding to:
>
> 2.1 Set the terms of this collaborative approach;
>
> 2.2 Adopt a common definition of the level of language skills required of bilingual judges so that they can preside over proceedings in their second language;
>
> 2.3 Identify the appropriate number of bilingual judges and/or designated bilingual positions;

36 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1105 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

37 Ibid.

> 3. Encourage the attorneys general of each province and territory to initiate a consultation process with the judiciary and the bar, with the participation of the French-speaking common law jurists' association or the legal community of the linguistic minority population, to take into consideration their point of view on the appropriate number of bilingual judges or designated bilingual positions;
>
> 4. Re-evaluate the bilingual capacity of the superior courts, periodically or when changes occur that are likely to have an impact on access to justice in the minority language, together with the attorneys general and chief justices of the superior courts of each province and territory.[38]

When the Interim Commissioner of Official Languages appeared before the Committee on 4 May 2017, the federal government had still not followed up on the recommendations in *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary* (2013). However, she noted that some progress had been made: “Our discussions with people from the Department of Justice suggest that they want to look at the recommendations we have made, but we haven't seen anything concrete yet.”[39]

Since then, the Department of Justice has published *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary* (Department of Justice’s action plan). Made public on 25 September 2017, the Department’s action plan contains seven steps that “follow up on the reforms to the superior courts judicial appointments process implemented in October 2016.”[40] The measures in the plan are designed to “improve the information gathered on applications; strengthen assessment of candidates’ second official language skills; enhance information about the linguistic capacity of courts; and consider potential complement to second-language training for judges.”[41]

To a certain degree, points 6 and 7 in the Department of Justice’s action plan respond to recommendations made by the Commissioner of Official Languages in 2013 in regard to intergovernmental coordination. According to points 6 and 7, the Department of Justice will “work with interested jurisdictions and the courts to develop the means for assessing existing bilingual capacity of superior courts”[42] and “consult with provinces

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38 Office of the Commissioner of Official Languages of Canada, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013, p.3.

39 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1120 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

40 Department of Justice, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*. Backgrounder.

41 Ibid.

42 Department of Justice, Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary.

and territories to examine possible ways of assessing the needs of Canadians in accessing superior courts in both official languages."[43]

1.3 Achieving an objective language assessment of superior court and Supreme Court of Canada candidates

1.3.1 The work of the Commissioner of Official Languages

As mentioned previously, the former commissioner of official languages highlighted a second shortcoming in the superior court judicial appointment system. He found that there is no objective means of evaluating candidates' language skills.[44]

Mr. Fraser made the following recommendation to correct this problem:

> 5. The Commissioner of Official Languages recommends that, by September 1, 2014, the federal Minister of Justice give the Office of the Commissioner for Federal Judicial Affairs the mandate of:
>
> 5.1 Implementing a process to systematically, independently and objectively evaluate the language skills of all candidates who identified the level of their language skills on their application form;
>
> 5.2 Sending the appropriate advisory committee the results of each candidate's language assessment;
>
> 5.3 Collecting and publishing data on the number of candidates whose language assessment confirms that they would be able to preside over a proceeding in both official languages immediately upon appointment.[45]

1.3.2 Language assessment in the current superior court and Supreme Court judicial appointment process

The Interim Commissioner of Official Languages and other witnesses highlighted a recent initiative concerning the language skills of federally appointed judges. In August 2016, the federal government made changes to the appointment process for superior court judges. Candidates must now conduct a more detailed self-evaluation; the Questionnaire for the Supreme Court of Canada Judicial Appointment

43 Ibid.

44 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1105 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

45 Office of the Commissioner of Official Languages of Canada, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013, p.3.

Process 2017[46] (the application form) includes four questions about their language skills, while the previous form contained only one.

Specifically, candidates must indicate in which official language they are able, without further training, to read and understand court materials, discuss legal matters with colleagues, converse with counsel in court, and understand oral submissions in court. The questionnaire also states that candidates may be assessed as to whether they are functionally bilingual in the two official languages.[47]

The Parliamentary Secretary to the Minister of Justice explained that, under the Department of Justice's action plan, candidates who claim to be able to fulfil the four functions described above in both official languages will be required to answer two additional questions: "Can you preside over a trial in the other official language?" and "Can you write a decision in the other official language?"[48]

Although candidates for federal judicial appointments complete a different form, they must answer the same questions and may also have to undergo a language skills assessment.[49]

In the case of the Supreme Court, the government states it will "ensure that Supreme Court of Canada nominees are … functionally bilingual."[50] The term "functionally bilingual" means that "a Supreme Court of Canada judge should be able to read materials and understand oral argument without the need for translation or interpretation in French and English."[51] According to the government, it "would be an asset if the judge can converse with counsel during oral argument and with other judges of the Court in French and English."[52]

Most of the witnesses appearing before the Committee felt that adding new language proficiency questions to the current application is a good move. The Interim Commissioner believes that when these measures have been fully implemented the

46 Commissioner for Federal Judicial Affairs Canada, *Questionnaire for the Supreme Court of Canada Judicial Appointment Process 2017,* p.4.

47 Ibid.

48 LANG, *Evidence*, 1st Session, 42nd Parliament, 21 November 2017, 1535 (Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada).

49 Commissioner for Federal Judicial Affairs Canada*, Questionnaire for Federal Judicial Appointments,* October 2016, p.6.

50 Commissioner for Federal Judicial Affairs Canada, "SCC Appointments," *Frequently Asked Questions*.

51 Ibid.

52 Ibid.

Minister of Justice "will have access to the results of these evaluations when discussing a court's needs with a chief justice or when making recommendations for appointments to the bench"[53] and that these "changes are concrete measures that address some of the recommendations issued by Commissioner Fraser in his study."[54] She also stated that this "recent progress reflects an increasing awareness in the legal community with regard to access to justice in both official languages."[55]

Lawyer Marc-André Roy also believes the above-mentioned initiative "assures us that, in a foreseeable future, the next judges will be appointed under standards of bilingualism."[56] That being said, Mr. Roy feels that further action is needed as "it remains wholly possible that a subsequent government may quite simply abandon the practice."[57]

1.3.3 The problem with self-evaluation

All witnesses criticized the fact that the current application process for federally appointed judges allows candidates to assess their own language skills. Daniel Boivin, President of the Fédération des associations des juristes d'expression française (FAJEF), told the Committee that "the bilingualism self-assessment is a step in the right direction, but it is not enough. There must be an evaluation."[58]

The FAJEF is extremely concerned about the consequences of this subjective process, fearing that candidates may overestimate their language skills:

> In the system, people declare themselves to be bilingual too often. They are certainly bilingual enough to be able to communicate in both official languages in a social setting. But it is another thing entirely to be able to hear witness[es] and fully understand evidence, because that requires very specific language knowledge.[59]

Mr. Boivin explained the importance of assessing judges' language skills objectively, especially those of Supreme Court judges:

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53 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1110 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

54 Ibid.

55 Ibid.

56 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1245 (Marc-André Roy, Lawyer, As an Individual).

57 Ibid.

58 Ibid., (Daniel Boivin, President, Fédération des associations des juristes d'expression française de common law).

59 Ibid.

> These days, the Supreme Court hears the most complex and technical of cases, ones that have not been able to be resolved elsewhere. So the judges are called upon to resolve extremely complex matters. In that context, litigants must constantly be wondering whether the judge understands them when they use the technical and precise terminology of a complicated principle. It's a question I often ask myself in my area of practice. That is why it is essential to be able to measure the true ability of already sitting judges who call themselves bilingual, as well as the ability of those who are seeking judges' positions that are designated bilingual.[60]

Lawyer Karine McLaren, Director of the Centre de traduction et de terminologie juridiques at the University of Moncton, was adamant: "Self-assessment absolutely does not work. I think we have to move toward a model that is not based on self-assessment."[61] Ms. McLaren supported her statement with an example from New Brunswick, in which "a judge appointed to the Provincial Court who said he was bilingual gave a decision when he was not capable of hearing the case in French."[62]

The Honourable Denise LeBlanc, Judge responsible for the Legal Language Education Program, stated as follows:

> I think the government needs to move away from self-assessment. In order to benefit from a sufficient pool of judges with the proficiency to deal with legal matters in both languages, it is necessary to adopt a formal assessment process, as opposed to self-assessment.[63]

Lawyer Mark Power was of the same opinion:

> It is not only perfectly normal, it is responsible to require certification to confirm that those who think or say that they can do something actually can do it. … I have no business being a member of the Royal 22nd Regiment if I cannot express myself well enough in French for my shell to go where my fellow soldiers tell me it is supposed to go. Likewise, I should not be a federal public servant providing front-line services if I do not have an exemption or the highest classification for service.
>
> Self-assessment does not work. … We are not going to test anyone's language ability on CPAC once a candidate has been officially announced. We do it with public servants and

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60 Ibid.

61 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1235 (Karine McLaren, Director, Centre de traduction et de terminologie juridiques, Faculty of Law, University of Moncton, and Member, Réseau national de formation en justice).

62 Ibid.

63 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1140 (Denise LeBlanc, Judge responsible for the Program, Legal Language Education Program, KortoJura).

> with members of the Royal 22nd Regiment, and we should also do it with judges, whether at the Supreme Court of Canada or elsewhere.[64]

The ability to assess judges' legal language skills does exist in Canada, at least for provincially appointed judges. Experts at KortoJura, a component of the legal language education program, have developed tests of French oral comprehension and oral expression in a legal context. KortoJura is currently developing the Legal English Listening Test for francophone judges.[65]

The afore-mentioned tests are based on a proficiency scale that, as Normand Fortin of KortoJura explained, "was created by a committee of judges and second language evaluation experts" and "served as a guide for the development of the tests."[66] The scale "is based on tasks that a judge must normally accomplish. The judges who developed the grid … ranked the various tasks based on their complexity and the language proficiency level needed to accomplish them."[67]

This work led to the development of "four levels of language proficiency, which were refined throughout the training and evaluation process."[68] The four levels of proficiency are described as follows:

> [T]he person who has the first level, i.e. FJ1, should have a level of competence that is sufficient to preside over an undisputed single case, or an administrative hearing. It can be an adjournment, a plea or a request for an individual to plead guilty or not guilty.
>
> …
>
> [T]he FJ2 level is higher than the FJ1. At that level a judge can preside over several successive hearings in a day, where the challenged elements are rather simple, but could require testimony; for instance, a bail hearing, or simple trials.
>
> At the FJ3 level a judge is able to preside over the majority of hearings, but he could run into trouble if there was a disputed case involving several parties or several witnesses.
>
> At the FJ4 level a judge can function in an environment where the vast majority of judicial activities take place in the second official language.[69]

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64 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1250 (Mark Power, Lawyer, specialist in language rights, As an Individual):

65 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1110 (Normand Fortin, Conceptualization, test content and certification, Evaluation Service, KortoJura).

66 Ibid.

67 Ibid.

68 Ibid.

The Committee asked Mr. Fortin what would be the appropriate level for a Supreme Court judge. Not surprisingly, he said level 4,[70] adding that if the scale were to be tailored for the Supreme Court of Canada, the Supreme Court judges court would have to be consulted on the requirements to perform their duties in that environment.[71]

As mentioned earlier, the language proficiency test and evaluation scales developed by KortoJura reflect the complexity and precision of the legal language used by provincial judges:

> [O]ur tests are unique, since they were designed and developed in cooperation with judges. They cover real situations experienced by judges, and they have been validated by judges. The tests are corrected by judges, and those same judges help prepare the final evaluation of the language proficiency of the person taking the test. To our knowledge, no other evaluation tool in Canada or around the world meets these criteria.[72]

The *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*, contains two strategies intended to improve the current process for assessing the language skills of candidates for appointment to a superior court. The Committee has already addressed the first part of this strategy, namely, the fact that additional questions will be asked of the “candidates who have self-identified as having bilingual capacity.”[73] The second part consists of asking judicial advisory committees “to verify the answers to these questions to ensure they align with the candidates’ declared language ability.”[74] In addition, the “Commissioner for Federal Judicial Affairs (CFJA) will also be authorized and encouraged to conduct language assessments and/or spot checks.”[75]

In point 2 of the Department of Justice’s action plan, the Department states its second strategy. The CFJA “will be asked to develop recommendations for the Minister of Justice for an assessment tool that could be implemented in the future to objectively assess all candidates who self-identify as having bilingual capacity, with a view to identifying

69 Ibid., 1120.

70 Ibid., 1150.

71 Ibid.

72 Ibid., 1110.

73 Department of Justice, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

74 Ibid.

75 Department of Justice, *Action Plan: Enhancing the Bilingual Capacity of the Superior Courts, Backgrounder*.

relative levels of proficiency. The CFJA's recommendations will address any additional resources required to operationalize the assessment tool."[76]

Self-assessment is currently the only means used to determine the language proficiency of federally appointed judges and to ensure that future Supreme Court judges are "functionally bilingual."

In light of the above, the Committee recommends:

Recommendation 3

That the Government amend the *Judges Act* by adding the following after section 3:

Bilingualism — designation of positions

4(1) A position designated bilingual by the attorney general of the province must be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak and understand both official languages in accordance with the standards to be developed by the Office of the Commissioner for Federal Judicial Affairs.

Bilingualism — appointment of bilingual judges

(2) The chief justice of the superior court of the province may ask that a position be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak and understand both official languages.

Mandate

(3) The Office of the Commissioner for Federal Judicial Affairs shall evaluate the person's level of proficiency in both official languages.

The Committee believes that resources are available to assist the Office of the Commissioner for Federal Judicial Affairs in making recommendations for developing and implementing an objective assessment of the language skills of federal judiciary candidates. Therefore, the Committee recommends:

Recommendation 4

That the Office of the Commissioner for Federal Judicial Affairs explore existing Canadian resources, such as KortoJura, to develop a language proficiency test and a scale to

76 Department of Justice, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

evaluate the language skills of candidates for appointment to the federal judiciary and the Supreme Court.

1.3.4 Support for legislation to ensure a sufficient number of bilingual judges

Lawyer Marc-André Roy believes that legislation should be used to ensure a sufficient number of bilingual judges are appointed:

> In our view, it is important to put in place rules, probably by amending the *Official Languages Act*, to establish quotas or, at the very least, guidelines to ensure that, when the government appoints judges to those courts, there is a sufficient number of judges capable of fulfilling their functions in both official languages. As a result, francophones' rights of access to justice would be upheld across the country.[77]

According to Mr. Roy, there are five main reasons for taking a legislative approach. First, the "federal laws and the laws of New Brunswick, Quebec, Ontario, Manitoba and the three territories are enacted in both official languages." [78] Therefore, there is a need for judges who can understand French "in order to give full effect to the French version of these laws."[79]

Second, the *Criminal Code* guarantees that accused persons have equal access to the courts in the official language of their choice. The federal government must therefore ensure that there are enough judges with the necessary language skills to ensure this federal statute is upheld.[80]

Third, some provinces and territories "guarantee litigants' language rights before superior and appellate courts."[81] If the federal government does not appoint judges able to hear cases in the minority official language, the provinces and territories will be unable to fulfil their obligations.[82]

Fourth, appointing more bilingual judges to superior courts will generate a larger pool of bilingual candidates for the Supreme Court.[83]

77 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1220 (Marc-André Roy, Lawyer, As an Individual).

78 Ibid.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

Fifth and finally, a legislative amendment "would allow the federal government to meet the commitment set out in part VII of the *Official Languages Act*."[84]

1.4 Language training and training in litigants' language rights

During the Committee's hearings, the issue of providing the judiciary with language training and training in the language rights of litigants was not addressed in depth. This might be because this type of training is available and handled by various institutions, such as the Office of the Commissioner for Federal Judicial Affairs, as indicated in the 2013 recommendations by the Commissioner of Official Languages:

> 9. The federal Minister of Justice ask the Office of the Commissioner for Federal Judicial Affairs to review the current language training program, by September 1, 2014, to enrich its applied component, taking into account the applied training program currently offered by the Canadian Council of Chief Judges.
>
> 10. The Canadian Judicial Council examine the possibility of asking the National Judicial Institute to add a module specifically on the language rights of litigants to its orientation program and continuing training, as well as a component on language rights in the various modules offered to the judiciary.[85]

In points 3, 4 and 5 of the Department of Justice's action plan, the Department makes a commitment to review the training programs for federally appointed judges.

> The CFJA [Office of the Commissioner for Federal Judicial Affairs] will examine the delivery of existing language programs, including enhancement of the applied component focused on courtroom-based skills.
>
> The CFJA will make available training and information to JACs [Judicial Advisory Committees] on linguistic rights of litigants. The Department will provide support as appropriate.
>
> The Minister will ask the Canadian Judicial Council to develop training modules for federally-appointed judges on the linguistic rights of litigants, to be delivered through the National Judicial Institute.[86]

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84 Ibid.

85 Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013, p. 4.

86 Department of Justice, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

2. INCREASE THE LANGUAGE PROFICIENCY OF ALL JUSTICE SYSTEM STAKEHOLDERS

The level of bilingualism among federally appointed judges, particularly at the Supreme Court level, is certainly an important part of achieving substantive equality regarding access to justice in both official languages, but it itself is not the only element that could be improved.

An official from the Quebec Community Groups Network (QCGN) explained that, "possessing rights and having a bilingual judiciary is of limited value if the infrastructure surrounding access to justice is not able to operate to provide services in both official languages."[87]

In its report *Toward a New Action Plan for Official Languages and Building New Momentum for Immigration in Francophone Minority Communities*, the Committee stressed the importance of receiving bilingual services from all parties in the justice system, and stated that "the limited bilingual capacity of other stakeholders in the system is one of the biggest obstacles to access to justice in French."[88]

2.1 Proposed action plan by the Réseau national de formation en justice

In 2014, the federal government mandated the Réseau national de formation en justice (RNFJ) "to advise it on the language training needs of provincial justice system practitioners."[89] Two years later, RNFJ submitted its action plan to the Official Languages Directorate at the Department of Justice: *Giving True Meaning to Equality: A new approach to standardization, training and the development of legal and jurilinguistic tools to ensure equal access to justice in both official languages*. The organization's goal is to ensure that "Canada's justice system [has] the institutional capacity to operate equally well in both official languages."[90]

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87 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1100 (Mr. Stephen Thompson, Director, Strategic Policy, Research and Public Affairs, Quebec Community Groups Network).

88 LANG, report, *Toward a New Action Plan for Official Languages and Building New Momentum for Immigration in Francophone Minority Communities*, December 2016, p.24.

89 Réseau national de formation en justice (RNFJ), *Giving True Meaning to Equality: A new approach to standardization, training and the development of legal and jurilinguistic tools to ensure equal access to justice in both official languages,* 1 December 2016, p.5.

90 Ibid. Note: The action plan is being submitted to help "lay the groundwork for the new federal 2018-2023 official languages plan."

RNFJ proposes that this objective be achieved through systemic corrective action involving two strategic directions: (1) act on the levers of public policy; and (2) invest in structuring initiatives.[91]

2.1.1 Strategic direction 1: Act on the levers of public policy

Under the first strategic direction, the federal government would include in its next official languages action plan a public policy statement that affirms the government's objectives "with respect to equal access to justice in both official languages"[92] and strengthens "the strategic alignment of government departments, agencies and other stakeholders."[93]

In his appearance before the Committee, Ronald Bisson, RNFJ's Senior Manager, said that the proposed public policy should "formulate the principles of collaboration with the provinces in the area of justice, taking into account the constitutional and legislative framework."[94] This recommendation echoes the first four recommendations on intergovernmental cooperation by the Commissioner of Official Languages in the report, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*.[95]

RNFJ's proposed public policy would also remind Canadians that in criminal and family law we need to talk in terms of equal official language communities, not minorities:

> The Beaulac decision was very clear on this subject. It is rather an issue of two official language communities that are equal. Wherever I go in Canada, I hear people talking about minorities and they say they want to serve them. In criminal and family law, we don't talk about minorities, but about two equal communities.[96]

RNFJ's action plan would also include federal departments and agencies not identified as federal partners in the federal government's last two official languages roadmaps, in particular the Canada Border Services Agency, the Royal Canadian Mounted Police,

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91 Ibid.

92 Ibid, p.8.

93 Ibid.

94 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1205 (Ronald Bisson, Senior Manager, Réseau national de formation en justice).

95 Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013, p. 3.

96 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1205 (Ronald Bisson, Senior Manager, Réseau national de formation en justice).

Correctional Service Canada, the Public Prosecution Service of Canada, and Public Safety Canada.[97] RNFJ believes that these institutions should also participate, "in collaboration with Justice Canada, ... in the implementation of the next multi-year official language action plan."[98] RNFJ noted that their participation would concern only "matters related to linguistic training and tools."[99]

The testimony below underscores the importance of including federal institutions with a justice mandate in the development and implementation of the next action plan for official languages. The following case described by QCGN concerns Correctional Service Canada (CSC).

QCGN shared its concerns with the Committee about the application of the *Official Languages Act* at the CSC Federal Training Centre in Laval. In February 2017, QCGN representatives, along with literacy, education and legal information specialists, visited the Federal Training Centre. The visit, a CSC regional initiative, "focused on official languages' oriented issues related to inmate programs, educational opportunities, staff-inmate interaction, and living and working environments."[100] Discussions also took place on "staff and management challenges related to complying with official languages' obligations."[101]

In its brief to the Committee, QCGN said that "the QCGN delegation identified several serious concerns related to the application of the *Official Languages Act* within CSC's Quebec institutions." Moreover, QCGN said it has "every reason to believe [violations of the act] are systemic in nature and therefore likely affecting English and French minority inmates in other institutions."[102]

QCGN wanted to make clear that the "leadership of the correctional service in the Quebec region was proactive in establishing a relationship with our community. They are very concerned with their linguistic responsibilities and looking for a way to fulfill them. ... They just don't know how."[103] QCGN is committed to working with CSC to help tackle

97 Ibid.

98 RNFJ, *Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages,* 1 December 2016, p.8.

99 Ibid.

100 Quebec Community Groups Network (QCGN), *Brief to the Committee,* 11 April 2017, p. 3.

101 Ibid., p. 4.

102 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1100 (Stephen Thompson, Director, Strategic Policy, Research and Public Affairs, Quebec Community Groups Network).

103 Ibid., 1115.

its challenges as regards the *Official Languages Act*. QCGN believes CSC needs more federal support to address these gaps: “[T]hey [CSC] need help, in terms of resources, and official languages expertise.”[104]

Under the first strategic direction in RNFJ’s action plan, Mr. Bisson stressed the importance of creating a central hub to ensure the interdepartmental and intergovernmental horizontal coordination of matters relating to justice in both official languages. RNFJ recommends “that the federal government assign responsibility for this coordination to Justice Canada's official languages directorate.”[105]

2.1.2 Strategic direction 2: Invest in structuring initiatives

RNFJ’s second strategic direction proposes a series of 18 structuring initiatives (see Appendix A) to meet known and emerging needs in justice.[106] These initiatives are broken down into the following six areas of action:

1. standardization of French common law vocabulary;
2. production and regular updating of legal and jurilinguistic tools and educational resources that can be accessed nationwide;
3. training of jurilinguists, who are the architects of legal French and who create and keep current the language of the law;
4. on-the-job training for professionals who offer justice-related services and have direct contact with justice system users;
5. postsecondary training in French in the fields of law and justice to expand the pool of future qualified professionals; and
6. introduction of a system allowing for measurement and certification of legal French and legal English skills.[107]

In his appearance before the Committee, Mr. Bisson said that these initiatives are aimed at a “systemic corrective action”[108] and that RNFJ’s action plan states that “[a]ll the

104 QCGN, *Brief to the Committee*, 11 April 2017, p. 5.

105 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1205 (Ronald Bisson, Senior Manager, Réseau national de formation en justice).

106 RNFJ, *Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages,* 1 December 2016, p.27.

107 Ibid., p.6.

proposed initiatives will be accessible Canada-wide and, in most cases, will be developed jointly by RNFJ members or by members working in collaboration with other stakeholders."[109]

At its meeting of 9 March 2017, the members of the Committee had the opportunity to learn more about the standardization of French common law vocabulary and the introduction of a system allowing for measurement and certification of legal French and English skills, two of the six areas of action identified by RNFJ.

2.1.2.1 Standardization of French common law vocabulary

Ms. McLaren explained the standardization of French common law vocabulary as follows:

> Essentially, it is the creation of Canadian common law terminology in French according to a scientific approach. The objective of standardization is to establish in French a language of common law that coincides exactly with the language of common law in English and that is the same from one province to another. The endeavour should lead to a complete terminology in all sectors making technical use of the legal vocabulary of common law.[110]

Ms. McLaren also explained why the standardization of French common law vocabulary is critical to access to justice in both official languages:

> Why is this process necessary? It is necessary because the common law terminology network was developed exclusively in English for centuries. As a result, we find ourselves in an exceptional situation, where we have to introduce as a group a set of legal terms whose meaning is heavily charged and which simply do not exist in French. The standardization operation therefore often results in the creation of new terms or concepts in French, which are called neologisms. This terminology is documented in a terminology database called Juriterm.
>
> The standardized terminology of common law in French is the cornerstone to access to justice in French. ... It is the existence of this technical language that makes it possible, among other things, to build and feed the tools used by legal professionals to offer legal services to justice system users; to teach common law in French; to support language

108 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1205 (Ronald Bisson, Senior Manager, Réseau national de formation en justice).

109 RNFJ, *Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages,* 1 December 2016, p.25.

110 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1215 (Karine McLaren, Director, Centre de traduction et de terminologie juridiques, Faculté de droit, Université de Moncton, and member, Réseau national de formation en justice).

> training of professionals in the justice field; to provide legislative drafters with the legal vocabulary necessary to draft laws in both official languages; and to provide legal translators, court interpreters and stenographers with a reliable vocabulary for expressing the law in the other official language.[111]

Ms. McLaren pointed out that there are still entire fields of law that have never been studied and fields that have been studied only partially.[112] As a result, "[c]ommon law in French has a lot of catching up to do."[113] This also means that the "essential tools it requires are also still quite insufficient."[114] These problems create linguistic insecurity for all litigants, which ultimately blocks equal access to justice in French:

> [I]f the language of common law in French is not complete or reliable, it is absolutely impossible to talk about equal access to justice in both official languages. Claiming to practise common law in French becomes an undertaking charged with risks and problems for all players in the judicial system, starting with justice system users. We then turn to English, even if it is not the justice system user's chosen language, in order to avoid potentially harmful consequences related to working in French. This is precisely what linguistic insecurity is.[115]

RNFJ therefore recommends that the Government of Canada "equip the justice system with the language code and a range of linguistic tools to enable it to function equally well in English or in French."[116]

2.1.2.2 Introduction of a system to measure and certify legal French and English skills

Rénald Rémillard, Director General of the Centre canadien de français juridique, said that there is no "measurement or certification of legal-related language skills."[117] Yet the benefits of measuring and certifying these skills are clear:

> [They] would increase the public's confidence in the language proficiency of stakeholders in the judicial system, including judges, court interpreters, crown attorneys, and probation officers.

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111 Ibid.

112 Ibid.

113 Ibid.

114 Ibid.

115 Ibid.

116 Ibid.

117 Ibid., 1220 (Rénald Rémillard, Director General, Centre canadien de français juridique inc. et Fédération des associations de juristes d'expression française de common law inc., and member, Réseau national de formation en justice).

> They would make it possible to avoid situations where legal-related language proficiency leads to unfortunate situations or, in the worst case, to legal errors that could undermine the rights of justice system users.
>
> They would also help the judicial system better allocate its bilingual human resources in order to more effectively serve francophone justice system users.
>
> Lastly, they would make it possible to determine objectively the true bilingual capacity of judges and other stakeholders involved in the administration of justice. This information could be useful, in particular when selecting candidates for the judiciary.[118]

KortoJura works closely with RNFJ to develop language proficiency evaluations for various professionals in the justice system. Normand Fortin noted that some tools have already been developed: "There is a language proficiency scale for crown attorneys, one for court clerks, and one for judges."[119] The Committee is pleased to see that such work is underway:

> We currently have demand from all legal professions where people have some degree of involvement or interaction with the court. We therefore have the ability to develop tests like the ones Mr. Fortin described, not just with language experts, but also with legal experts. We want to offer testing to those who need it, and we know the demand is huge because we are working on developing those markets.[120]

2.1.3 Support distance legal language training

Appearing before the Committee, RNFJ representatives highlighted the importance of investing in new technology to allow distance training:

> Investment in technology is needed. We are calling for investment in technology so that not only the training can be given in person, but also an employee can access training directly in their office, using their computer.
>
> ...
>
> Technology is an example of an investment that provides structure and is permanent.[121]

KortoJura representatives also want to leverage technology to "make tools for mentoring or tutoring programs available online."[122] This would allow them to create a "virtual

118 Ibid.

119 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1145 (Normand Fortin, Conceptualization, test content and certification, Evaluation Service, KortoJura).

120 Ibid., (Françoise Bonnin, Director, Evaluation Service, KortoJura).

121 LANG, *Evidence*, 1st Session, 42nd Parliament, 9 March 2017, 1220 (Ronald Bisson, Senior Manager, Réseau national de formation en justice).

community"[123] with all participants, building a "Canada-wide network of knowledge sharing so that judges from the two language communities can help each other."[124]

These initiatives are essential for learners to maintain their knowledge and develop their skills between the training sessions given in person. The Honourable Denise LeBlanc explained the importance of being in constant communication with learners as follows:

> One of the obstacles is the lack of training or education sessions in-between the longer training sessions and the tutoring. In terms of being able to function in a second language, especially in a legal setting, you can appreciate that if you only go to formal training sessions twice a year, and you don't necessarily get the opportunity to use your skills in-between, it's very hard to progress.
>
> That's one of the aspects we are reflecting on in considering what will happen in the next five years. It has an impact on the length of time, if you will, before a person can reach level 4.[125]

The Committee thanks RNFJ for its action plan on access to justice in both official languages and recommends:

Recommendation 5

That the Department of Justice implement directions 1 and 2 and the initiatives proposed by the Réseau national de formation en justice in its report, *Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages*.

3. THE NEED TO EXPAND THE SCOPE OF FEDERAL SUPPORT PROGRAMS FOR ACCESS TO JUSTICE IN BOTH OFFICIAL LANGUAGES

Over the past decade, the federal government has made significant investments to improve access to justice, especially in criminal law. As Mr. Boivin notes, "It makes sense

122 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1110 (Allain Roy, Director General, Legal Language Education Program, KortoJura).

123 Ibid.

124 Ibid.

125 Ibid., 1145 (Denise LeBlanc, Judge responsible for the Program, Legal Language Education Program, KortoJura).

to focus on access to justice in French in the context of criminal law. After all, it is an important point of contact between citizens and the legal system."[126]

While witnesses agreed that the federal government needs to continue to support criminal law initiatives, Mr. Boivin and many others told the Committee that the scope of government programs needs to be expanded to improve access to justice in both official languages in other areas of law, particularly family law.

3.1 Support family law: application of the *Divorce Act*

The Committee learned that, even though the *Divorce Act* is a federal act, not all French-speaking Canadians are able to divorce in French. This is the case for people whose divorce proceedings take place in British Columbia, Nova Scotia, and Newfoundland and Labrador.[127]

Mr. Boivin believes this situation is "inconsistent with the objectives of the *Official Languages Act* and the requirements of subsection 41(1) of the act."[128] He believes the federal government can and must correct it:

> The power of Parliament to legislate in its own areas could do for divorce what the federal Parliament has done for criminal law, meaning that when justices hear someone under that federal power, they will have to provide the service in English and in French.[129]

The Committee believes that the federal government must expand the scope of its support programs for access to justice in both official languages. Therefore, the Committee recommends:

Recommendation 6

That the Department of Justice expand the scope of its support programs for access to justice in both official languages by ensuring that Canadians who enter into divorce proceedings are heard in the official language of their choice throughout the process, regardless of the place where the proceedings take place.

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126 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1205 (Daniel Boivin, President, Fédération des associations des juristes d'expression française de common law).

127 Ibid.

128 Ibid., 1210.

129 Ibid., 1230.

3.2 Support the translation of judgments by superior courts and provincial appellate courts

Despite the fact that the provincial and territorial superior courts are federally appointed, the administration of these courts falls under the responsibility of the provinces and territories. The Government of Canada does not provide funding for the translation of decisions by these courts, even if they relate to areas of federal law. Some witnesses argued that translation of provincial and territorial superior court decisions should be included in the Government of Canada's strategy to support access to justice in both official languages. Mr. Power and Mr. Roy pointed out that, "the availability of judgments in both official languages contributes to the cohesion of jurisprudence in all jurisdictions."[130]

3.2.1 Quebec jurisprudence

The Barreau du Québec believes that the Department of Justice should work more closely with various Quebec stakeholders, including the Quebec justice department, courts and the Société québécoise d'information juridique (SOQUIJ), and "provide financial assistance to develop a strategy that will help encourage the translation of judgments."[131]

Claudia P. Prémont, former president of the Barreau du Québec, notes that "Quebec has an interest in its jurisprudence being known, but it is also extremely positive for the rest of Canada to have access to the cases of Quebec courts."[132] Quebec jurisprudence that is not translated into English has "much less of an impact. … Courts in other provinces cannot understand it, so it is simply not consulted."[133]

The Hon. Jacques R. Fournier, Chief Justice of the Superior Court of Quebec, and Paul-Matthieu Grondin, President of the Barreau du Québec, also believe that Canada must benefit from Quebec legal thought, for example, the decisions, authoritative texts (academic works) and constitutional interpretations developed in Quebec:[134]

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130 Juristes Power Law, Memorandum, *Appearance before the House of Commons Standing Committee on Official Languages*, 6 April 2017, p. 3.

131 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 April 2017, 1220 (Claudia P. Prémont, former President, Quebec Bar).

132 Ibid.

133 Ibid.

134 LANG, *Evidence*, 1st Session, 42nd Parliament, 21 November 2017, 1650 (Paul-Matthieu Grondin, President of the Quebec Bar, Barreau du Québec).

> Quebec case law is influenced by that of other Canadian provinces, especially in bankruptcy law and the all-important criminal arena. The reverse influence is not possible, however. Our case law is not portable. The wall separating Quebec from western and eastern Canada is impenetrable; Quebec's case law does not leave Quebec. Here, our way of thinking stems from our training as civil lawyers but influences our thinking in criminal matters and, clearly, bankruptcy law, because it is a form of private law. Our way of thinking is not portable and does not enrich Canada's body of law. Conversely, Canada's body of law does enrich ours[135].

Clearly, there is a cultural dimension to the issue: "The legal field is in fact part of a people's culture. In a bijural country, it is not right for the culture of a people to be a one-way street."[136]

According to the Hon. Judge Fournier, the current situation does not help to achieve some form of cohesive thought across the country, as the Fathers of Confederation had hoped. For this to occur, ideas must travel and influence each other.[137]

The former president of the Barreau du Québec also told the Committee that there are not enough resources to translate bills and legislation:

> [S]ection 133 of the *Constitution Act, 1867*, requires Quebec's National Assembly to pass legislation in both official languages. Nonetheless, over the years, members of the legislative assembly have adopted the practice of voting for legislation drafted solely in French. Therefore, amendments passed by parliamentary committees are routinely not immediately available in English.
>
> Bills are initially drafted by lawyers or notaries who are legislative drafters and then translated by translators who do not necessarily have legal training. As you can imagine, that causes problems. In some cases, the errors are grammatical, but in other cases, the discrepancies between the two versions may even lead to a completely different interpretation of the law.[138]

Discrepancies between the English and French versions can lead to problems interpreting the law. As a result, "[u]sers of the justice system must ... turn to the courts for a ruling on the interpretation of the law."[139] The most striking example is that of the *Civil Code*: "It took more than 18 years to produce equally sound versions of the civil

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135 Ibid., 1635 (Jacques Fournier, Chief Justice of the Superior Court of Quebec).

136 Ibid., 1710.

137 Ibid., 1635.

138 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 April 2017, 1210 (Claudia P. Prémont, former President, Quebec Bar).

139 Ibid.

code in both English and French."[140] The English version of the *Code of Civil Procedure* is currently being revised:

> In particular, the Bar of Montreal highlighted numerous errors in the new *Code of Civil Procedure* of Québec. It is actually not that new anymore, having come into force in Quebec more than a year ago. A tremendous amount of work is under way to fix the differences between the French and English versions as quickly as possible.[141]

It is important to note that the Quebec government has committed to taking steps to improve its translation services in terms of both quality and quantity:

> So commitments have been made, including the commitment to hire anglophone civil lawyers to translate statutes. We are not talking about professional translators, but about anglophone civil lawyers. That could improve the outcome. That idea has been put forward. It has not been fully addressed, as it has to go through the Treasury Board, as well, but the Department of Justice has made a certain commitment.
>
> A commitment was also made to hire jurilinguists on an ad hoc basis, in cases of important pieces of legislation. However, co-drafting is currently not planned owing to the province's resources.[142]

The Committee believes that translation is essential to building the Canadian legal corpus and, in particular, to integrating Quebec legal thought in that corpus. Therefore, the Committee recommends:

Recommendation 7

That the Department of Justice encourage the translation of more judgments of jurisprudential interest pertaining to areas of federal law from superior courts and provincial and territorial appellate courts.

4. INCREASE SUPPORT FOR COMMUNITY GROUPS WORKING IN THE FIELD OF JUSTICE

Mr. Boivin said that access to justice in both official languages is hampered by the lack of community groups and networks working in the field of justice.[143]

140 Ibid., 1215.

141 Ibid.

142 Ibid.

143 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1235 (Daniel Boivin, President, Fédération des associations des juristes d'expression française de common law).

Although some francophone communities like Ontario's benefit from networks like the Association des juristes d'expression française de l'Ontario, "[t]he fact remains that such is not the case everywhere."[144] Programs that support access to justice in both official languages do not provide multi-year core funding, particularly for legal claims, hampering the capacity of OLMCs to build such groups and networks.

Mr. Doucet described the problem as follows:

> [T]he basic funding that supported advocacy for equal access to justice in both languages is now practically non-existent ... the new philosophy that focuses more on legal information no longer enables the associations of French-speaking jurists to do this fundamental advocacy work.[145]

Community groups and networks dedicated to legal claims are essential bridges between the federal minister of justice and her provincial counterparts.[146] As Mr. Doucet explained, they ensure "that a sufficient number of bilingual judges [are] appointed and that the governments [take] both linguistic communities into account in developing measures to provide equal access to justice in both languages, so that bilingualism in the legal system [does] not lose ground."[147]

The lack of core, multi-year funding for community groups that advocate for access to justice in both official languages undermines the capacity of OLMCs to intervene in access to justice matters.

None of the recent commitments in *Action Plan: Enhancing the Bilingual Capacity of the Superior Courts* directly involve OLMCs. Contrary to recommendation 3 of the Commissioner of Official Languages' 2013 study on justice in the superior courts, the Department of Justice's action plan does not "encourage the attorneys general of each province and territory to initiate a consultation process with the judiciary and the bar, with the participation of the French-speaking common law jurists' association or the legal community of the linguistic minority population, to take into consideration their

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144 Ibid.

145 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1225 (Michel Doucet, Professor, Director, International Observatory on Language Rights, Université de Moncton, As an Individual).

146 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1235 (Daniel Boivin, President, Fédération des associations des juristes d'expression française de common law).

147 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1225 (Michel Doucet, Professor, Director, International Observatory on Language Rights, Université de Moncton, As an Individual).

point of view on the appropriate number of bilingual judges or designated bilingual positions."[148]

Furthermore, the Department of Justice's action plan does not provide for a reassessment of the bilingual capacity of superior courts, particularly "when changes occur that are likely to have an impact on access to justice in the minority language."[149]

Moreover, the Department of Justice's action plan does not refer to recommendation 6 of the Commissioner's report (2013), which asks the Minister of Justice to " appoint to each advisory committee a member of that province's or territory's English-speaking or French-speaking minority community."[150]

Marco Mendicino, Parliamentary Secretary to the Minister of Justice, simply stated that the consultation process with the provinces and territories, as described in point 7 of Department of Justice's action plan, will require collaboration with OLMC's "that will share with us the challenges faced by litigants from official language minority communities who require equal access to the judicial system."[151]

The Committee is of the opinion that the Department of Justice must promote the expertise that has been developed by the OLMC organizations and networks working in the field of justice. Therefore, the Committee recommends the following:

Recommendation 8

That the Department of Justice ensure that official language minority communities:

> **(a) have the capacity to intervene in matters of access to justice in both official languages in terms of both claims and legal training and information;**
>
> **(b) are represented on every judicial advisory committee.**

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148 Office of the Commissioner of Official Languages of Canada, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013, Ottawa, 2013, p.3.

149 Ibid.

150 Ibid., p.4

151 LANG, *Evidence*, 1st Session, 42nd Parliament, 21 November 2017, 1540 (Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada).

5. ACCESS TO FEDERAL COURT DECISIONS IN BOTH OFFICIAL LANGUAGES

5.1 Special report to Parliament by the Commissioner of Official Languages

In November 2016, the Commissioner of Official Languages, Graham Fraser, tabled a report in Parliament pertaining to the federal courts' language obligations regarding the online posting of decisions. More specifically, the report highlighted the fact that the federal courts do not simultaneously post the English and French versions of their decisions on their website. The Interim Commissioner of Official Languages stated that "it can take many months for a decision to be published in the other official language."[152]

The above-mentioned report is the result of a long series of attempts by the Commissioner of Official Languages to address the problem of access to judgments in both official languages. In fact, the Commissioner began his investigation in 2007. After numerous unsuccessful discussions with the Courts Administration Service (CAS), the Commissioner filed a report in April 2016 with the Governor in Council. It "recommended that the government table a bill or apply for a reference to the Supreme Court of Canada in order to clarify the language obligations set out under the *Act*."[153] According to the Commissioner, the government "decided not to opt for the judicial approach ... or the legislative approach."[154]

It seems the problem centres on a disagreement between the Office of the Commissioner of Official Languages and CAS concerning the interpretation of the *Official Languages Act*.

The Commissioner of Official Languages argues that the posting of federal court decisions online falls under Part IV of the *Official Languages Act* (Communications with and Services to the Public):

> [W]e believe that publishing Federal Court rulings falls under part IV of the act. We also believe that it is the public's right to have access to justice in both official languages.

152 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1105 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

153 Office of the Commissioner of Official Languages, *Report to Parliament of the Commissioner of Official Languages on the investigation into the Courts Administration Service under subsection 65(3) of the Official Languages Act*, Ottawa, November 2016, p. 5.

154 Ibid., p. 7.

> That is directly compromised when rulings of federal courts are not published simultaneously on their websites in both official languages.[155]

CAS argues that Part IV of the *Official Languages Act* does not apply to federal court decisions because of the principle of judicial independence.[156] In a document entitled *Canada's Court System*, the Department of Justice explains the principle of judicial independence:

> Under the Constitution, the judiciary is separate from and independent of the other two branches of government, the executive and legislature. Judicial independence guarantees that judges will be able to make decisions free of influence and based solely on fact and law. The principle of judicial independence has three components: security of tenure; financial security; and administrative independence. [157]

Administrative independence means that "[n]o one can interfere with how courts manage the legal process and exercise their judicial functions."[158] Ms. Ghislaine Saikaley, the Interim Commissioner said that CAS argues that, based on the principle of administrative independence, "a judge may render a decision in one language, and then the decision is translated."[159]

Moreover, CAS insists that the simultaneous publication of federal court decisions in both official languages falls under Part III of the *Official Languages Act* (Administration of Justice), specifically section 20:

> **Decisions, orders and judgments that must be made available simultaneously**
>
> **20 (1)** Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where
>
> > **(a)** the decision, order or judgment determines a question of law of general public interest or importance; or
> >
> > **(b)** the proceedings leading to its issuance were conducted in whole or in part in both official languages.

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155 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1105 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

156 Ibid.

157 Department of Justice Canada, *Canada's Court System*, 2015, p.15.

158 Ibid.

159 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1105 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

Other decisions, orders and judgments

(2) Where

(a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or

(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance,

the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.

Oral rendition of decisions not affected

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in only one of the official languages, of any decision, order or judgment or any reasons given therefor.

Decisions not invalidated

(4) No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.[160]

The Interim Commissioner explained that "[s]ection 20 of the *Official Languages Act* provides that decisions, in certain cases, must be rendered in both languages, including when the proceedings have been conducted in both languages, and if it is a decision of general public interest."[161] Ms. Saikaley also said that "very few of these decisions fall into this category, which means that the judges render them only in one language, and then they are translated."[162] She believes "the problem goes beyond translation; it affects the interpretation of legislation."[163]

160 *Official Languages Act* (R.S.C., 1985, c. 31 (4th Supp.).

161 LANG, *Evidence*, 1st Session, 42nd Parliament, 4 May 2017, 1110 (Ghislaine Saikaley, Interim Commissioner, Office of the Commissioner of Official Languages).

162 Ibid.

163 Ibid.

Lawyer Mark Power also said that there is “a problem with the translation of federal judgments” and that this is due in part to “the ambiguity of section 20, specifically paragraph 20(1)(a).”[164] Mr. Power pointed out that there is “no consensus in the legal community or in the judiciary on the rationale for translating a decision”[165] and that, in general, section 20 “is actually not well implemented.”[166]

To end the “continued ambiguity”[167] that “creates considerable legal uncertainty,”[168] Commissioner Fraser recommended that Parliament send the matter to one of the two standing committees on official languages to “thoroughly examine the issues raised regarding equal access to justice in both official languages ... and recommend the legislative amendments that should be made to the *Official Languages Act* to clarify the language obligations applicable to the language in which federal court decisions are posted on-line.”[169]

In view of the above, the Committee recommends:

Recommendation 9

> **(a) That the Government of Canada take the necessary steps to set out the criteria for “decisions that must be made available simultaneously” within the meaning of section 20 of the *Official Languages Act* and the language obligations that apply to the language of federal court decisions posted on their websites.**
>
> **(b) That the chief justices of the various jurisdictions choose what judgments to publish in both official languages based on criteria to be set out.**

164 LANG, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1210 (Mark Power, Lawyer, Specialist in language rights, As an Individual).

165 Ibid.

166 Ibid.

167 Office of the Commissioner of Official Languages, *Report to Parliament of the Commissioner of Official Languages on the investigation into the Courts Administration Service under subsection 65(3) of the Official Languages Act*, Ottawa, November 2016, p. 5.

168 Ibid.

169 Ibid., p. 7.

6. CLARIFY THE ROLE OF THE COMMISSIONER OF OFFICIAL LANGUAGES AS TO COURT REMEDIES

Paragraph 78(1)(a) of the *Official Languages Act* provides that the Commissioner of Official Languages may apply for a remedy, and paragraph 78(1)(b) provides that the Commissioner may appear before the court on behalf of any person who has applied for a remedy.[170]

Mr. Power and Mr. Roy said that in recent years the Commissioner of Official Languages has intervened only "sporadically in court proceedings, and nearly exclusively as an intervener."[171] They stated it would be beneficial for the next Commissioner of Official Languages to "play a more active role before the courts"[172] in order to advance "the interpretation of language rights and enhance the progression towards equal status of the French and English languages."[173]

To this end, Mr. Power and Mr. Roy recommend amending the *Official Languages Act* to "specify the circumstances in which the Commissioner of Official Languages must (rather than may) initiate judicial proceedings or participate in them," for example in order to resolve "structural problems in implementation."[174]

Mr. Power and Mr. Roy believe that such an amendment would remove the burden placed on individuals and community groups alone to defend the language rights of Canadians.[175]

The Committee has gathered evidence through its various studies on the modernization of the *Official Languages Act*. The Committee will take these recommendations into account in its future studies.

170 *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.).

171 Juristes Power Law, Memorandum, *Appearance before the House of Commons Standing Committee on Official Languages*, 6 April 2017, p. 6.

172 Ibid., p. 7.

173 Ibid., p. 6.

174 Ibid., p. 7.

175 Ibid., p.6.

7. NEED TO INCREASE FUNDING FOR THE COURT CHALLENGES PROGRAM

Many witnesses welcomed the reinstatement of the Court Challenges Program. Mr. Doucet explained what the program means for the advancement of language rights:

> We relied a great deal on the Language Rights Support Program. Now we are going to rely on the Court Challenges Program. I know that currently a lot of groups are waiting for the Court Challenges Program to be up and running in order to fund some legal actions. Obviously the ordinary citizen looking for justice cannot himself finance a legal recourse in a public interest case about linguistic rights.[176]

Mr. Power and Mr. Roy noted that the scope of the new program has been expanded to include the language rights set out in the *Official Languages Act*. Currently, $1.5 million is dedicated to the component on the clarification of official language rights. Mr. Power and Mr. Roy argue that it is "highly probable that, given the broadened mandate of the new program ... it will be necessary to attribute more funds to the language rights components."[177]

The Committee believes that the Government of Canada must ensure that the Court Challenges Program has adequate funding for all cases relating to the clarification of official languages rights. Therefore, the Committee recommends:

Recommendation 10

That the Government of Canada evaluate the needs of the Court Challenges Program, specifically the component on the clarification of official language rights, and increase its budget, if necessary.

The Committee cannot ignore the fact that the 2013 report on justice by the Commissioner of Official Languages is a landmark document in terms of access to justice in both official languages. The majority of the recommendations put forward by the witnesses who participated in this study are based on those of the Commissioner. Had the Commissioner's recommendations been implemented, the Committee's review of the situation would have shown progress. The Department of Justice's action plan to improve the bilingual capacity of the superior court judiciary is commendable, and the Committee believes that its recommendations will support the Department's

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176 LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1230 (Michel Doucet, Professor, Director, International Observatory on Language Rights, Université de Moncton, As an Individual).

177 Juristes Power Law, Memorandum, *Appearance before the House of Commons Standing Committee on Official Languages*, 6 April 2017, p. 7.

commitments. However, the Committee is concerned that OLMCs are not partners in these seven commitments.

The Committee wishes to thank all the witnesses who participated in this study and all those who work to **ensure justice is done in both official languages**.

APPENDIX A

11.19. Summary table of initiatives and investments

The following table lists the proposed initiatives and associated investments (in millions of dollars) for the period from 2018 to 2023.

Initiatives	Proposed investment - 2018-2023 ($M)
1. Standardization of French common law vocabulary	15
2. Production and regular updating of legal and jurilinguistic tools and educational resources that can be accessed nationwide	
3. Training of jurilinguists	10
4. Legal-related language training in French and English for justice sector employees who have direct contact with justice system users	15
5. Continuing professional development centre for jurists	5
6. National program for language rights training and research	5
7. French common law certificate offered in English-language law faculties in Western Canada and Ontario	5
8. Training in Indigenous language rights and access to justice in both official languages	1
9. Creation of a Canada-wide criminology program with bridging and transfer options	2
10. Creation of a Canada-wide law and justice program with bridging and transfer options	2
11. Creation of a Canada-wide college police foundations program in French, and a training program in French in at least one regional, provincial or municipal police academy	2,5
12. Creation of a Canada-wide college paralegal program	2

Initiatives	Proposed investment - 2018-2023 ($M)
13. Creation of a Canada-wide graduate college program in cybercrime	2
14. Creation of Canada-wide graduate college program in victimology	2
15. French forensic science certificate	1,5
16. Measurement and certification of legal-related language skills in French and English	2
17. Ongoing research and impact assessment	2
18. Regions where equal access to justice in both official languages is particularly difficult to achieve	2,5
Total	**76.5**

The funds the proponents will require to coordinate the initiatives will be determined at a later date, based on the amounts allocated to the field of justice in the federal government's 2018-2023 official languages plan. The same applies for the funds required for the administration and coordination of the RNFJ

Source: *Réseau national de formation en justice (RNFJ), Giving True Meaning to Equality: A new approach to standardization, training and the development of legal and jurilinguistic tools to ensure equal access to justice in both official languages, 1 December 2016, p.35.*

APPENDIX B
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
As an individual Sébastien Grammond, Professor Civil Law Section, University of Ottawa	2017/03/07	50
Réseau national de formation en justice Ronald Bisson, Senior Manager Karine McLaren, Member Lawyer, Director, Centre de traduction et de terminologie juridiques, Faculté de droit, Université de Moncton Rénald Rémillard, Member Director General, Centre canadien de français juridique inc. et Fédération des associations de juristes d'expression française de common law inc.	2017/03/09	51
Barreau du Québec Sylvie Champagne, Secretary of the Order and Director of the Legal Department Claudia P. Prémont, Bâtonnière du Québec	2017/04/04	54
As individuals Mark C. Power, Lawyer Specialist in language rights Marc-André Roy, Lawyer	2017/04/06	55
Fédération des associations de juristes d'expression française de common law inc. Daniel Boivin, President Rénald Rémillard, Director General		
As an individual Michel Doucet, Professor, Director, International Observatory on Language Rights Université de Moncton	2017/04/11	56
Association of English speaking Jurists of Quebec Michael Bergman, President	2017/04/11	56

Organizations and Individuals	Date	Meeting
Infojustice Manitoba	2017/04/11	56
Caroline Pellerin, Director		
Quebec Community Groups Network		
Stephen Thompson, Director Strategic Policy, Research and Public Affairs		
Office of the Commissioner of Official Languages	2017/05/04	58
Mary Donaghy, Assistant Commissioner Policy and Communications Branch		
Pascale Giguère, Director and General Counsel Legal Affairs Branch		
Jean Marleau, Acting Assistant Commissioner Compliance Assurance Branch		
Ghislaine Saikaley, Interim Commissioner		
As an individual	2017/05/11	60
Benoît Pelletier, Professor Faculty of Law, University of Ottawa		
KortoJura		
Françoise Bonnin, Director Evaluation Service		
Normand Fortin, Conceptualization, test content and certification Evaluation Service		
Hon. Denise LeBlanc, Judge responsible for the Program Legal Language Education Program		
Allain Roy, Director General Legal Language Education Program		
As an individual	2017/05/30	63
Daniel Jutras, Professor		
Barreau du Québec	2017/11/21	80
Paul-Matthieu Grondin, President of the Quebec Bar		

Organizations and Individuals	Date	Meeting
Department of Justice	2017/11/21	80
Sacha Baharmand, Counsel Official Languages Directorate, Public Law and Legislative Services Sector		
Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada		
Stephen Zaluski, General Counsel and Director Judicial Affairs, Courts and Tribunal Policy, Public Law and Legislative Services Sector		
Superior Court of Québec		
Hon. Jacques R. Fournier, Chief Justice		

APPENDIX C
LIST OF BRIEFS

Organizations and Individuals

Barreau du Québec

Centre de traduction et de terminologie juridiques

Power, Mark C.

Quebec Community Groups Network

Roy, Marc-André

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 50, 51, 54, 55, 56, 58, 60, 63, 78, 79, 80, 81 and 82) is tabled.

Respectfully submitted,

Hon. Denis Paradis
Chair

SUPPLEMENTARY REPORT
NEW DEMOCRATIC PARTY OF CANADA

"Ensuring Justice is Done in Both Official Languages"

Introduction

The New Democratic Party of Canada (NDP) would like to thank all those who appeared before the Standing Committee on Official Languages and who submitted written briefs as part of the study on access to justice in both official languages.

The NDP supports most of the recommendations in the Committee's report, although we wish to make a few comments about access to justice in superior courts and the Supreme Court. Like the Committee's report, this report reflects a desire to put measures in place to improve the bilingual capacity of the judiciary.

Supreme Court of Canada

Access to justice is important for all Canadians, especially for members of Canada's official language minority communities. The Liberal government's new policy for appointing judges to the Supreme Court requires all new judges to be proficient in both official languages.

The NDP applauds the appointment of Justice Malcom Rowe and Justice Sheila L. Martin to the Supreme Court. No doubt they demonstrated their proficiency in English and in French.

Yet the problem with the new policy is that it risks being short-lived because it is not legislated. A new government or even a change in the current Liberal government's way of thinking could mean a change in policy. The requirement to have bilingual Supreme Court justices must therefore be written into law to ensure that individuals have the right to be understood in the official language of their choice. This is also what the majority of witnesses recommended:

"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.[1]

[1] LANG, *Evidence*, 1st Session, 42nd Parliament, 7 March 2017, 1205 (Mr. Sébastien Grammond, Professor, Civil Law Section, University of Ottawa, As an Individual).

And:

"The best way to ensure that the judges appointed to the highest court in the country are able to understand both official languages without the assistance of an interpreter is no doubt through a federal law amending the *Supreme Court Act* or the *Official Languages Act*."[2] [Translation]

In this respect, the New Democratic Party has introduced legislation four times since 2008 to ensure access to justice in both of Canada's official languages. Since 2015 François Choquette has been advocating for Bill C-203, *An Act to amend the Supreme Court Act (understanding the official languages)*. His predecessor, Yvon Godin, tried three times to pass a similar bill to improve access to justice in the highest court in the country. The Liberals voted three times in support of Yvon Godin's bills.

Yet on 27 October 2017 the Liberal government voted against Bill C-203, *An Act to amend the Supreme Court Act (understanding the official languages)*, which the NDP had introduced in the House of Commons.

The Liberal government defended its position, arguing that the bill could require a constitutional amendment. However, many experts who appeared before the Standing Committee on Official Languages suggested that Bill C-203 did not violate the Constitution:

"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."[3]

And:

"Two things. First, if someone wants to convince you that mandatory bilingualism would affect an essential characteristic of the Supreme Court, turn the question around. Ask them if being unilingual is an essential feature of the Supreme Court.
[...]
So, basically, when you ask which situation would be changed, the answer is unilingualism. I will never be convinced that unilingualism is an essential feature of the

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[2] Mark Power and Marc-André Roy, *De la possibilité d'être compris directement par les tribunaux canadiens, à l'oral comme à l'écrit, sans l'entremise de services d'interprétation ou de traduction,* Revue générale de droit, Vol. 45, No. 2, 2015, pp. 403–441. [in French only]

[3] LANG, *Evidence*, 1st Session, 42nd Parliament, 7 March 2017, 1210 (Mr. Sébastien Grammond, Professor, Civil Law Section, University of Ottawa, As an Individual).

Supreme Court of Canada. Believe you me, a Supreme Court judge will never be convinced of that either."[4]

In this regard, the NDP partially supports recommendation 1, which calls on the Government of Canada to table a bill during the 42nd Parliament guaranteeing that bilingual judges are appointed to the Supreme Court of Canada.

However, the NDP believes the Liberal government has had enough time to find an alternative to Bill C-203, *An Act to amend the Supreme Court Act (understanding the official languages)*, as this bill was introduced in December 2015.

In addition, we believe that 120 days following the tabling of this report is sufficient for the Government to demonstrate its seriousness and legislate the requirement that Supreme Court judges be proficient in both official languages.

NDP RECOMMENDATION 1

That the Government of Canada introduce a bill that would ensure judges appointed to the Supreme Court of Canada are proficient in both official languages no later than 120 days after the tabling of this report.

AMENDMENT TO THE *OFFICIAL LANGUAGES ACT*

Recommendation 2 proposes an amendment to subsection 16 (1) of the *Official Languages Act*, which excludes the Supreme Court from the language obligations to which other federal courts are subject:

16 (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;

(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and

[4] LANG, *Evidence*, 1st Session, 42nd Parliament, 11 May 2017, 1245 (Mr. Benoît Pelletier, Professor, Faculty of Law, University of Ottawa, As an Individual).

(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.))

Several witnesses suggested removing this exclusion, which is no longer relevant because the Government has decided to appoint only judges who are proficient in both official languages:

"For that reason, I strongly support the idea of amending the *Official Languages A*ct by removing the provision in section 16 that exempts Supreme Court justices from the language proficiency requirement. The *Official Languages Act* requires that all federal court judges be able to understand the proceedings in the official language chosen by the parties without the assistance of an interpreter. The same requirement applies to New Brunswick court judges. I believe the exception for Supreme Court justices should be eliminated."[5]

The NDP supports the second recommendation that, pursuant to recommendation 1, the Government amend subsection 16(1) of the *Official Languages Act* so that the requirement to be able to understand both official languages also applies to judges of the Supreme Court of Canada.

In this regard, François Choquette already introduced Bill C-382, *An Act to amend the Supreme Court Act (understanding the official languages)* on 31 October 2017, which would amend subsection 16(1) as required by recommendation 2.

SUPERIOR COURTS

On 25 September 2017, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, announced the Government's action plan to improve the bilingual capacity of the superior courts. This plan is in response to the report of the Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary.*

The NDP generally supports this new action plan. However, we again deplore the fact that there is no legislation in place to give it the force of law. The action plan states:

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[5] LANG, *Evidence*, 1st Session, 42nd Parliament, 11 April 2017, 1215 (Mr. Michel Doucet, Professor and Director, International Observatory on Language Rights, Université de Moncton, As an Individual).

“The Commissioner for Federal Judicial Affairs (CFJA) will also be authorized and encouraged to conduct language assessments and/or spot checks.”[6]

The NDP notes that this part of the plan, which authorizes the CFJA to evaluate language skills, rather than systematically, independently and objectively conduct language assessments, does not meet recommendation 5 in the report of the Office of the Commissioner of Official Languages:

5. The Commissioner of Official Languages recommends that, by September 1, 2014, the federal Minister of Justice give the Office of the Commissioner for Federal Judicial Affairs the mandate of:

5.1. Implementing a process to systematically, independently and objectively evaluate the language skills of all candidates who identified the level of their language skills on their application form.[7]

The NDP therefore supports recommendation 3 of the report:

That the Government amend the *Judges Act* by adding the following after section 3:

Bilingualism — designation of positions

4(1) A position designated bilingual by the attorney general of the province must be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak clearly in and fully understand both official languages in accordance with the standards to be developed by the Commissioner for Federal Judicial Affairs.

Bilingualism — appointment of bilingual judges

(2) The chief justice of the superior court of the province may ask that a position be filled by a person who, in addition to meeting the criteria set out in section 3, is able to speak clearly in and fully understand both official languages.

Mandate

(3) The Office of the Commissioner for Federal Judicial Affairs shall evaluate the person’s level of proficiency in both official languages.

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[6] Department of Justice, *Enhancing the Bilingual Capacity of the Superior Court Judiciary - Action Plan.*

[7] Office of the Commissioner of Official Languages, Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary, Ottawa, 2013, p. 3.

The amendment to the *Judges Act* and the measures in the action plan to improve the bilingual capacity of the superior courts would increase access to these courts. Given that MP François Choquette has already introduced a bill that supports this recommendation, Bill C-381, *An Act to amend the Judges Ac*t (bilingualism), the NDP recommends that the Government implement recommendation 3 in the 120 days following the tabling of this report.

NDP RECOMMENDATION 2

That the Government implement recommendation 3 in the 120 days following the tabling of this report.

FURTHER CONSIDERATION

The Committee was unable to study some elements despite their importance. Two follow.

TRANSLATION BUREAU

Witnesses raised concerns about the backlog in the translation of federal court judgments. In fact, since the Courts Administration Service (CAS) (created in 2003 to oversee the administration of the Federal Court, Federal Court of Appeal, Tax Court and Court Martial Appeal Court of Canada) largely ceased using the Translation Bureau's services, there appears to be a growing backlog of judgments (both in English and in French) that have simply not been translated.

The CAS decided to go with Legitech, a U.S.-based multinational, that doesn't even specialize in legal translation, hence the drastic slowdown in translating judgments. The NDP believe that having accurate and timely translations of judgments is critical, as these become case law, and most Francophone judges cite their Anglophone colleagues' judgments and vice-versa.

For these reasons, the NDP recommends that the CAS use the services of the Translation Bureau exclusively to ensure accurate and timely translations of judgments.

NDP RECOMMENDATION 3

That the CAS use the services of the Translation Bureau exclusively to ensure accurate and timely translations of judgments.

Moreover, the NDP wishes to emphasize the statement by the former minister of public services and procurement, the Honourable Judy Foote, during her appearance before the Standing Committee on Official Languages:

"I have written to Minister Brison to request his support in considering reverting to a mandatory service delivery model for the Translation Bureau as a complement to other initiatives in support of official languages."[8]

We look forward to a reply from the President of the Treasury Board, the Honourable Scott Brison.

MISUSE OF ROADMAP FUNDING

A Justice Department internal report entitled *Evaluation of the Contraventions Act Program* states that more than $40 million from the *Contraventions Act* program was diverted from the Official Languages Roadmap between 2008 and 2018. This money should have been invested in improving access to justice in both official languages. As the President of the Fédération des communautés francophones et acadiennes (FCFA), Jean Johnson, notes, the needs of official language minority communities are dire:

"For many organizations and institutions in our communities, the clock is ticking. If we want to inject new life into the Francophonie in minority communities, curb population decline and slow down assimilation, we need $575 million in additional investments for our communities in the next action plan for official languages."[9] [Translation]

The NDP also calls on the Liberal government and the Department of Justice to make up this shortfall in the action plan for official languages for 2018-2023 to ensure greater access to justice in both official languages.

NDP RECOMMENDATION 4

That the Government and the Department of Justice make up the $40 million shortfall that should have been invested in access to justice in both official languages.

CONCLUSION

Canada's 150th anniversary, the 50th anniversary of the *Official Languages Act*, and the renewal of the action plan for official languages should be important milestones in access to justice in both official languages in Canada. The federal government must leave its mark on history by taking concrete action to enhance the vitality of official language minority communities. We must work together to ensure substantive equality

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[8] LANG, *Evidence*, 1st Session, 42nd Parliament, 9 February 2017, 1105 (Judy Foote, Minister of Public Services and Procurement).

[9] *À la recherche d'un plan Trudeau pour les communautés francophones et acadiennes*. [in French only]

of English and French for litigants. The current government must therefore put measures in place to ensure the bilingual capacity of our judiciary.