

## MEMORANDUM

**WITNESSES:** Mark Power and Marc-André Roy

**DATE:** Thursday, April 6th, 2017

**RE:** Appearance before the House of Commons Standing Committee on  
Official Languages

Study on the complete implementation of the *Official Languages Act* in the  
Canadian justice system

### Topics:

1. **Publication of judgments:** The federal government can and must do more to ensure that more judgments are issued in both official languages, including at the Federal Court, appellate courts and provincial and territorial superior courts
2. **Role of the Commissioner of Official Languages of Canada before the courts:** The *Official Languages Act* should be amended in order to tighten mechanisms intended to ensure its implementation, including the power of the Commissioner of Official Languages of Canada to apply to the court for a remedy and funding for other proceedings through the new Court Challenges Program
3. **Supreme Court of Canada:** The federal government should initiate a reference to the Supreme Court of Canada in order to confirm the constitutional amendment formula for imposing a requirement that individuals appointed to the Supreme Court of Canada be able to fulfill their functions in both official languages without relying on simultaneous translation or interpretation services
4. **Judicial Appointments:** Amendments must be made to the *Official Languages Act* in order to establish rules ensuring that a sufficient number of judges appointed by the federal government are able to fulfill their functions in both official languages without relying on simultaneous translation or interpretation services

**1. Publication of judgments: The federal government can and must do more to ensure that more judgments are issued in both official languages, including at the Federal Court, appellate courts and provincial and territorial superior courts**

[1] Currently, section 20 of the *Official Languages Act* governs the translation of judgments issued by federal courts:

*Décisions de justice importantes*

**20 (1)** Les décisions définitives — exposé des motifs compris — des tribunaux fédéraux sont simultanément mises à la disposition du public dans les deux langues officielles :

a) si le point de droit en litige présente de l'intérêt ou de l'importance pour celui-ci ;

b) lorsque les débats se sont déroulés, en tout ou en partie, dans les deux langues officielles, ou que les actes de procédure ont été, en tout ou en partie, rédigés dans les deux langues officielles.

*Autres décisions*

(2) Dans les cas non visés par le paragraphe (1) ou si le tribunal estime que l'établissement au titre de l'alinéa (1)a) d'une version bilingue entraînerait un retard qui serait préjudiciable à l'intérêt public ou qui causerait une injustice ou un inconvénient grave à une des parties au litige, la décision — exposé des motifs compris — est rendue d'abord dans l'une des langues officielles, puis dans les meilleurs délais dans l'autre langue officielle. Elle est exécutoire à la date de prise d'effet de la première version.

*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.

*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.

*Décisions orales*

(3) Les paragraphes (1) et (2) n'ont pas pour effet d'interdire le prononcé, dans une seule langue officielle, d'une décision de justice ou de l'exposé des motifs.

*Précision*

(4) Les décisions de justice rendues dans une seule des langues officielles ne sont pas invalides pour autant.

*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.

[2] The principles laid out at section 20 of the *Official Languages Act* are quite laudable. That said, the effective implementation of this provision depends on the availability of sufficient funding, especially in order to reduce as much as possible, or even eliminate, the delay between the release of the original reasons and their translation. For this reason, the federal government must allocate more funds to the translation of judgments in federal courts.

[3] Furthermore, it is important to note that a great number of important judgments issued by superior courts and provincial appellate courts are rendered in a single official language and are not translated.<sup>1</sup> In British Columbia, Alberta, Saskatchewan, Prince Edward Island, Nova Scotia, and Newfoundland and Labrador, there is no obligation to translate judgments. Regimes vary in other jurisdictions. For example, in Ontario, the *Courts of Justice Act* provides that reasons for decision may be written in either language (ss126(2)). In Quebec, section 9 of the *Charter of the French language* provides that judicial decisions may be rendered in another language, but that a translation at the expense of the State must be made upon request by a party to the proceedings.

[4] The availability of judgments in both official languages is important for two reasons. First, it is crucial that justice be rendered in litigants' chosen official language. Second, the availability of judgments in both official languages contributes to the cohesion of jurisprudence in all jurisdictions. This is particularly important with respect to Quebec judgments, which are typically only available French, thereby rendering them practically inaccessible to unilingual jurists in other provinces and territories.

[5] One way for the federal government to remedy this second deficiency is to fund the translation of judgments that are of jurisprudential interest so that they may be available in both official languages. In this vein, the federal government had set aside \$200, 000 in funding to enable the *Société québécoise d'information juridique* (SOQUIJ) to translate a certain number of Quebec judgments to English between 2010 and 2012. Unfortunately, this funding was not renewed. Yet, such a measure would allow the government to foster the equality of both official languages in the administration of justice, which would without a doubt be a positive measure for the purposes of part VII of the *Official Languages Act*, in addition to fostering the advancement of law. A relevant excerpt of part VII of the *Official Languages Act* is reproduced below:

---

<sup>1</sup> See Karine McLaren, « La langue des décisions judiciaires au Canada », Observatoire international des droits linguistiques.

**43. (1)** Le ministre du Patrimoine canadien prend les mesures qu'il estime indiquées pour favoriser la progression vers l'égalité de statut et d'usage du français et de l'anglais dans la société canadienne et, notamment, toute mesure :

- a) de nature à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement;
- [...]
- d) pour encourager et aider les gouvernements provinciaux à favoriser le développement des minorités francophones et anglophones, et notamment à leur offrir des services provinciaux et municipaux en français et en anglais et à leur permettre de recevoir leur instruction dans leur propre langue;
- [...]

**43. (1)** The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society and, without restricting the generality of the foregoing, may take measures to

- (a) enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development;
- [...]
- (d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;
- [...]

[6] We encourage the federal government to establish federal-provincial funding to this end.

**2. Role of the Commissioner of Official Languages of Canada before the courts: The Official Languages Act should be amended in order to tighten mechanisms intended to ensure its implementation, including the power of the Commissioner of Official Languages of Canada to apply to the court for a remedy and funding for other proceedings through the new Court Challenges Program**

[7] The principal institution tasked with the implementation of the *Official Languages Act* is the Office of the Commissioner of Official Languages of Canada, whose mandate includes investigation of complaints received from the public and to report on compliance with the Act by federal institutions to which it applies. Part X of the *Official Languages Act* also provides a remedy before the courts and that the Commissioner of Official Languages may exercise this right on behalf of an individual, and may also appear before the court as an intervener:

*Recours*

77 (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

*Délai*

(2) Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).

*Autre délai*

(3) Si, dans les six mois suivant le dépôt d'une plainte, il n'est pas avisé des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou du refus opposé au titre du paragraphe 58(5), le plaignant peut former le recours à l'expiration de ces six mois.

*Application for remedy*

77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

*Limitation period*

(2) An application may be made under subsection (1) within sixty days after

- (a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),
- (b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or
- (c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5),

or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.

*Application six months after complaint*

(3) Where a complaint is made to the Commissioner under this Act but the complainant is not informed of the results of the investigation of the complaint under subsection 64(1), of the recommendations of the Commissioner under subsection 64(2) or of a decision under subsection 58(5) within six months after the complaint is made, the complainant may make an application under subsection (1) at any time thereafter.

*Ordonnance*

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

*Précision*

(5) Le présent article ne porte atteinte à aucun autre droit d'action.

*Exercice de recours par le commissaire*78 (1) Le commissaire peut selon le cas :

- a) exercer lui-même le recours, dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête ou des recommandations visées au paragraphe 64(2) ou dans le délai supérieur accordé au titre du paragraphe 77(2), si le plaignant y consent ;
- b) comparaître devant le tribunal pour le compte de l'auteur d'un recours ;
- c) comparaître, avec l'autorisation du tribunal, comme partie à une instance engagée sur le fondement de la présente partie.

[Emphasis added]

*Order of Court*

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

*Other rights of action*

(5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

*Commissioner may apply or appear*78 (1) The Commissioner may

- (a) within the time limits prescribed by paragraph 77(2)(a) or (b), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;
- (b) appear before the Court on behalf of any person who has applied under section 77 for a remedy under this Part; or
- (c) with leave of the Court, appear as a party to any proceedings under this Part.

[8] When the *Official Languages Act* was enacted, it was expected that the Commissioner of Official Languages of Canada would play an important role before courts, particularly as an applicant. This view was justified in light of the Commissioner's expertise in matters of official languages, but also due to the financial means at his or her disposal.<sup>2</sup> However, in practice, the Commissioner only intervenes sporadically in court proceedings, and nearly exclusively as an intervener. As a result of this trend, those who wish to exercise their rights in court must do so on their own and generally with their own funds.<sup>3</sup> A more active role for the Commissioner in the judicial arena is essential in order to advance the interpretation of language rights and enhance the progression towards equal status of the French and English languages.

<sup>2</sup> See Mark Power and Justine Mageau, « Réflexions sur le rôle du Commissaire aux langues officielles devant les tribunaux » (2011) 14 : 1 RGD 179

<sup>3</sup> See *Thibodeau v Air Canada*, 2011 FC 876, reversed in part at the Federal Court of Appeal : 2012 FCA 246. The Federal Court of Appeal decision is confirmed by the Supreme Court of Canada: 2014 SCC 67. Before the Federal Court, M. Thibodeau was awarded costs in the amount of \$5 375.95: 2005 FC 1621.

[9] It is highly desirable that the next Commissioner of Official Languages of Canada, of its own initiative, play a more active role before the courts. Furthermore, it may be advisable to amend 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, this power should be exercised in order to resolve structural problems in implementation<sup>4</sup> (as opposed to individual or exceptional cases), or where the impact of a government practice has important repercussions on official language minority communities.<sup>5</sup>

[10] Finally, it is important to emphasize that the funding offered by the federal government to help individuals initiate proceedings regarding language rights is key to the effective implementation of these rights. As such, the reinstatement of the Court Challenges Program and its expansion to language rights provided for in the *Official Languages Act* is a very important positive measure for official language minority communities. It is highly probable that, given the broadened mandate of the new program regarding official languages, it will be necessary to attribute more funds to the language rights component than the 1.5 million dollars currently provided for.

---

<sup>4</sup> For example, for French language services offered by Air Canada, or those offered by the Canadian Air Transport Security Authority.

<sup>5</sup> For example, the elimination of the language rights component of the Court Challenges Program by several governments.

**3. Supreme Court of Canada: The federal government should initiate a reference to the Supreme Court of Canada in order to confirm the constitutional amendment formula for imposing a requirement that individuals appointed to the Supreme Court of Canada be able to fulfill their functions in both official languages without relying on simultaneous translation or interpretation services**

[11] Much has been written over the last decade on whether judges of the Supreme Court of Canada should be able to fulfill their functions in both official languages.<sup>6</sup> It is high time that going forward, all judges appointed to the highest court in the land be able to understand both official languages, both written and spoken, without relying on simultaneous interpretation or translation services. As such, the current federal government's commitment to require candidates for judicial appointment in the Supreme Court of Canada be "functionally bilingual" is a step in the right direction.

[12] That said, the appointment process established by the current government is not entrenched in any law, such that nothing would prevent a subsequent government from abandoning this requirement and appointing unilingual judges. As noted by Professor Sébastien Grammond during his appearance on March 7, 2017, it is quite possible that the imposition of a requirement that judges of the Supreme Court of Canada be able to fulfill their functions in both official languages could be implemented unilaterally by the federal Parliament. However, there is some doubt as to whether the federal Parliament may legislate alone on this question or whether a constitutional amendment would require the assent of seven provinces representing 50% of the population (pursuant to ss 42(1)(d) of the *Constitution Act, 1982*). Recently, in the *Reference re Supreme Court Act, ss. 5 and 6*, the Supreme Court of Canada found that:

[74] [...] Le Parlement ne peut pas modifier unilatéralement la composition de la Cour suprême du Canada. Les caractéristiques essentielles de la Cour sont protégées par la partie V de la *Loi constitutionnelle de 1982*. La composition de la Cour ne peut être modifiée que conformément à l'art. 41 de la *Loi constitutionnelle de 1982* et, partant, pareille modification requiert le consentement unanime du Parlement et de l'assemblée législative de chaque province. Les autres caractéristiques essentielles de la Cour ne peuvent être modifiées que conformément à l'art. 42 de la *Loi constitutionnelle de 1982*, qui exige le consentement d'au moins sept provinces représentant, au total, au moins la moitié de la population de toutes les provinces.

[...]

[94] L'alinéa 42(1)d) applique la procédure de modification 7/50 aux caractéristiques essentielles de la Cour, plutôt qu'à toutes les dispositions de la *Loi sur la Cour suprême*. La mention expresse de la Cour

[74] [...] Parliament cannot unilaterally change the composition of the Supreme Court of Canada. Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41 of the *Constitution Act, 1982* and therefore require the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42 of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[...]

[94] Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*. The express mention of the Supreme Court of Canada

<sup>6</sup> See Sébastien Grammond and Mark Power, « Should Supreme Court Judges be Required to be Bilingual? », in Nadia Verrelli, *Democratic Dilemma: Reforming Canada's Supreme Court*, McGill-Queen's University Press, 2013, also available online : <<http://www.capitaldocumentation.ca/documents/SCC.pdf>>.



suprême du Canada à l'al. 42(1)d) garantit le bon fonctionnement de la Cour suprême. Celui-ci exige qu'une protection constitutionnelle soit accordée aux caractéristiques essentielles de la Cour, identifiées à la lumière de son rôle dans la structure constitutionnelle tel qu'il avait évolué jusqu'au rapatriement. Ces caractéristiques essentielles incluent, à tout le moins, la juridiction de la Cour en tant que cour générale d'appel de dernier ressort pour le Canada, notamment en matière d'interprétation de la Constitution, et son indépendance.

in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[Emphasis added]

[13] Therefore, from a legal perspective, the question is whether the imposition of a requirement that judges to be able to fulfill their functions in both official languages would amount to a modification of an “essential feature” of the Supreme Court, a concept on which the court did not elaborate in that case. Of course, no one can predict how the Supreme Court of Canada would decide the matter if the question were brought before it. This is why it would be advisable for the federal government to initiate a reference to the Supreme Court of Canada asking the court to decide this issue. This would be the best means of pursuing the matter without personalizing the debate (as was the case with the challenge to the appointment of Justice Marc Nadon to the Supreme Court of Canada).

**4. Judicial Appointments: Amendments must be made to the *Official Languages Act* in order to establish rules ensuring that a sufficient number of judges appointed by the federal government are able to fulfill their functions in both official languages without relying on simultaneous translation or interpretation services**

[14] Pursuant to section 96 of the *Constitution Act, 1867*, all judges sitting in superior courts (also known as, depending on the province or territory, the “Superior Court”, “Supreme Court”, “Court of Queen’s Bench”) and appellate courts are appointed by the Governor General. Further, it is important that rules be established to ensure that a sufficient number of judges in these courts be able to hear cases in the official language of the minority for a number of reasons, including:

1. Federal laws, and the laws of New Brunswick, Quebec, Ontario, Manitoba and the three territories are enacted in both official languages. The courts must therefore have a certain capacity to function in both official languages in order to give effect to the English and French versions of these laws.
2. Section 530 of the *Criminal Code* gives the accused a right of equal access to designated courts in the official language chosen. As such, all courts of criminal jurisdiction, in all jurisdictions, must be capable of giving effect to this guarantee.
3. Many provincial and territorial regimes guarantee litigants’ language rights before superior and appellate courts. This is the case, for example, in Ontario. In New Brunswick, this requirement is provided for at subsection 19(2) of the *Canadian Charter of Rights and Freedoms*.
4. Enhancing the capacity of the judiciary of the provinces and territories to function in both official languages is essential in order to maintain a pool of candidates capable of functioning in both official languages for appointment to the Supreme Court of Canada.
5. Creating such rules would give effect to the federal government’s commitment made under Part VII of the *Official Languages Act* (see extracts below).

[15] At least since 1995, the Commissioner of Official Languages has raised issues regarding access to justice in both official languages due to the lack of judges capable of functioning in both official languages in the superior and appellate courts in the country.<sup>7</sup> At least since 1995, the Commissioner of Official Languages of Canada has raised issues regarding access to justice in both official languages due to the lack of judges capable of functioning in both official languages in the superior and appellate courts in the country.<sup>8</sup> In 2013, the Commissioner of Official Languages of Canada published a joint report with the Commissioner of Official Languages of New Brunswick and the French Language Services Commissioner of Ontario presenting a number of recommendation on the question. This report, which was never implemented by the federal government, proposed many recommendations intended to determine

---

<sup>7</sup> See Office of the Commissioner of Official Languages of Canada, *The equitable use of English and French before the Courts in Canada : a study by the Commissioner of Official Languages*, 1995.

<sup>8</sup> See Office of the Commissioner of Official Languages of Canada, *The equitable use of English and French before the Courts in Canada : a study by the Commissioner of Official Languages*, 1995.

the needs of the provinces with respect to judges capable of functioning in both official languages et to implement a process for systematic evaluation of linguistic competencies of candidates for judicial appointment. A copy of a summary of this report and its recommendations may be found at **Appendix “A”**.

[16] The federal government must ensure that it exercises its power regarding judicial appointments in a manner that ensures that the Canadian judicial system has the capacity to respond to the demand for judges capable of fulfilling their functions in both official languages. However, this is not currently the case. The most efficient means of implementing such a process would be to legislate a rigorous, mandatory evaluation procedure to assess judicial appointment candidates' linguistic competencies and in order to enjoin the government to evaluate the demand for judges capable of functioning in both official languages. An amendment to Part III of the *Official Languages Act* would be required to realize this objective.

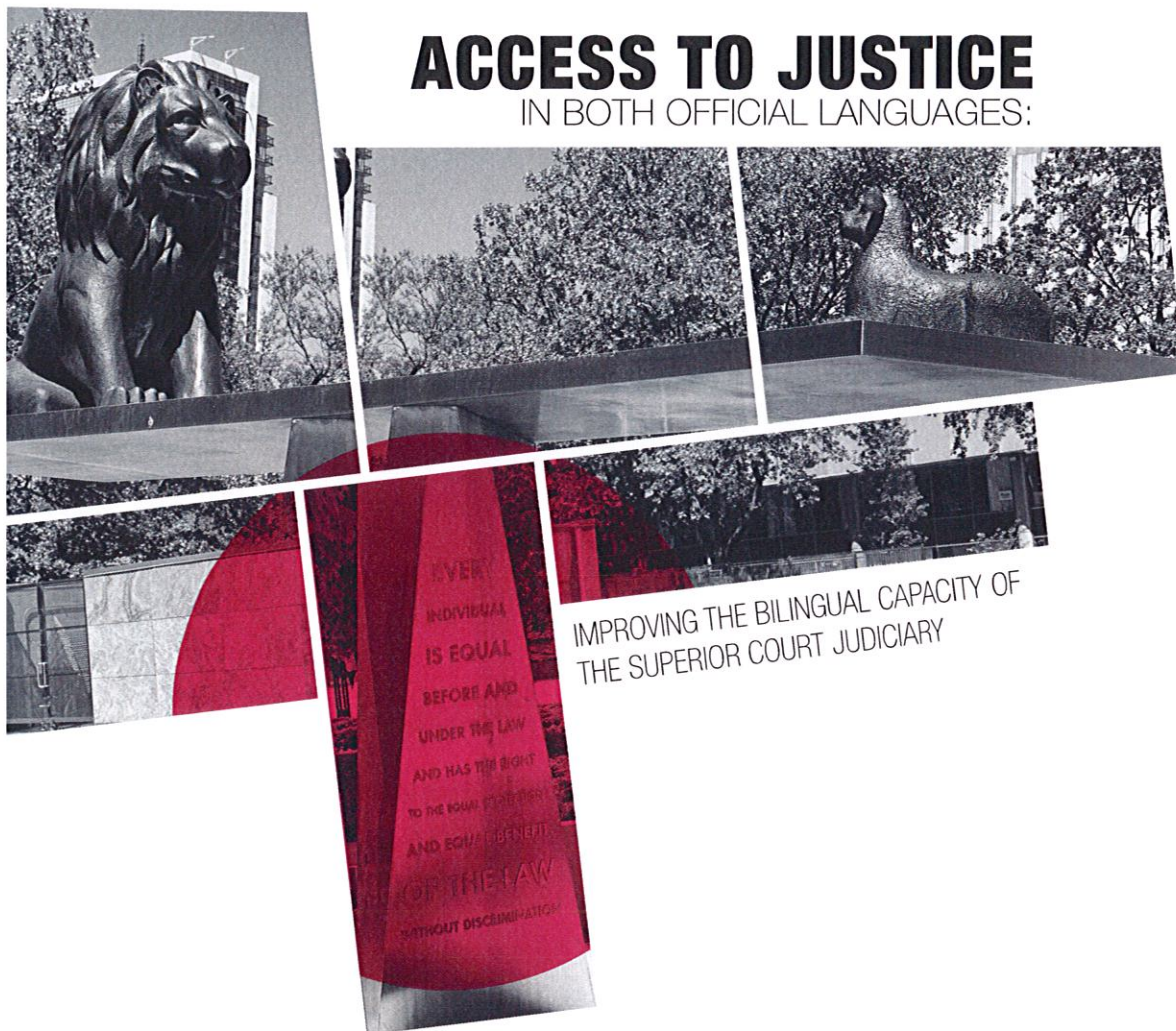
Office of the  
Commissioner of  
Official Languages



Commissariat  
aux langues  
officielles

# ACCESS TO JUSTICE

IN BOTH OFFICIAL LANGUAGES:



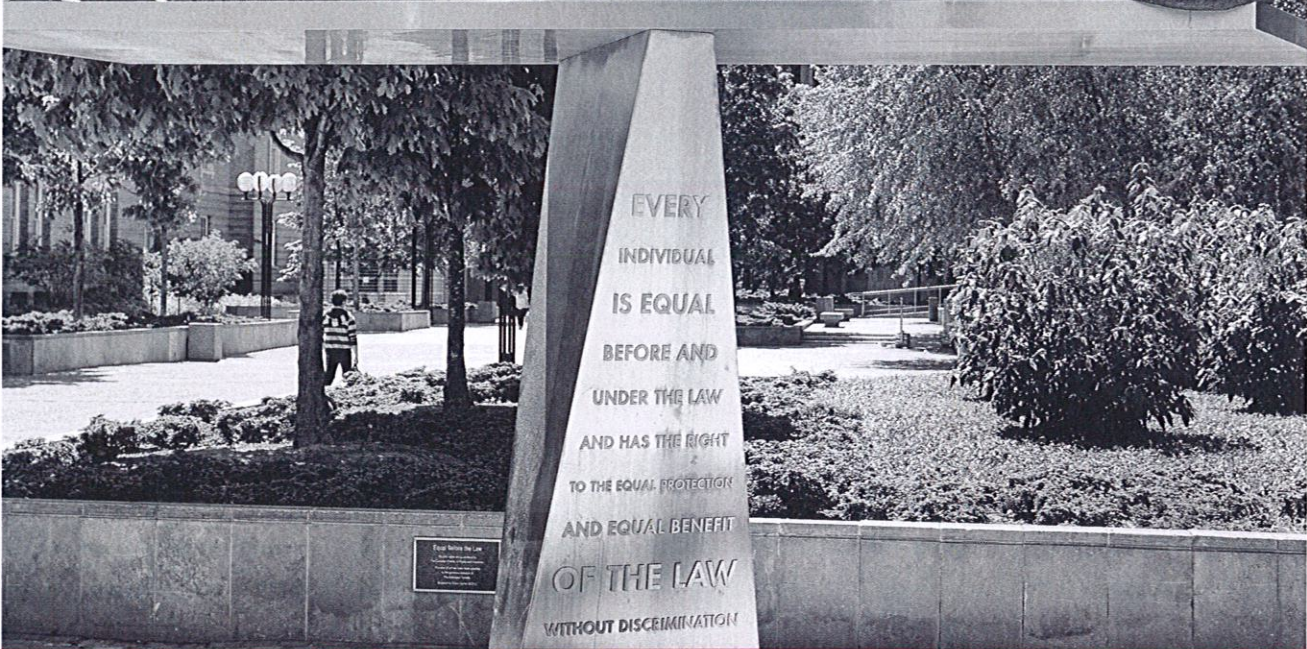
*Acknowledgements*

*The Commissioner of Official Languages of Canada would like to thank everyone who participated in this study, in particular the members of the advisory committee, who provided invaluable advice throughout the process. The Commissioner would also like to thank the chief justices who agreed to share their experiences and views on the issues examined in this study. Finally, he is very grateful to everyone who took part in the consultations by being interviewed or completing the survey. Your generosity has not gone unnoticed.*

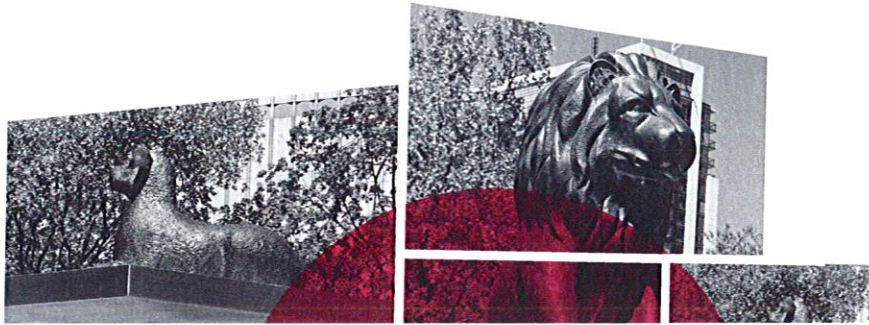
# TABLE OF CONTENTS

PREFACE .....	I
SUMMARY .....	1
LIST OF RECOMMENDATIONS.....	3
<i>Bilingual capacity of the superior courts</i> .....	3
<i>Language skills of judicial candidates</i> .....	3
<i>Composition and role of the advisory committees</i> .....	4
1. INTRODUCTION.....	5
2. METHODOLOGY.....	7
2.1 Literature review .....	7
2.2 Examination of the judicial appointment and training process .....	7
2.3 Lawyer survey and interviews.....	8
2.4 Stakeholder interviews.....	9
3. CONTEXT .....	10
3.1 Language rights before the courts .....	10
3.2 Interventions with governments and other authorities.....	11
3.3 Institutions that play a role in the appointment or training of judges .....	14
3.4 Diversity of language policies .....	15
4. VIEWS OF JUSTICE STAKEHOLDERS .....	17
4.1 Survey results .....	17
4.2 Results of interviews.....	20
5. PROCESS FOR APPOINTING SUPERIOR COURT JUDGES .....	23
5.1 Description of the appointment process .....	23
5.2 Practices used in certain provinces.....	27
5.3 Observations and courses of action .....	28
5.4 Conclusions and recommendations .....	32
6. LANGUAGE TRAINING OF SUPERIOR COURT JUDGES .....	34
6.1 Description.....	34
6.2 Initiative of provincial courts .....	35
6.3 Findings and courses of action .....	36
6.4 Conclusions and recommendations .....	36
7. CONCLUSION .....	37
APPENDIX – DOCUMENTS CONSULTED .....	38









## PREFACE

In the McMurtry Gardens of Justice in downtown Toronto, there is a sculpture by Canadian artist Eldon Garnet of a mighty lion and a little lamb, calmly eyeing each other from opposite ends of an elevated platform precariously balanced on a fulcrum. Despite the difference in size between the two animals, the platform remains perfectly balanced. The title of the sculpture? “Equal Before the Law.”

The sculpture, rich in symbolism, serves as a poignant illustration of the ambition of this report: to ensure that all Canadians can fully and freely exercise their language rights in their dealings with Canada’s superior courts, in particular the right to be heard in the minority official language.

The legislative framework of Canada and of a citizen’s province or territory guarantees one’s formal language rights before the courts. However, in reality, citizens who speak the minority official language all too often encounter obstacles in their quest for justice that limit them to being heard in the language of the majority, despite their rights to the contrary.

One of these obstacles is the shortage of federally appointed judges capable of hearing cases in the minority official language. It is this problem that we, as commissioners whose jurisdiction includes rights in matters of access to justice in both official languages, will be addressing here and seeking to resolve.

We are the first to admit that “improving the bilingual capacity of the judiciary for superior courts” is a subject that, at first glance, may seem rather abstract. However, such is not the case; the repercussions are very real for the English-speaking couple in Quebec adopting a child, for the Franco-Ontarian charged with a criminal offence, for the Acadian fired without cause—in short, for anyone who would benefit from being able to express themselves and be understood by a judge in the official language in which they are most proficient, and in which they can spontaneously make accurate, complete and nuanced arguments in the minority official language that is first and foremost the language of their experiences, their heart, their intellect and their identity.

To minimize the need to ensure that justice is available throughout Canada in the minority official language would do great harm to Canadian society. Linguistic duality, we must remember, is a cornerstone of Canadian identity, fully recognized by the Constitution and the *Canadian Charter of Rights and Freedoms*.

No one would deny that the *Charter* is an emblematic document for Canadians. This is not surprising, since it enshrines the essential and supreme values of our society. Embracing the *Charter*, however, means subscribing to it as a whole, not just the most convenient parts.



Furthermore, it means understanding that a right is only meaningful when it is available in full—we do not grant “the right to a partial vote;” we do not recognize “the right to a little bit of freedom;” we do not say that the rule of law applies “sometimes;” and we do not recognize the “nearly” equal status of English and French as the official languages of our country.

In short, the values of the *Charter* must be applied equally, whether we have the strength of the lion or the gentleness of the lamb. This is the principle that underlies our reflection on the free exercise by *all* Canadians of their language rights before our country’s courts.

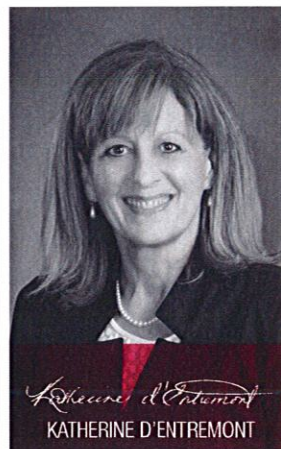
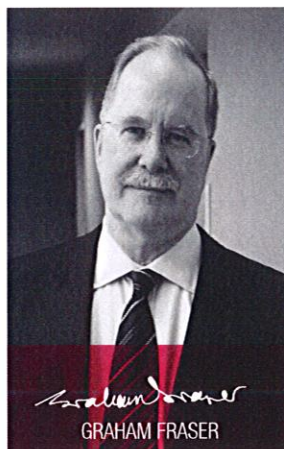
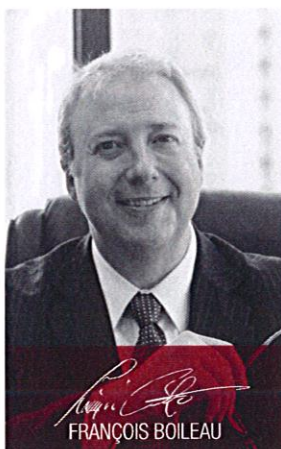
The year 2012–2013 was a milestone year for the three commissioners behind this report. Not only did we mark the 50th anniversary of the Royal Commission on Bilingualism and Biculturalism, whose historic legacy includes the *Official Languages Act*, but we also signed new memoranda of understanding to further explore and leverage the potential for cooperation in areas of common interest. We have been busy, as demonstrated by this report, submitted only a few short months

after the memoranda were signed, and we have been innovative, as demonstrated by the solutions we propose.

We trust that this spirit of innovation and urgency will also serve to encourage the authorities to implement our recommendations. A spirit of collaboration is indispensable when it comes to solving systemic problems with limited resources, and a spirit of urgency is necessary because not one day passes without Canadians from English- or French-speaking minority communities having the intimidating experience of appearing in court exacerbated by not being able to exercise the right to use the official language of their choice before the very people who are responsible for delivering justice.

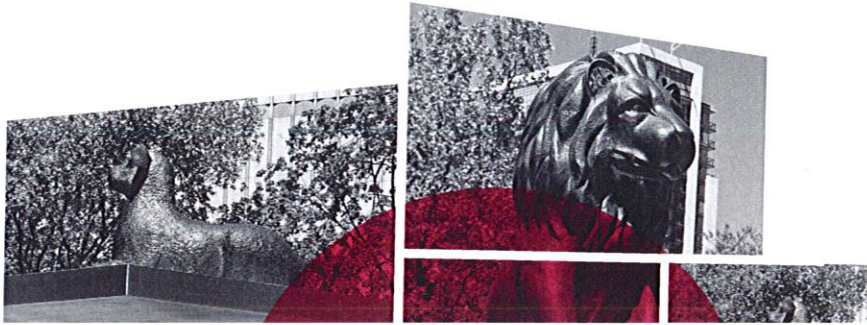
When it comes to language rights, if there is one place where the scales must be balanced, it is before the courts.

We sincerely hope that our recommendations will help achieve what we believe to be a “just” vision and, in doing so, attain the ultimate objective of keeping justice in perfect balance.









## SUMMARY

*"The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical."<sup>1</sup>*

- The Right Honourable Beverley McLachlin, Chief Justice of Canada

For Canadians who are members of official language minority communities to feel comfortable using the official language of their choice before the superior courts, it is crucial for these courts to be able to offer all their services and to function in English and in French. In this regard, the bilingual capacity of the judiciary for superior courts is a *sine qua non* condition for access to the Canadian justice system in both official languages and ensuring the rights of litigants are not prejudiced by their language choice.

For superior courts and courts of appeal to be able to respect the language rights of litigants, it is therefore essential for the federal Minister of Justice to appoint an appropriate number of bilingual judges with the language skills necessary to preside over cases in the minority official language. Currently, the institutional bilingual capacity of the superior courts remains a challenge in a number of provinces and territories. Another challenge lies in judges' ability to maintain their language skills at a level that is sufficient to preside over a hearing in their second official language.

The Commissioner of Official Languages of Canada, in partnership with François Boileau, the French Language Services Commissioner of Ontario and Michel Carrier, the Commissioner of Official Languages for New Brunswick, decided in 2012 to conduct an in-depth study on two issues that have an impact on the bilingual capacity of superior court judges: the judicial appointment process and the language training available to judges appointed to superior courts.

The study looked at the appointment processes for the superior courts of six provinces: Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba and Alberta. It also took into account certain practices for appointing provincial judges in New Brunswick, Quebec, Ontario and Manitoba.

From the consultations conducted as part of the study, it was determined that the judicial appointment process does not guarantee sufficient bilingual capacity among the judiciary to respect the language rights of Canadians at all times.

<sup>1</sup> The Rt. Hon. Beverley McLachlin, "The challenges we face," in Canadian Judicial Council, *Access to Justice: Meeting the Challenge, 2006-2007 Annual Report*. Online version: [www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_annualreport\\_2006-2007\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_annualreport_2006-2007_en.pdf), p. 1.

This finding is based on three key observations. First, there is no objective analysis of needs in terms of access to the superior courts in both official languages in the different districts and regions of the country. Second, there is no coordinated action on the part of the federal Minister of Justice, his provincial and territorial counterparts and the chief justices of the superior courts to establish a process that would ensure, at all times, that an appropriate number of bilingual judges are appointed. Finally, the evaluation of superior court judicial candidates does not allow for an objective verification of the language skills of candidates who identify themselves as being able to preside over proceedings in their second language.

In light of these findings, the study outlines courses of action to improve the bilingual capacity of superior court judges. The federal Minister of Justice, together with his provincial counterparts and the chief justices of the superior courts, should establish a memorandum of understanding for each province and territory to ensure constant bilingual capacity in Canada's superior courts. This collaborative approach would involve consultations with associations of French-speaking jurists or the minority-language legal community in each province or territory. In addition, an objective process should be established to evaluate candidates' language skills. Lastly, the judicial advisory committees should have a member from the province's or territory's official language minority community.

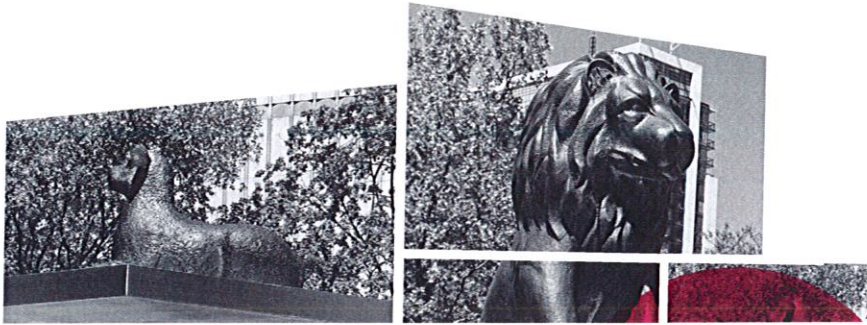
With respect to language training, the program currently offered by the Office of the Commissioner for Federal Judicial Affairs (FJA) appears to meet judges' needs in terms of second language learning as well as maintaining and strengthening their language skills. However, the study concludes that language training should be principally considered a way to maintain and improve the bilingual capacity of a superior court, which should be assured at the outset by the appointment process.

Furthermore, the language training tools provided to provincial court judges could be useful models if FJA would like to provide an additional language training program to superior court judges allowing for the verification of their language capacity in practical work situations.

Finally, superior court judges must be better aware of the language rights of litigants to ensure substantive equality in access to justice in both official languages.

The 10 recommendations presented in the study are concrete and pragmatic. While they are addressed primarily to the federal Minister of Justice, they cannot be implemented without the full participation of his provincial and territorial counterparts, as well as the chief justices of the superior courts and various other stakeholders in the justice system.





## LIST OF RECOMMENDATIONS

### A- APPOINTMENT PROCESS

#### *Bilingual capacity of the superior courts*

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;
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.

#### *Language skills of judicial candidates*

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.

*Composition and role of  
the advisory committees*

The Commissioner of Official Languages recommends that the federal Minister of Justice:

6. Appoint to each advisory committee a member of that province's or territory's English-speaking or French-speaking minority community;
7. Ask the advisory committees to identify which candidates on the list sent to the Minister of Justice are "bilingual," or able to preside over proceedings in English or French immediately upon appointment, based on the results of their language assessment by the Office of the Commissioner for Federal Judicial Affairs;
8. Ask the Office of the Commissioner for Federal Judicial Affairs to provide advisory committee members with the information they need to properly understand the language rights of the people who go to trial and the language obligations of the superior courts.

**B- LANGUAGE TRAINING AND LANGUAGE  
RIGHTS TRAINING**

The Commissioner of Official Languages recommends that:

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.