Office of the Commissioner of Official Languages

Commissariat aux langues officielles

ACCESS TO JUSTICE
IN BOTH OFFICIAL LANGUAGES:

IMPROVING THE BILINGUAL CAPACITY OF THE SUPERIOR COURT JUDICIARY

Ontario
Office of the French Language Services Commissioner

Commissioner of Official Languages for New Brunswick

Commissaire aux langues officielles du Nouveau-Brunswick

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ACCESS TO JUSTICE
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OF THE SUPERIOR COURT JUDICIARY

Study by the Commissioner of Official Languages of Canada in partnership with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario

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EVERY
INDIVIDUAL
IS EQUAL
BEFORE AND
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AND HAS THE RIGHT
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Equal Before the Law

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.

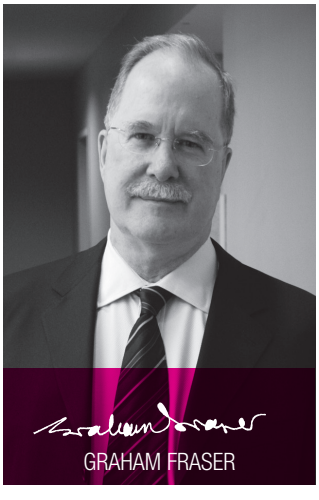
The year 2012–2013 was a milestone year for the three commissioners behind this report. Not only did we mark the 50th anniversary of the Royal Commission on Bilingualism and Biculturalism, whose historic legacy includes the *Official Languages Act,* but we also signed new memoranda of understanding to 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.


FRANÇOIS BOILEAU


GRAHAM FRASER


KATHERINE D'ENTREMONT

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."[1]

- 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.

1 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, 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.

1. INTRODUCTION

This study concerns access to justice. In this regard, it joins the many voices that have expressed the urgency of acting on and addressing one of the largest challenges faced by the Canadian justice system, namely eliminating those barriers that all Canadians subject to the law face in seeking justice and which prohibit the full exercise of their rights before the courts.

This call to action was clearly articulated by the Honourable Warren K. Winkler, Chief Justice of Ontario, in a speech he gave in 2008:

> Everyone favours "access to justice" [...] But like so many other words or expressions, the phrase has become so commonplace that the urgency of its meaning has tended to become blunted down. We cannot allow "access to justice" to become a cliché, devoid of meaning and significance. We must redouble our efforts to open up our system of justice so that it serves the needs of ordinary Ontarians with real life problems. What we require is action and innovation, not platitudes.[2]

While access to justice is a concern for all, access to justice in either of Canada's official languages is an additional challenge for the approximately two million Canadians who are members of official language minority communities. The ability to use English or French before superior courts and courts of appeal, in both criminal and civil proceedings, still too often depends on authorities' willingness to adopt measures so that the courts have the capacity to function in both official languages.

A number of stakeholders in the judicial system have an important role to play in creating an environment conducive to the use of English and French by those who use the system. While access to justice in English and French is also dependent on the bilingual capacity of police departments, legal aid services and court officers,[3] it cannot be achieved if the judiciary does not have sufficient bilingual capacity to ensure equal access to justice in English and French for all parties who come before it. This is the *sine qua non* condition of the courts' respect for the public's language rights.

2 The Honourable Warren K. Winkler, Chief Justice of Ontario, "Access to Justice – Remarks," Canadian Club of London, speech given in London on April 30, 2008. Online version: www.ontariocourts.ca/coa/en/ps/speeches/accessjustice.htm.

3 The importance of ensuring the bilingual capacity of court officers was documented in a recent study by the Department of Justice Canada. See: Department of Justice Canada, *Canada-Wide Analysis of Official Language Training Needs in the Area of Justice*, Ottawa, 2009. Online version: www.justice.gc.ca/eng/csj-sjc/franc/justice/analys.html.

Recognizing that judges sit on courts that are established and managed by provincial and territorial governments, the Commissioner of Official Languages undertook this study in 2012 together with François Boileau, French Language Services Commissioner of Ontario, and Michel Carrier, Commissioner of Official Languages for New Brunswick. Access to justice in both official languages in New Brunswick and access to justice in French in Ontario are rights that are guaranteed in these two provinces. The three commissioners have combined their efforts to identify obstacles preventing people from exercising their language rights before the courts and to find solutions to help improve the bilingual capacity of the system.

Having reiterated many times the importance of coordinated action by different levels of government to correct the shortcomings that still limit access to justice in both official languages, the three commissioners decided to examine two issues that have an impact on the bilingual capacity of the federal judiciary: the federal appointment process for superior court and court of appeal judges[4] and the language training provided to them.

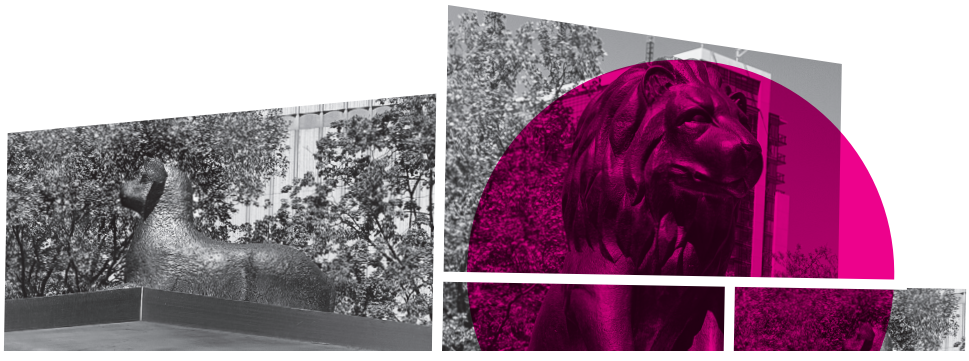
For the purposes of this study, "bilingual capacity of the judiciary" is defined as the presence of an *appropriate number of bilingual judges* in the superior courts, in other words, *judges with the necessary language skills to preside over hearings in the minority official language*.

To gain a national perspective of the challenges related to the bilingual capacity of the judiciary for superior courts, the superior courts and courts of appeal in six provinces were examined: Ontario, Quebec, Manitoba, Alberta, New Brunswick and Nova Scotia. The study does not seek to measure the bilingual capacity of these courts or to determine whether there is a shortage of bilingual judges. Rather, it describes the experiences of those on the front line in the court system and their perceptions of the bilingual capacity of the judiciary.

The study also looks at the process for appointing judges to the superior courts to determine how well this process ensures that an appropriate number of bilingual judges are appointed. Based on observations related to this process and the provincial judicial appointment processes, this report presents courses of action to improve the bilingual capacity of the judiciary for superior courts.

Finally, the study includes an analysis of language training programs currently provided to superior court judges. It also looks at the Canadian Council of Chief Judges language training initiative for provincial court judges, since some characteristics of this initiative are very pertinent to this study.

4 This study looks only at the bilingual capacity of the judiciary for "superior courts," which are the following institutions: (1) superior trial courts, the names of which vary across Canada and include the courts of Queen's Bench, the provincial supreme courts and the provincial superior courts; and (2) the provincial courts of appeal.



2. METHODOLOGY

The study began in summer 2012 and ended in April 2013. In support of this initiative, the Office of the Commissioner of Official Languages formed an advisory committee consisting of representatives of the Canadian Judicial Council, the Fédération des associations des juristes d'expression française de common law, the Canadian Bar Association, the Conference of French Speaking Common Law Members of the Canadian Bar Association, the Centre canadien de français juridique, the Barreau du Québec and the Ontario, New Brunswick, Nova Scotia, Manitoba and Alberta associations of French-speaking jurists. The Office of the Commissioner organized two meetings with the members of this committee, to examine the issues that were raised by the study and to explore possible solutions. The Federation of Law Societies of Canada attended one of the meetings as an observer. Members were also invited to comment on a draft of the report.

The study is also based on the quantitative and qualitative information described in the subsections below.

2.1 LITERATURE REVIEW

The purpose of the literature review was to document the context surrounding this study. Accordingly, previous studies on access to justice in both official languages, as well as the work of various parliamentary committees that have examined this issue, were analyzed. The list of documents consulted can be found in the Appendix.

2.2 EXAMINATION OF THE JUDICIAL APPOINTMENT AND TRAINING PROCESS

The prime objective of this examination was to document and compare the federal judicial appointment processes with certain provincial processes. Particular attention was paid to the role of the candidates' bilingualism in the process. Language rights training and second official language training opportunities provided to judges were also documented and compared.

Interviews were conducted with various stakeholders who play a role in the appointment process for judges or in their training. At the federal level, focus was on the processes in Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba and Alberta superior courts. At the provincial level, the processes for appointing provincial judges in New Brunswick, Quebec, Ontario and Manitoba were examined. The Canadian Council of Chief Judges' language training initiative for provincial court judges was also examined for comparison purposes.

2.3 LAWYER SURVEY AND INTERVIEWS

The on-line survey, conducted in October and November 2012, sought to learn about jurists' perceptions of the ability of superior court judges to hear cases in both official languages and the impact of this situation on access to justice in both official languages.

The survey questionnaire, which consisted primarily of closed questions, was distributed to members of the New Brunswick, Nova Scotia, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia associations of French-speaking jurists. Questionnaires were also sent to a sample of Barreau du Québec members.

In total, 373 individuals responded to the questionnaire. Of these, 202 were practising before a superior court and could therefore answer all the questions. The geographical distribution of the respondents can be found in Table 1.

The vast majority of the respondents (84%) were lawyers working in private practice. Other respondents included Crown prosecutors, lawyers working for private-sector businesses, legal aid lawyers and lawyers working for the federal government or a provincial government.

TABLE 1 GEOGRAPHICAL DISTRIBUTION OF SURVEY RESPONDENTS (N=202)

PROVINCES	NUMBER OF RESPONDENTS	PERCENTAGE
Nova Scotia	6	3%
New Brunswick	15	7%
Quebec	75	37%
Ontario	76	38%
Manitoba	7	4%
Saskatchewan	10	5%
Alberta	5	3%
British Columbia	8	4%
Total	202	100%*

Source: Survey conducted by PRA Inc. for this study (2012).
* The percentages have been rounded and therefore do not total 100%.

It is important to note that the results of this survey were not intended to provide data that is statistically representative of the target populations. This is why no margin of error was provided. Rather, the survey was intended to gather opinions from lawyers practising in the minority language before the superior courts. The results of the survey must therefore be interpreted from this perspective.

A series of follow-up interviews was also conducted to further analyze certain survey results. In total, 36 follow-up interviews were carried out.[5]

5 These interviews were conducted with survey respondents who volunteered to be interviewed. This self-selection method obviously has a bias. However, more than one third of survey respondents (72 individuals) were prepared to participate in an interview, indicating a large amount of interest in the issue among the jurists surveyed.

2.4 STAKEHOLDER INTERVIEWS

Interviews were conducted with 32 people who are involved in the legal community or who represent organizations involved in access to justice issues. These include the following:

- Nine chief justices of superior courts and courts of appeal in the six provinces targeted by the study;
- The chief justices of three provincial courts and one provincial court judge;
- The Canadian Bar Association;
- The associations of French-speaking jurists (N.B., N.S., Ont., Man., Sask., Alta., B.C.);
- The Barreau du Québec;
- The Centre canadien de français juridique;
- The Office of the Commissioner for Federal Judicial Affairs Canada (FJA);
- The Conference of French Speaking Common Law Members of the Canadian Bar Association;
- The Canadian Judicial Council;
- La Fédération des associations de juristes d'expression française de common law;
- The Federation of Law Societies of Canada;
- The National Judicial Institute.

These interviews were conducted in person or by telephone, and based on an interview guide sent in advance.

3. CONTEXT

When a court is not able to respect the language rights of those who come before it, access to justice is inevitably hindered. Over the years, this has led a number of stakeholders to recommend changes to the judicial appointment process so that courts of justice are able to provide equal access to justice in both official languages. This section of the report further explores these findings and describes the roles of different institutions in the superior court judicial appointment process or language training.

3.1 LANGUAGE RIGHTS BEFORE THE COURTS

Access to justice is an issue that is attracting more and more attention. By its very nature, the court system is both complex and intimidating. The questions that are raised there and the issues it handles can have serious consequences for people who go before it, who may find themselves vulnerable and overwhelmed by the proceedings they are facing. This situation is exacerbated when these people decide to represent themselves in first instance, or even before the court of appeal.[6]

It is in this context that the language rights of litigants are especially important. In Canada, the right to be heard before the courts in either official language goes well beyond the notion of fairness. As the Supreme Court of Canada ruled in *Beaulac,* the purpose of this fundamental right is to protect Canada's official language minorities and help them preserve their cultural identity.[7] Ruling on access to a criminal proceeding in either English or French, the Supreme Court of Canada stated the following:

> Where institutional bilingualism in the courts is provided for, *it refers to equal access to services of equal quality* for members of both official language communities in Canada.[8] [Our emphasis]
> [. . .]
> In the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.[9]

The Supreme Court of Canada also emphasized that violation of language rights constitutes "a substantial wrong and not a procedural irregularity."[10]
[The Court's emphasis]

6 On the question of self-representation before the courts, see the speech by the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, given at the Empire Club of Canada, Toronto, March 8, 2007.

7 *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para 34.

8 *Ibid* at para 22.

9 *Ibid* at para 39.

10 *Ibid* at para 54.

It is due to the purpose of language rights and their importance to the protection of linguistic minorities that a number of stakeholders over the past 20 years have urged the different levels of government to take the necessary measures to improve access to justice in both official languages.

3.2 INTERVENTIONS WITH GOVERNMENTS AND OTHER AUTHORITIES

Over the past two decades, the Office of the Commissioner of Official Languages has added its voice to the chorus calling for governments to take measures to resolve problems related to access to justice in both official languages, in particular the bilingual capacity of the federal judiciary.

Nearly 20 years ago, the Office of the Commissioner of Official Languages published the study *The Equitable Use of English and French Before the Courts in Canada*,[11] which drew a portrait of access to justice in both official languages. It described the unequal linguistic capacity of Canada's superior courts of both first instance and appeal. Commissioner Victor Goldbloom recommended that the federal government place appropriate emphasis on language skills in selecting candidates for the judiciary.

Some years later, in 2002, the Department of Justice Canada published the study *Environmental Scan: Access to Justice in Both Official Languages.*[12] Recognizing the importance of bilingualism in the judiciary, the report recommended some possible solutions, including appointing more bilingual judges to provincial superior courts.

The *Environmental Scan* report was then studied by the Standing Senate Committee on Official Languages, which, in 2003, published a report containing a series of recommendations regarding the selection and appointment of bilingual judges. The Committee urged the government, among others, to take the necessary measures to ensure that candidates' language skills can be verified through a reference process.[13]

At this time, Commissioner Dyane Adam tabled an annual report (2003–2004) in which she recommended that the government re-examine the appointment process for superior court judges to provide these courts with adequate bilingual capacity. One year later, she appeared before the Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, to make a set of recommendations intended to ensure that bilingualism plays a greater role in the process of appointing judges.[14]

Commissioner Adam also took the opportunity provided by an appearance before the Standing Committee on Official Languages to illustrate the problem that many people who go to trial face. Indeed, in April 2004, the Commissioner noted that there were no bilingual judges in the Family Court Division of the Manitoba Court of Queen's Bench, and that this had

11 Office of the Commissioner of Official Languages, *The Equitable Use of English and French Before the Courts in Canada*, Ottawa, 1995.

12 Department of Justice Canada, *Environmental Scan: Access to Justice in Both Official Languages*, Ottawa, 2002.

13 Standing Senate Committee on Official Languages, *Third Report: Study the report entitled* Environmental Scan: Access to Justice in Both Official Languages, 2nd Session, 37th Parliament, 2003. Online version: www.parl.gc.ca/Content/SEN/Committee/372/offi/rep/rep03may03-e.htm.

14 Commissioner Adam recommended the following measures: that the selection criteria related to the candidates' language skills be given more weight; that the advisory committee be required to evaluate the bilingual capability of candidates who have identified themselves as such, in an interview, for example; that the list of candidates submitted to the Minister take note of candidates with sufficient knowledge of English and French; that the Minister of Justice commit to replacing all bilingual judges who leave their positions with judges who are also bilingual; and that the appointment process recognize the Minister of Justice's duty to consult the official language minority community or the jurists' association that represents its interests with respect to the bilingualism needs of a particular court. See Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence*, November 14, 2005, 1st session, 38th Parliament. Online version: www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Language=E&DocId=2106538&File=0.

been the case for several years. Manitoba Francophones with family law questions therefore faced significant additional delays and costs.[15] That same year, Commissioner Adam reported that two bilingual judges of the Superior Court of Ontario, in the Welland and Windsor districts, had been replaced by unilingual Anglophone judges. The Commissioner emphasized that these unilingual appointments resulted in the loss of the court's bilingual capacity and that access to justice for members of the Franco-Ontarian community in these regions had become more difficult.[16]

On November 28, 2005, the House of Commons Subcommittee on the process for appointment to the Federal Judiciary tabled a preliminary report recognizing the problems related to the appointment of bilingual judges and the need to reform the existing process.[17]

One year later, the federal Minister of Justice, in an appearance before the Standing Senate Committee on Official Languages, publicly committed to consulting the chief justices of superior courts to determine their needs with regard to bilingual judges when new candidates are appointed.[18]

On May 8, 2008, Commissioner Graham Fraser appeared before the House of Commons Standing Committee on Official Languages to address the judicial appointment process and the shortage of bilingual judges. He reiterated that access to justice is one of the cornerstones of the Canadian legal system, and the insufficient bilingual capacity of the superior courts and courts of appeal of the provinces and territories means that a significant segment of the Canadian population is being denied the right to access justice in the official language of its choice.[19]

In June of the same year, Commissioner Fraser made a written submission to the Senate Standing Committee for Legal and Constitutional Affairs regarding Bill C-31, which sought to allow for the appointment of 20 additional judges to the provinces' superior courts. He asked the Committee to recommend, in its report to the Senate, that the superior court judicial appointment process be reviewed to ensure that the courts have a sufficient number of bilingual judges to allow Canadians access to justice in the official language of their choice.

In June 2011, Commissioner Fraser submitted his final investigation report to the federal Minister of Justice on complaints related to the appointment of an insufficient number of bilingual judges in Ontario and Nova Scotia. The Commissioner concluded that there were shortcomings in the judicial appointment process and announced that he would conduct an in-depth study of the bilingual capacity of the judiciary for superior courts to gain a better understanding of the problem.

While Commissioner Fraser was taking these actions, there were positive developments in Ontario. In his first annual report on the first months of his mandate,[20] the new French language services commissioner of Ontario announced his intention to work closely with the Attorney General of Ontario to improve access to justice in both official languages.

15 See the testimony of Dyane Adam, House of Commons Standing Committee on Official Languages, *Evidence,* Parliament of Canada, April 21, 2004, 3rd session, 37th Parliament.

16 See the testimony of Dyane Adam, Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence*, November 14, 2005, Number 008, 1st session, 38th Parliament.

17 Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Process for Appointment to the Federal Judiciary*, Parliament of Canada, November 2005. Online version: www.parl.gc.ca/CommitteeBusiness/StudyActivityHome.aspx?Cmte=SMFJ&Stac=1366636&Language=E&Mode=1&Parl=38&Ses=1.

18 Proceedings of the Standing Senate Committee on Official Languages, Issue 3 – *Evidence*, June 5, 2006.

19 See the testimony of Graham Fraser, Standing Senate Committee on Official Languages, *Evidence*, Parliament of Canada, May 8, 2009, 1st session, 38th Parliament.

20 Office of the French Language Services Commissioner, *Paving the Way: Annual Report 2007-2008*, Toronto, 2008, p. 20.

Shortly afterwards, the Attorney General of Ontario launched public consultations aimed at improving the province's civil justice system. This initiative came in response to two events: the tabling of the Osborne report[21] and the Ontario Court of Appeal decision in *Belende v. Patel,*[22] which received a large amount of media attention. This decision is important in that the court recognized the fundamental nature of the right to a bilingual trial in Ontario, recognized that full implementation is contingent on the bilingual capacity of the courts and concluded that the violation of these quasi-constitutional rights "constitutes material prejudice to the linguistic minority."

Between 2007 and 2013, the French Language Services Commissioner of Ontario received complaints about additional delays that the complainants experienced before they could have a bilingual hearing before the Ontario Superior Court of Justice. Furthermore, in some cases, complainants were denied a hearing in the official language of their choice before a superior court, despite having clearly requested it. The French Language Services Commissioner's 2008–2009 annual report described situations where often well-intentioned unilingual judges, noticing that a Francophone could get by in English, offered to hear the case the same day in English. The person being tried was then put in the difficult position of having to choose between demanding their language rights be respected and thereby delaying the hearing and incurring sometimes significant costs, or renouncing their rights and proceeding in the language of the majority.[23]

In his second annual report, the French Language Services Commissioner of Ontario also discussed the shortage of bilingual judges. He recommended that the Attorney General of Ontario establish a committee that would include members of the judiciary, the bar and practitioners from the Francophone community in order to recommend concrete and concerted steps to address the shortage of bilingual judges as well as to actively find ways to increase knowledge of language rights among all members of the judiciary in Ontario.[24] In early 2010, the Attorney General established a committee in response to this recommendation. The June 2012 report of the French Language Services Bench and Bar Advisory Committee to the Attorney General, *Access to Justice in French*[25] contained several recommendations to improve the process for appointing bilingual judges and also increase the Ontario judiciary's capacity to administer justice in English and French equally, in accordance with the *Courts of Justice Act.*

21 At the request of the Attorney General of Ontario, Justice Coulter Osborne published a report in November 2007 titled *Civil Justice System Reform Project*. Of his 80 recommendations, the first two deal, in part, with access to justice in French and judicial appointments. Justice Osborne recommended that any future appointments should expressly consider the need for bilingual judges within a given region, especially for judicial districts that are in the practice of offering bilingual hearings. He also recommended that the needs of the civil justice system from the standpoint of the number of judges required should be the subject matter of a structured analysis by the federal government. The analysis should take into account the need for bilingual judges.

22 (2008) 290 D.L.R. (4th) 490, 2008 ONCA 148.

23 Office of the French Language Services Commissioner, *One Voice, Many Changes: Annual Report 2008-2009*, Toronto, 2009, p. 36.

24 *Ibid,* p. 37.

25 Ontario French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, *Access to Justice in French*, Toronto, 2012, p. 20.

Other stakeholders, such as the Canadian Bar Association,[26] the Fédération des associations des juristes d'expression française and some of its members,[27] also urged the federal government to take concrete measures.

Despite these frequent and diverse calls for action, progress in the area of appointing bilingual judges has been modest. Therefore, a more systematic process to enable superior courts to fully respect the language rights of people who go to trial is required.

3.3 INSTITUTIONS THAT PLAY A ROLE IN THE APPOINTMENT OR TRAINING OF JUDGES

To facilitate readability and understanding of this report, a brief description of the roles of institutions and organizations involved in the appointment and training of the superior court judiciary is described below.

Governor General Prime Minister of Canada Cabinet Federal Minister of Justice	The federal Minister of Justice makes recommendations to Cabinet on the appointment of puisne judges; Cabinet's recommendations lead to orders signed by the Governor General. The appointment of chief justices and associate chief justices is the prerogative of the Prime Minister of Canada..
Office of the Commissioner for Federal Judicial Affairs	Reporting directly to the federal Minister of Justice, the Office of the Commissioner for Federal Judicial Affairs (FJA) provides administrative support for judicial appointments to superior courts. FJA is responsible for supporting the advisory committees, whose work is described in subsection 5.1 of this report. FJA is also responsible for administering the language training provided to superior court judges.
Canadian Judicial Council	Chaired by the Chief Justice of the Supreme Court of Canada and consisting of the chief justices, associate chief justices and certain senior judges from Canada's provincial and federal superior courts, the Canadian Judicial Council is responsible for reviewing complaints or allegations against superior court judges. The Council also establishes policies and provides tools to ensure the uniformity and accountability of the judicial system. To this end, it determines the judiciary's training needs and may ask the National Judicial Institute to provide such training.
National Judicial Institute	The National Judicial Institute's main function is to provide training on substantive law to superior court judges. The Institute offers most of the continuous training programs for the Canadian judiciary.

26 See Canadian Bar Association resolution 05-02-A regarding the appointment of bilingual judges.

27 See, for example, the FAJEF's testimony before the House of Commons Standing Committee on Official Languages, Thursday, May 8, 2008, 39th Parliament, 2nd session; before the Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights on Tuesday, November 22, 2005, 28th Parliament, 1st session; and before the House of Commons Standing Committee on Official Languages, Wednesday, April 21, 2004, 37th Parliament, 3rd session.

3.4 DIVERSITY OF LANGUAGE POLICIES

In many respects, the bilingual capacity of a court is determined by the legal context in which it operates. Beyond the demographic reality of a region (particularly in terms of the concentration of the official language minority community), a province's language policy inevitably influences the bilingual capacity of its courts. This section looks at this reality and describes the characteristics and challenges associated with the current bilingual capacity of the superior courts.

Criminal law obligations

In criminal cases, Canadians have the right to a preliminary hearing and a trial in the official language of their choice, regardless of where in the country the case is heard. Sections 530 to 533.1 of the *Criminal Code* set out this right and, therefore, the obligation of the judge presiding over the hearing to communicate in the official language of the accused's choice, without the use of an interpreter. [28]

All superior and appeal courts of the provinces and territories have jurisdiction to hear *Criminal Code* cases. In general, these courts hear cases involving particularly serious offences (murder charges, for example), which can generally be heard by a judge and a jury, if the accused exercises this option. These cases can be appealed to each province's and territory's court of appeal.

However, the language obligations set out in the *Criminal Code* apply to trial proceedings, not to proceedings before a court of appeal.

Obligations in other areas of law

In the superior courts, two thirds of judges (648 judges out of a total of 1,017) practise in provinces that clearly recognize language rights in non-criminal cases,[29] such as in the areas of family law, wills and estate law, and contract or commercial law.

The scope and nature of language rights vary, however, from one province or territory to another:

- In New Brunswick, Quebec and Manitoba, constitutional provisions guarantee the right to use English or French in all cases before the superior courts and courts of appeal of these provinces.[30]
- In Ontario, the *Courts of Justice Act* [31] stipulates that English and French are the official languages of the courts of Ontario. In practical terms, in areas other than criminal law, parties to a proceeding can ask that it be conducted as a "bilingual proceeding" before the superior court or court of appeal of the province.[32]
- The three Canadian territories recognize the right of any citizen to use English or French in any proceeding before the courts established by these three legislatures.[33]
- Saskatchewan recognizes the right to use English and French before the courts, while Alberta limits this right to oral communication.[34]
- In the other Canadian provinces, litigants do not benefit from constitutional or legislative rights guaranteeing access in either official language to the superior courts in matters other than *Criminal Code* offences.

28 The obligation to be institutionally bilingual was confirmed by the Supreme Court of Canada in *R. v. Beaulac*, [1999] 1 S.C.R. 768.

29 These statistics were provided by the Office of the Commissioner of Federal Judicial Affairs Canada and are dated February 1, 2013.

30 For New Brunswick, see section 19(2) of the *Canadian Charter of Rights and Freedoms*; for Quebec, see section 133 of the *Constitution Act, 1867;* for Manitoba, see section 23 of the *Manitoba Act, 1870*.

31 *Court of Justice Act*, R.S.O. 1990, Chapter C.43, s. 125 and 126.

32 For a more detailed description of the concept of a bilingual proceeding see French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, *Access to Justice in French*, Toronto, 2012, p. 11.

33 See section 5 of the Yukon *Languages Act*, subsection 9 (1) of the *Official Languages Act* of the Northwest Territories and section 12.(1) of the Nunavut *Official Languages Act*.

34 Section 11(1) of the Saskatchewan *Languages Act*, LS 1988-89, c L-6.1; section 4 of the Alberta *Languages Act*, RSA 200, ch. L-6.

4. VIEWS OF JUSTICE STAKEHOLDERS

During the study, a number of stakeholders were asked to share their perceptions and experiences regarding the bilingual capacity of superior courts. Those consulted were judges and chief justices of superior courts, lawyers practising in the minority language and other stakeholders interested in questions related to the judiciary. The key results and findings of the surveys and interviews are found below.

4.1 SURVEY RESULTS

This section presents the results of the survey on superior courts of first instance. The results of the survey show that, according to the majority of respondents, the bilingual capacity of certain superior courts is insufficient and equal access to the superior courts in both official languages does therefore not exist.

In light of the fact that the bilingual capacity of the superior courts is likely to vary from district to district, the lawyers were first asked if there were cities where it was easier or more difficult to be heard in the minority language. Nearly all the respondents replied that there were in fact cities where it was easier to be heard in the minority language. Thus, there have been some successes.

However, in response to the question of whether there are cities where it is more difficult to be heard in the language of the minority, nearly all respondents who were able to answer this question (84 out of 94) gave a positive answer.

For cities where it was more difficult to proceed, the following issues were noted.

TABLE 2 CHARACTERISTICS SPECIFIC TO THE BILINGUAL CAPACITY OF A SUPERIOR COURT

Question: For regions or cities where it is more difficult to proceed in the language of the minority, please indicate the extent to which you agree with the following statements:	**% AGREE (N=84)**
Bilingual judges are not always available	85%
Court staff in these regions or cities do not provide full bilingual services	83%
There is an insufficient number of bilingual judges	82%
Bilingual judges' language skills are insufficient	61%
Proceedings are not heard in comparable timeframes	61%
Judges do not demonstrate a good understanding of language rights	48%

Source: Survey conducted by PRA Inc. for this study (2012).

In summary, this data shows that, in the districts or cities where it is more difficult to be heard in the minority language, there is often an insufficient number of bilingual judges, or the judges who are considered bilingual are not systematically available, and some judges who report being bilingual do not necessarily have a sufficient level of bilingualism to be able to preside over a hearing in the minority language. There is also a perception of uneven understanding of language rights among judges in these districts and cities. In addition, there are challenges related to the lack of bilingual court personnel and delays in proceedings in the minority language.

At the regional level, the trends described in Table 2 are generally less pronounced in Quebec and New Brunswick than in the other provinces surveyed, as illustrated in Figure 1.[35]

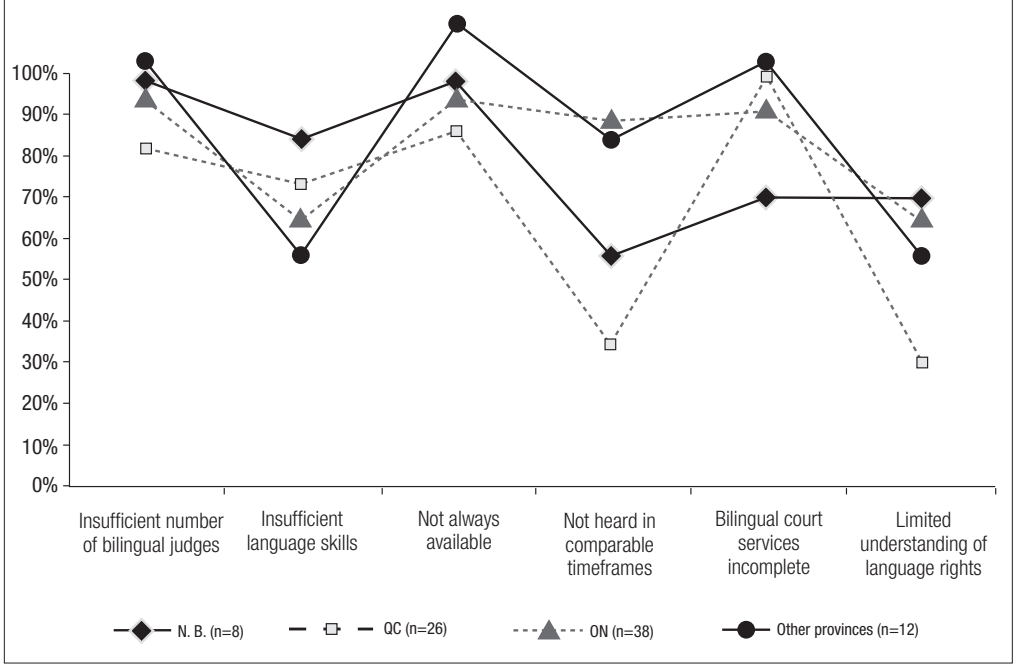
"There are more and more people who represent themselves … a number of them are not eligible for legal aid, but cannot afford to hire a lawyer either. However, when they appear before a judge who does not speak French, they're lost, with no one to explain to them what's happening and what to do." [translation]

- Lawyer consulted

"There was an example of a proceeding that what supposed to be bilingual. It ended up being in English only because the French-speaking client understood English. So Francophones have English imposed upon them indirectly by the system because it's easier." [translation]

- Lawyer consulted

FIGURE 1
LEVEL OF AGREEMENT WITH CERTAIN STATEMENTS, BY REGION WHERE IT IS MORE DIFFICULT TO PRACTISE IN BOTH OFFICIAL LANGUAGES
SOURCE: SURVEY OF LAWYERS (2012)



35 The low number of respondents in each province means that conclusions cannot be drawn about each province's situation. The data serves only as a general indication.

TABLE 3 CHARACTERISTICS SPECIFIC TO THE BILINGUAL CAPACITY OF A SUPERIOR COURT

Question: For regions or cities where it is easy to proceed in the language of the minority, please indicate the extent to which you agree with the following statements:	**% AGREE (N=120)**
Bilingual judges are available at all times	63%
Bilingual judges' language skills are sufficient	88%
Judges demonstrate a good understanding of language rights	83%
A sufficient number of bilingual judges has been assigned	78%
Proceedings can be heard in comparable timeframes	58%
The court offers full services in both languages	55%

Source: Survey conducted by PRA Inc. for this study (2012).

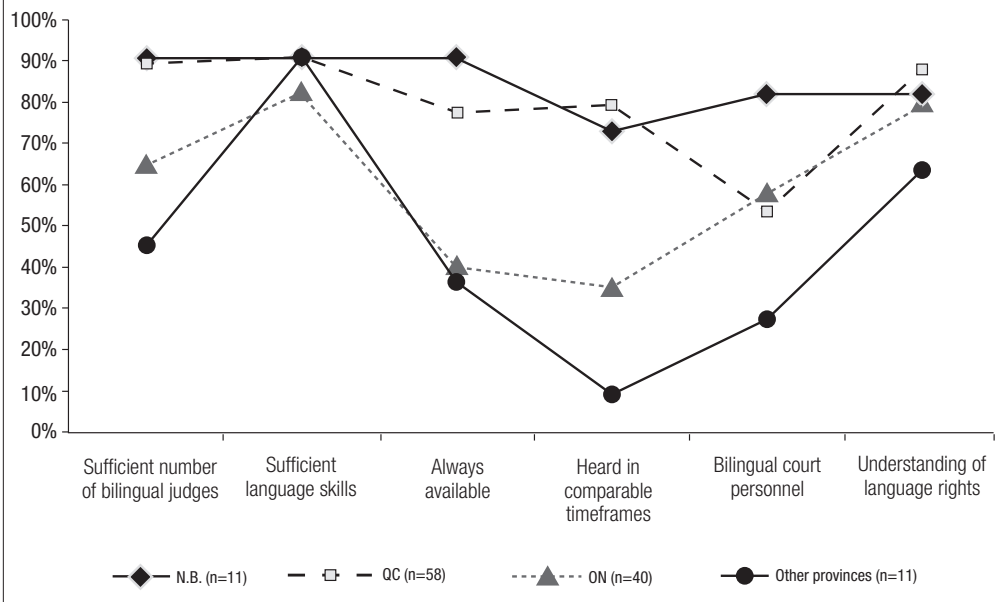
Referring to districts where it is considered easy to be heard in the minority language, respondents indicated their level of agreement with the statements in Table 3.

These results demonstrate that, even in districts and cities where it is relatively easy to be heard in the minority language, it cannot be assumed that there is equal or equivalent access in both official languages. According to a large proportion of respondents, being heard in the minority language may be an option, but there is a risk of additional delays and, even if bilingual judges are available, it is probable that other court services will not be available in the minority language.

On a regional basis, while the situation described by New Brunswick and Quebec respondents is relatively positive, this is not the case for respondents in Ontario and the other provinces surveyed (Nova Scotia, Manitoba and Alberta). Respondents in these three provinces found the delays resulting from requests to be heard in French, the availability of bilingual court personnel and the availability of bilingual judges to be the most problematic.

> *"For proceedings with a French-speaking client, when I know the other party is English, I tell my client to proceed in English because, if we don't, I know my client will be at a disadvantage. We make recommendations against the code of ethics because, if we don't, we know they will be at a disadvantage."* [translation]
>
> *- Lawyer consulted*

FIGURE 2
LEVEL OF AGREEMENT WITH CERTAIN STATEMENTS, BY REGION WHERE IT IS EASY TO PRACTISE IN BOTH OFFICIAL LANGUAGES
SOURCE: SURVEY OF LAWYERS (2012)



"I had a client who broke his parole conditions while waiting for an appeal. Because the bilingual court sits only a few times a year, he could not get an emergency hearing to move the appeal hearing forward to take into consideration the detention conditions. The judge decided to continue the parole despite the breach of conditions. This is a situation where you're caught between two injustices—either imprison someone while waiting for a hearing in the minority language, or release someone who does not deserve it and commit injustice against society." [translation]

- Lawyer consulted

Taken overall, the survey data confirms that the bilingual capacity of a superior court is not dependent only on the bilingualism of the judges and the availability of bilingual judges; however, this is still a key factor and remains problematic.

The situation in courts of appeal is generally seen in a more positive light by the respondents. As a whole, respondents from New Brunswick and Quebec felt that their respective courts of appeal had a good bilingual capacity. A more nuanced evaluation was given by the respondents from Ontario and the other jurisdictions.

4.2 RESULTS OF INTERVIEWS

The interviews with lawyers, members of the judiciary and organizations involved in the legal field helped to better understand certain challenges that were raised by the survey respondents.

Delays and additional costs

Many interview respondents noted that the decision by members of official language minority communities to proceed in their own language is not without consequences. They must, in practice, be prepared to face certain delays and perhaps even additional costs. This dynamic is obviously contrary to the language rights that confer equal status upon both official languages, which therefore require comparable access to the courts in both English and French.

"We say that a member of the Francophone minority has the choice between being served in English today or in French tomorrow." [translation]

- Lawyer consulted

These findings are similar to those of the recent report on access to justice in French in Ontario. In its report, the French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario highlighted the delicate situation that a number of lawyers find themselves in when advising their client which language to use for proceedings:

> The Committee also understands that many French-speaking lawyers feel compelled to inform their French-speaking clients that proceeding in French could have detrimental effects, including delay, and additional costs.[36]

"There are definitely adjournments due to a shortage of [bilingual] judges. If a [bilingual] judge goes on leave, has a conflict of interest or is on vacation, litigants face additional delays. They are indirectly pressured to choose service in English." [translation]

- Lawyer consulted

Required level of bilingualism

Beyond the question of delays or additional costs, it is also necessary to clarify what is meant by bilingualism in judges and determine the level of bilingualism that would ensure a real institutional capacity in both official languages. It goes without saying that a court proceeding (regardless of the area of law) requires all parties—especially the presiding judge—to be able to understand all the information and arguments presented, including any nuances that may have an impact on the outcome.

"There are some judges who say they are bilingual, but once they are appointed, they find out that they do not actually have the ability to preside over French-language hearings, and then refuse to hear cases in French." [translation]

- Stakeholder consulted

The individuals consulted for this study reported that the level of bilingualism required of a judge presiding over a proceeding in the minority language (or a bilingual proceeding) goes well beyond the ability to converse in both official languages. The judge must not only be able to understand the facts submitted and, as needed, the testimony, but must also have knowledge, in both official languages, of the legal terminology applicable to the proceeding in question.

On this subject, a study by the Department of Justice Canada on training needs within the judicial system clearly defines the various levels of language skills:

> Needless to say, a command of legal vocabulary is much more than the ability to conduct a conversation in both official languages. The ability to conduct a conversation in both official languages is the first stage in a logical progression. The second stage is a command of the legal vocabulary appropriate to the area of justice in which the stakeholder works. The third and final stage is the appropriation of legal *discourse* in both official languages, that is, the ability to properly apply the legal vocabulary that has been learned.[37] [Emphasis in study]

36 Ontario French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, *Access to Justice in French*, Toronto, 2012, p. 13.

37 Department of Justice Canada, *Canada-Wide Analysis of Official Language Training Needs in the Area of Justice*, Ottawa, 2009, p. 22.

However, the stakeholders consulted noted that the level of bilingualism of certain judges seems to be insufficient to ensure that information presented will be understood equally well in both official languages. This applies to both oral and written communication.

Awareness of litigants and the legal community

Making litigants and the legal community aware of the language rights that exist in their province is, from the point of view of a number of stakeholders, a significant challenge. Considering both the importance of the issues that come before a judge and the particularly formal nature of the court, the importance of this awareness cannot be underestimated. Litigants and the legal community must not only be able to understand the extent of language rights in a given jurisdiction—which the complexity of the Canadian legal system does not make easy—they must also be confident that exercising these rights will not have negative consequences.

> *"Francophones are often told 'If you speak English, why not proceed in English?'"* [translation]
>
> *- Stakeholder consulted*

This dynamic underscores the importance of making all stakeholders in the court system aware of the language rights of litigants so that they can proactively inform them and the legal community of their existence and the court's ability to ensure they are upheld. While this rule is universally applicable, it is even more important in regions where official language communities are a very small minority.

As some of the stakeholders who were consulted noted, some people's hesitation to exercise their language rights leads to a vicious circle: when fewer people exercise their rights, the judicial system has less opportunity to consolidate its linguistic capacity. Judges who are trying to improve or maintain their language skills have fewer opportunities to preside in their other language, which further reduces their chances of attaining a satisfactory level of bilingualism.

> *"We must not only tolerate or accommodate French in the courts; we must also promote it. If not, Francophones may be pressured to choose English to reduce costs, complexity or delays."* [translation]
>
> *- Judge consulted*

5. PROCESS FOR APPOINTING SUPERIOR COURT JUDGES

The previous section described the challenges and difficulties that the individuals consulted have identified with regard to the bilingual capacity of the judiciary for superior courts and the impact of this situation on the recognition and exercise of Canadians' language rights. This section will look at the key characteristics of the superior court judicial appointment process, in particular aspects that have a negative impact on the bilingual capacity of the judiciary.

At the outset, it is important to recognize that the Cabinet (Governor General in Council) is responsible for appointing superior court judges, on the recommendation of the Minister of Justice or the Prime Minister. The Minister of Justice submits recommendations for puisne judge appointments (regular members of a court), while recommendations for the appointment of chief justices and associate chief justices are the prerogative of the Prime Minister.[38]

There are very few formal rules for appointing superior court judges. The process remains largely discretionary. The primary criterion that the Cabinet must respect is to appoint lawyers who have at least 10 years standing at the bar of any province.[39]

The near-total absence of legislative or regulatory guidelines in no way prevents the Minister of Justice from establishing processes to support recommendations made to Cabinet. The next subsection describes the main steps of the judicial appointment process for superior courts and recommends courses of action that may help improve the bilingual capacity of the judiciary.

5.1 DESCRIPTION OF THE APPOINTMENT PROCESS

For the purposes of this study, the judicial appointment process for superior courts is divided into four steps, which are illustrated in Figure 3.

Review of application by the Office of the Commissioner for Federal Judicial Affairs

Lawyers who would like to apply for a position in the federal judiciary can do so at any point during the year because this process is not tied to the existence of a vacancy, such as when someone retires or resigns. The purpose of the appointment process is to create a pool of candidates who may be considered when a vacancy is to be filled.

38 For more information about the judicial appointment process for superior courts, see the Office of the Commissioner for Federal Judicial Affairs Web site: www.fja.gc.ca/appointments-nominations/process-regime-eng.html.

39 Section 3 of the *Judges Act*, R.S.C., 1985, c. J-1.

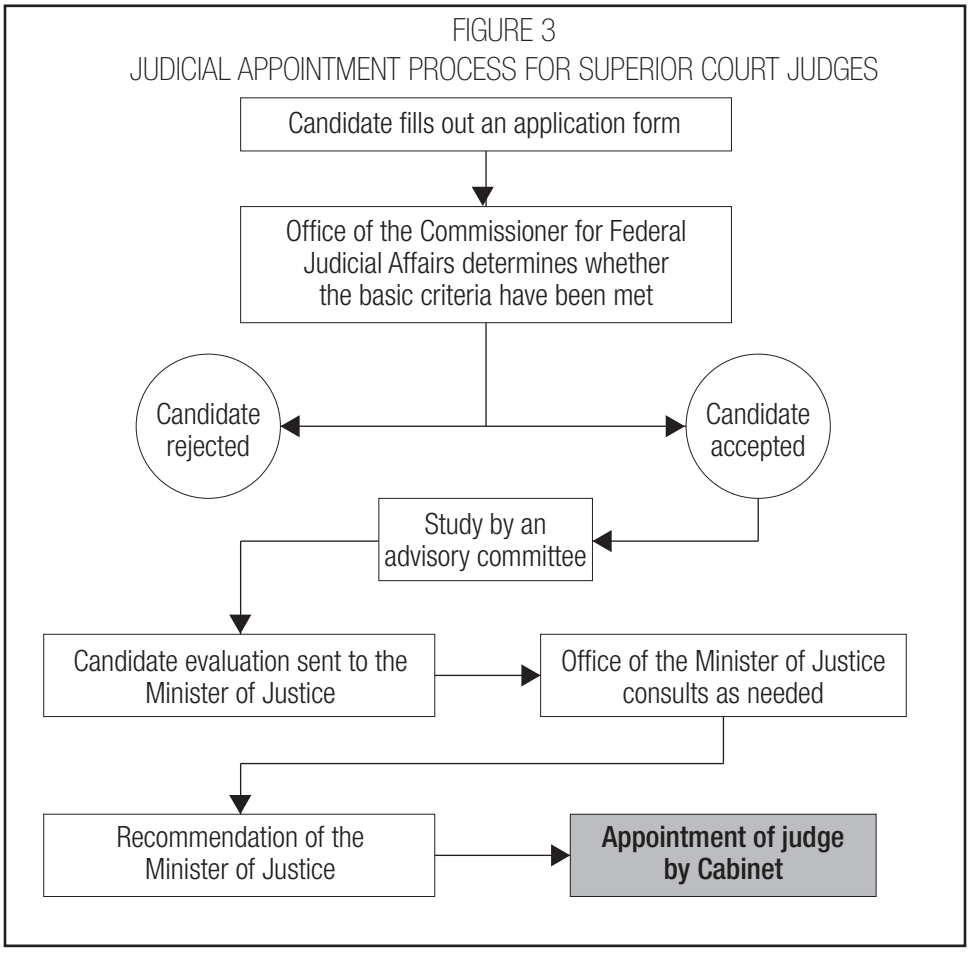
The application form allows lawyers to describe their professional history and describe why they would like to serve as a superior court judge. It is important to note that the form does ask candidates to specify the "language(s) in which [they are] competent to hear and conduct a trial," and offers English, French and "Other" as response options.

The application forms are submitted to FJA, which plays a key role in the judicial appointment process in support of the Minister of Justice.

However, its role is limited to ensuring that the steps of the process are administered correctly; it cannot issue an opinion on the applications it has received.

When FJA receives an application, it ensures that all the required information is included. It will also determine whether the applicant meets the pre-requisites for being a judge.[40] If the application is complete and admissible, it is sent to an advisory committee for review.

FIGURE 3
JUDICIAL APPOINTMENT PROCESS FOR SUPERIOR COURT JUDGES



40 For a precise description of the appointment conditions, see section 3 of the *Judges Act*, R.S.C., 1985, c. J-1.

The work of advisory committees [41]

There are currently 17 advisory committees responsible for evaluating the competencies of lawyers who have applied for a position in the federal judiciary.[42] The workload of these committees is considerable. For example, during 2011–2012, FJA sent these advisory committees 515 applications and 43 candidates were appointed to a superior court. [43]

There is an advisory committee for each of the 10 provinces and three territories. Due to their higher populations, Ontario and Quebec have additional committees: three in total in Ontario and two in Quebec.

The advisory committees are made up of eight people:

- Three members designated directly by the federal Minister of Justice
- One member designated by the provincial or territorial chief justice
- One member designated by the provincial or territorial law society
- One member designated by the Canadian Bar Association
- One member designated by the provincial or territorial Minister of Justice or Attorney General
- One member designated by the law enforcement community (police departments, enforcement officers, etc.)

The Commissioner for Federal Judicial Affairs or his delegate also sits on these committees, but does not have a vote. The Commissioner's role is to support the work of the committee.

ASSESSMENT CRITERIA FOR JUDICIARY CANDIDATES

Professional competencies and experience

- general proficiency in the law
- intellectual ability
- analytical skills
- ability to listen
- ability to maintain an open mind while hearing all sides of an argument
- ability to make decisions
- ability to exercise sound judgment
- reputation among professional peers and in the general community
- area(s) of professional specialization, specialized experience or special skills
- ability to manage time and workload without supervision
- ability to handle a heavy workload
- ability to work independently and under pressure
- interpersonal skills with peers and the general public
- awareness of racial and gender issues
- bilingualism

Personal suitability

- sense of ethics
- patience
- courtesy
- honesty
- common sense
- tact
- integrity
- humility
- punctuality
- fairness
- reliability
- tolerance
- sense of responsibility
- consideration for others

Source: Office of the Commissioner for Federal Judicial Affairs

41 Information regarding the advisory committees is largely drawn from the Office of the Commissioner for Federal Judicial Affairs Web site: www.fja.gc.ca.

42 One of the 17 committees is specialized in the evaluation of candidates to the Tax Court of Canada.

43 Statistics from the Office of the Commissioner for Federal Judicial Affairs Web site: www.fja.gc.ca.

Each advisory committee meets as needed to discuss the candidacies sent to it by FJA. In addition to examining information about candidates, the members of the advisory committee check references to evaluate the extent of the candidates' competencies, including their bilingual ability. The committee is also encouraged to consult a large number of additional sources within and outside of the legal community to obtain further information about the candidates' professional competence and experience.[44]

To facilitate candidate assessment, FJA provides a list of professional competencies and personal qualities sought in members of the judiciary. Fifteen professional competencies and experience criteria and 14 personal suitability criteria (see text box, page 25) guide the analysis of applications. It should be noted that these competencies and qualities are not weighted.

While bilingualism is on the list of competencies that are sought, it is not evaluated systematically or based on objective criteria. The advisory committees very rarely interview candidates. Moreover, given the large number of competencies sought, one might wonder how much priority can be given to bilingualism.

For each application, the advisory committee determines whether the candidacy is "recommended" or "not recommended." This evaluation is valid for a period of two years. The committee may also add comments about the candidacy. It then sends the list of candidates for a province or territory to FJA, which then forwards it to the federal Minister of Justice.

It is important to note that the advisory committees have no legislative authority. They are a mechanism that the federal government put in place to support the work of the Minister of Justice.

Consultations conducted by the Minister of Justice

When a judiciary position is to be filled, the Minister of Justice has a list of recommended and non-recommended candidates that can be used to designate the person who will be called upon to fill the position. In theory, the Minister of Justice could appoint someone who has not been recommended by the committee, or even a lawyer who is not on the list of recommended candidates, but, in practice, the Minister of Justice traditionally chooses one of the candidates recommended by the advisory committee.

The Minister may conduct any consultations considered appropriate before choosing the person to recommend for appointment. As a general rule, the Minister of Justice communicates with the chief justice of the court in question to discuss, for example, the court's needs in a specific area of law, bilingual capacity or other requirements. The Minister may also communicate with anyone else who can provide information that is useful to him in making a decision.

The Cabinet decision

Once the Minister has determined which candidate he intends to recommend for a given position, the Minister's office, in collaboration with FJA, prepares the formal recommendation to be submitted to Cabinet, which will in turn make the appointment by an order in council signed by the Governor General.

44 Office of the Commissioner for Federal Judicial Affairs Canada Web site. *Guidelines for Advisory Committee members.* www.fja.gc.ca/appointments-nominations/committees-comites/guidelines-lignes-eng.html#References.

5.2 PRACTICES USED IN CERTAIN PROVINCES

The government of each province or territory is responsible for appointing judges to the provincial courts and other courts that fall under provincial jurisdiction. The practices used to do so vary significantly from one province or territory to another. This subsection of the study is therefore not intended to describe in detail the appointment process for each province or territory, but rather to identify selected practices that could be considered at the federal level:[45]

- *Vacancy-based process*: In some provinces, including Quebec, Ontario and Manitoba, the appointment process is only initiated when a position becomes vacant. Candidates are asked to apply once the announcement of the vacant position has been published. This is different from the federal process, which seeks to establish a pool of candidates to fill any eventual vacancies.

- *Designation of bilingual positions*: For the purposes of this study, it is particularly interesting to note that certain positions for the judges of the Ontario Court of Justice and for justices of the peace are, in fact, designated bilingual. The chief justice of the Ontario Court of Justice decides whether a position should be filled by a bilingual judge and, traditionally, the Attorney General respects this decision.

- *Candidate interviews*: One of the key differences between the provincial processes and the federal process is the candidate interviews. New Brunswick, Quebec, Ontario and Manitoba systematically interview candidates to evaluate, among other things, their language skills.

- *Evaluating candidates' bilingual capacity*: In Ontario, the process for appointing a bilingual justice of the peace includes an evaluation to objectively determine the candidates' oral and written French skills, in accordance with provincial language skills assessment standards.[46] This approach goes well beyond the kind of assessment that can be conducted by interviewing candidates.

- *Composition of the advisory committees*: In Ontario, the advisory committee responsible for reviewing applications is composed of 13 members and, in accordance with the *Courts of Justice Act*, the appointment of these members must reflect "Ontario's linguistic duality and the diversity of its population and ensure overall gender balance."[47] Manitoba has adopted a similar approach.

These practices illustrate the current trend in Canada towards closer oversight of discretionary judicial appointment powers to make the process more objective and transparent. This type of oversight can only improve access to justice in both official languages and strengthen the language rights of litigants.

45 This analysis is based on a review of the appointment systems used in New Brunswick, Quebec, Ontario and Manitoba.

46 For more information on this process, see the Government of Ontario Web site: www.ontariocourts.ca/ocj/jpaac/application/. See also: Ontario French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, *Access to Justice in French*. Toronto, 2012, p. 33.

47 Section 43(3) of the *Courts of Justice Act*, R.S.O. 1990, ch. C.43.

5.3 OBSERVATIONS AND COURSES OF ACTION

The results of the survey and interviews, as well as the information from the review of the appointment processes in several Canadian jurisdictions, allow us to make a number of observations regarding the judicial appointment process of superior court judges. These observations are the basis for the courses of action being proposed to the Government of Canada to improve the bilingual capacity of the judiciary for superior courts.

Need for an adapted and coordinated approach

While there is a certain bilingual capacity among superior court judges now, it is neither the result of a systematic and clearly articulated process nor the result of a coordinated approach among different stakeholders.

"My experience tells me that our [court's bilingual] capacity has occurred simply by happenstance or luck. I am not aware that the language capability of a candidate for judicial office has played a part in their appointment to this court."

- Judge consulted

Members of Canada's two official language communities will not be able to receive *equal access to services of equal quality* from the superior court judiciary unless there is always an appropriate number of bilingual judges with the ability to preside over bilingual proceedings or proceedings in the minority language without the help of simultaneous interpretation.

To achieve this, the measures taken to improve and consolidate the bilingual capacity of the judiciary must take into account the specific characteristics and needs of each jurisdiction. The language regime in place in each province and the organization of the courts by the provincial government are two factors that the federal Minister of Justice should take into account when seeking solutions to improve the appointment process.

In other words, the solution is not to adopt a single approach for all superior courts across the country. It is incumbent upon primary interested parties, including provincial attorneys general and the chief justices of each superior court, to work closely with the federal Minister of Justice to ensure that a sufficient number of bilingual judges are appointed. While this collaborative approach is essential to determining the appropriate number of bilingual judges, it must also take into account the opinions of key actors, such as the bars, the French-speaking jurists' associations and the legal community of the linguistic minority population. These consultations would make it possible to identify the needs of both litigants and lawyers in terms of legal services in the minority language.

Approaches to consider to improve and ensure the bilingual capacity of the judiciary

The consultations conducted during this study and the comparative analysis of the federal and provincial appointment processes led to the development of three possible approaches to ensure the bilingual capacity of the judiciary for superior courts.

1) AN APPROPRIATE NUMBER OF DESIGNATED BILINGUAL POSITIONS

Under this approach, the federal Minister of Justice could work with the attorneys general and chief justices of each province to determine the appropriate number of designated bilingual positions for each court. Then, when these positions become vacant, the Minister of Justice would be required to appoint a bilingual judge, in other words, a judge who upon appointment has already demonstrated that he or she possesses the language skills to preside over hearings in the minority language. This is the approach used by the province of Ontario for appointing justices of the peace. It would have the advantage of ensuring a level of certainty, continuity and stability in the bilingual capacity of the courts, and would help increase the confidence of litigants that they will have access to justice in their language. This approach would also allow for the designation of bilingual positions in certain judicial districts.

2) AN APPROPRIATE NUMBER OF BILINGUAL JUDGES

A second approach would be to establish a threshold for bilingual capacity within the judiciary by determining the appropriate number of bilingual judges, without tying this number to specific positions. This approach provides less certainty, but has the benefit of giving greater flexibility to the chief justice, who would be able to assign bilingual or minority-language motions and trials to judges with the required language skills, regardless of the linguistic designation of their position.

3) A MIXED APPROACH

The third approach, which may be appropriate in certain jurisdictions, is a combination of the first two. Designating positions as bilingual would not be an end in itself, but rather a short- to medium-term method for addressing the shortage of bilingual judges. Once the bilingual capacity of the court is established through the appointment of bilingual judges to these bilingual positions, the chief justice can determine whether designating positions as bilingual is still appropriate under all circumstances, or whether the bilingual capacity of the court can be guaranteed simply by appointing bilingual judges.

In all three options, in addition to ensuring the institutional bilingual capacity of the judiciary, the chief justices may want to consolidate and increase this capacity by encouraging the appointment of judges with language skills that are sufficient to enable them to eventually, through a language training program, attain the level of bilingualism required to preside over proceedings in the minority language.

Evaluating judicial candidates' language skills

Regardless of which approach is used to improve or ensure the bilingual capacity of the judiciary for superior courts, the absence of a rigorous and independent process to evaluate candidates' language skills remains a significant shortcoming in the existing judicial appointment process.

The only criterion systematically compiled regarding the bilingual capacity of candidates for superior court judicial appointment is the question in the application form that asks candidates to specify in which language(s) they are capable of hearing cases and conducting trials. At best, this self-assessment is discussed by the advisory committee members or by the office of the Minister of Justice during consultations. At worst, this self-assessment is not confirmed in any way. This situation fails to offer chief justices any guarantee of the level of bilingualism of newly appointed "bilingual" judges, or of their ability to carry out all their judicial duties in their second language.

The answer to the question in the current application form should serve as a starting point for a formal language skills assessment process. However, the question should also be modified so that candidates can specify their level of language skills. They should indicate whether they (1) have the skills required to preside over a hearing in English and French immediately upon appointment, or (2) will have the language skills required to do so after taking language training. The candidates' language skills would be evaluated by FJA, since this is the organization responsible for administering the appointment process.

A rigorous and independent language assessment of this nature would enable the advisory committee to identify bilingual candidates who can be appointed as bilingual judges or to a designated bilingual position as well as candidates who are likely to achieve the appropriate level of bilingualism with language training.

Obviously, not all superior court judges need to be able to preside over hearings in both official languages. However, appointments of bilingual judges that establish the bilingual capacity of a superior court must guarantee to all those who come before the court that the judges do in fact have, and immediately upon appointment, the language skills required to understand and communicate clearly in both English and French. A guarantee of this nature is only possible if there is a mechanism to evaluate candidates' language skills. Finally, having an accurate picture of judges' language skills would enable chief justices to assign bilingual cases to judges who have the required skills to handle them, and would be useful in organizing language training.

Role and composition of advisory committees

The advisory committees have the mandate to assess judicial candidates in order to allow the federal Minister of Justice to recommend those who best meet the needs of the superior court to which they will be assigned. As part of their assessment, the advisory committees are not limited to only consulting the individuals whom the candidate lists as references. They are also encouraged to consult other sources within and outside of the legal community who may have information on the candidates' professional experience and competencies.

Currently, there is no guarantee that the advisory committees include members with a good understanding of the linguistic reality of their province or territory. The participation of a member from the province's or territory's official language minority community would enable the advisory committees to better fulfill their mandate, by helping them identify resource persons who can provide pertinent references for the bilingual candidates' professional experience and competencies.

The federal Minister of Justice nominates three members of each advisory committee. In accordance with the obligation under the *Official Languages Act* to promote both official languages, the Minister should ensure that the advisory committees have at least one member from the English-speaking or French-speaking minority community of the province or territory.

FJA is responsible for supporting the work of each advisory committee. Accordingly, it must ensure that the members of the advisory committees have a sufficient understanding of the language rights of people who appear before the superior courts.

Finally, the advisory committees prepare a report listing the people who were assessed and whether their application is "recommended" or "not recommended." The report can sometimes include a summary or comments in support of the assessment. It would be useful to specify, on the list of candidates sent to the Minster of Justice, those who are in fact "bilingual" based on the results of FJA's language assessment so the Minister has all the relevant information. The committee could also indicate in the comments which candidates will have the language skills required to preside over a hearing in English or French after taking language training.

Importance of data on the pool of bilingual candidates

One of the issues often raised is insufficient number of qualified bilingual candidates, which is cited as an obstacle to appointing an appropriate number of bilingual judges. In reality, it is impossible to know how many bilingual lawyers apply because FJA does not collect data of this kind. There is currently no mechanism to evaluate the number of qualified bilingual candidates in the pool from which the Minister of Justice makes each new appointment. Since this data does not exist, we can only speculate on the need to encourage more applications from bilingual lawyers.

FJA would be the ideal organization to collect and publish this information.

To more accurately measure the number of qualified bilingual candidates, it would be useful for FJA to collect and publish annual statistics in this regard. It would also be helpful to determine the number of qualified candidates who, according to an objective and independent assessment, are likely to become bilingual after taking language training. This data would be useful not only for the Minister of Justice, but also for the bars, the French-speaking common law jurists' associations and faculties of law. This information would also help target efforts to encourage more applications from qualified bilingual candidates and ensure there is a large enough pool of bilingual candidates from which the Minister can make appointments based on merit and excellence.

5.4 CONCLUSIONS AND RECOMMENDATIONS

Currently, there is no coordinated action by the federal Minister of Justice and his provincial and territorial counterparts to ensure sufficient bilingual capacity at all times among the judiciary of the federal superior courts. In addition, while the Minister of Justice may consult the chief justices on their language needs, this approach is not based on a structured and systematic analysis of the bilingual capacity of the superior courts. Finally, the appointment process does not guarantee that bilingual candidates appointed do in fact have the language skills required to preside over proceedings in their second language.

Consequently, to ensure that the appointment process makes it possible to ensure and consolidate the bilingual capacity of the superior courts, the Commissioner of Official Languages is making recommendations on:

- the bilingual capacity of superior courts
- the language skills of judicial candidates
- the composition and role of the advisory committees.

These recommendations must be considered in the broader context of institutional bilingualism in the courts, which also requires bilingual capacity on the part of court officers and the structures that support the work of the judiciary.

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.

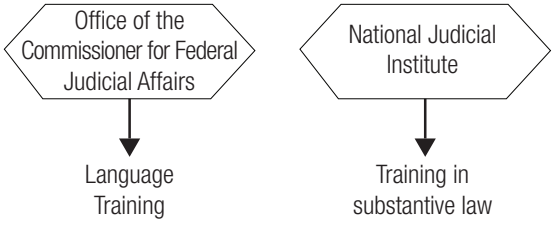
6. LANGUAGE TRAINING OF SUPERIOR COURT JUDGES

Language training of judges is essential in maintaining and strengthening the bilingual capacity of the superior courts. This section of the report looks first at the training currently offered to superior court judges, and then describes the language training initiative of the Canadian Council of Chief Judges. This section ends with recommendations for improving the language training offered to the federal judiciary.

6.1 DESCRIPTION

Two organizations provide training to Canada's superior court judges. As Figure 4 shows, FJA is responsible for language training for superior court judges, while the National Judicial Institute is responsible for training in substantive law.

FIGURE 4
JUDICIARY TRAINING



FJA offers three levels of language training:

- Level 1 includes basic, intermediate and advanced courses. These courses are equivalent to federal government A, B and C levels. While they may include certain legal aspects, these training activities focus primarily on second language proficiency.
- Level 2 enables participants to perfect their second language skills.
- Level 3 focuses specifically on French-speaking judges working outside Quebec. This course seeks to develop their proficiency in French legal terminology.

The training offered by FJA includes immersion sessions (one or two weeks), private individual sessions once or twice a week and one- or two-week intensive courses in Ottawa.

The consultations held as part of this study confirmed that these training activities are greatly appreciated by superior court judges. The chief justices inform the judges in their courts of the existence of these programs and facilitate access for those who are interested.

The duration of the language training required before participants are able to preside over proceedings in their second language depends on the participant's language skills. It is therefore difficult to set specific expectations in terms of learning progress. As a number of stakeholders who were consulted have noted, it is not always easy for judges to put their training to use.

Training provided by the National Judicial Institute

The National Judicial Institute does not provide language training. It offers training in substantive law.

In terms of language rights training, the Institute publishes an on-line booklet for judges on language rights, but does not offer any training specifically on this subject. Language rights are instead raised indirectly through more general training activities regarding, for example, the socio-economic realities that judges must consider when carrying out their duties.

In its report, the French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario noted the lack of language rights training for superior court judges:

> At the Court of Appeal for Ontario and the Superior Court of Justice, there is currently no program on French language rights, or the status of those rights. There is also no orientation on French language rights in the education program for new judges.[48]

Based on this finding, the Advisory Committee mentioned the role that the National Judicial Institute could play in filling this void:

> The National Judicial Institute has expertise in this field and could be asked to develop a module that could be used by the various courts. The National Judicial Institute could also be asked to integrate French language rights issues in the curriculum designed for other courses offered to judges.[49]

6.2 INITIATIVE OF PROVINCIAL COURTS

In 2011, the Canadian Council of Chief Judges launched its training program called *Formation en français juridique pour juges canadiens de nomination provinciale*, some features of which are worth mentioning in this report.

The Centre canadien de français juridique produces the content and ensures the delivery of the program, while the Provincial Court of New Brunswick is responsible for its administration. This program focuses on practical training. The judges who participate in these sessions (which are about one week in duration) take part in simulated hearings. The participants are put in a court house with court officers, witnesses, lawyers and others as needed (such as police officers), and are asked to preside over a simulated hearing in order to make use of what they have learned.

The training program also includes an assessment of the participants' language skills, based on a scale designed by the Centre canadien de français juridique in consultation with the Provincial Court of New Brunswick, to apply specifically to the work of judges. This scale enables participants to better understand their level of bilingual capacity in the context of their duties and to adapt their training accordingly.

For this type of training, participants must already have a certain degree of second language proficiency. The program is intended to improve their mastery of legal vocabulary and communications that occur in the context of legal proceedings.

Currently, this program is available to judges who would like to improve their knowledge of legal French. At the time of the preparation of this report, the people responsible for the project were looking

48 French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, *Access to Justice in French*, Toronto, 2012, p. 20.

49 *Ibid*, p. 21.

at the possibility of offering this training to judges who would like to improve their knowledge of legal English.

6.3 FINDINGS AND COURSES OF ACTION

Language training for judges focuses mainly on giving them the ability to preside over proceedings in either official language. The training activities must therefore enable the development needed to reach this goal.

In this study, it was observed that, although they target two distinct clienteles, the training activities currently offered by FJA and the Canadian Council of Chief Judges are largely complementary.

Specifically, FJA's language training focuses primarily on developing proficiency in the second official language, while incorporating some aspects related more directly to judicial work. The Canadian Council of Chief Judges' training focuses primarily on putting acquired knowledge into practice using approaches such as simulated hearings. It would be worthwhile for the two organizations to work more closely together, as this would benefit the judges of both superior courts and provincial courts.

This greater collaboration would also make it possible to explore the option of adapting the language skill scale developed as part of the *Formation en français juridique pour juges canadiens de nomination provinciale* program so that it can be applied to superior court judges.

It would also be beneficial for the National Judicial Institute to follow up on the French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario's recommendation that it offer language rights training intended for, but not limited to, newly appointed judges. This training would be an excellent complement to the language training offered to superior court judges.

6.4 CONCLUSIONS AND RECOMMENDATIONS

To ensure that citizens have equal access to the superior courts in both official languages, the bilingual capacity of superior court judges must be guaranteed through the appointment process. Language training should serve to maintain and enhance the court's bilingual capacity, while allowing interested judges to take advantage of the learning activities and to use their language skills within the context of their work. The current FJA language training program seems to meet judges' needs in terms of second language learning as well as maintaining and strengthening their bilingual capacity. However, the language training tools offered to provincial court judges could be useful models if FJA would like to provide a complementary language training program for superior court judges wishing to evaluate their language skills in work-related situations.

Finally, superior court judges must be better aware of the language rights of those who appear before the courts in order to ensure substantive equality in access to justice in both official languages.

In light of the foregoing, 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.

7. CONCLUSION

Access to justice is a fundamental right of all Canadians. A number of initiatives have recommended changes that would eliminate obstacles that limit access to justice. However, while access to justice is an issue for all litigants, access to justice in either of Canada's official languages is a particular challenge for the close to two million Canadians who are members of an official language minority community.

In a country that proudly claims linguistic duality as a fundamental value and a crucial part of its identity, no one should suffer delays, additional costs or any other hardships for having chosen to be heard in English or in French. There is an urgent need to put mechanisms in place in order to ensure that all of the provinces' and territories' superior courts and appeal courts have an appropriate number of bilingual judges so that English- and French-speaking Canadians have full access to justice in both official languages. While many have expressed the need to review the existing appointment process, there still has not been any coordinated action by the federal Minister of Justice along with his provincial and territorial counterparts to ensure sufficient bilingual capacity at all times in the judiciary for the federal superior courts.

The consequences of inaction are significant; the words of the Chief Justice are especially poignant and equally applicable to access to justice in both official languages:

> Access to justice is, and continues to be, the challenge for the civil justice system. Ontario's justice system is well served by dedicated and capable judges, lawyers and administrators. But, we can do better. We can build upon our recent successes and re-double our efforts to dismantle the barriers that continue to block our path to true "access to justice." What is the risk of inaction, you ask? If we do not meet the challenges and come up with constructive and creative solutions to these barriers, we risk losing the public's confidence in our justice system and, in turn, we risk losing the foundation upon which our justice system is grounded—that being, the rule of law.[50]

Due to the constitutional nature of language rights, it is important to eliminate immediately any obstacles that threaten the delicate balance of equality of both official languages in the judicial system.

Consequently, the Commissioner of Official Languages of Canada, along with Katherine d'Entremont, the Commissioner of Official Languages for New Brunswick and François Boileau, the French Language Services Commissioner of Ontario, urge the federal Minister of Justice to implement the recommendations of this study, and take action together with his provincial and territorial counterparts and the chief justices of Canada's superior courts and appeal courts.

50 The Honourable Warren K. Wrinkler, Chief Justice of Ontario, "Access to Justice – Remarks," Canadian Club of London, speech given in London on April 30, 2008. Online version: www.ontariocourts.ca/coa/en/ps/speeches/accessjustice.htm.

APPENDIX
DOCUMENTS CONSULTED

Association des juristes d'expression française de la Nouvelle-Écosse, *Portrait du système judiciaire en français de la Nouvelle-Écosse,* February 2012. Online version: www.ajefne.ns.ca/Files/Portraitfrancais.pdf (French only).

Barreau de Montréal, *Access to justice in English in the District of Montreal: Status Report,* February 2007. Online version: www.barreaudemontreal.qc.ca/loads/Publications/Rapport%20AccessJustice-eng.pdf.

Barreau du Québec, *Préserver la confiance*, Submission to the Commission d'enquête sur le processus de nomination des juges, September 23, 2010. Online version: www.barreau.qc.ca/export/sites/newsite/pdf/medias/positions/2010/20101001-preserver-la-confiance.pdf (French only).

Bastarache, Michel (Hon.) *Report of the Inquiry Commission into the appointment process for judges to the Court of Quebec, municipal courts and the Tribunal administratif du Québec*, Publications du Québec, 2011. Online version: www.cepnj.gouv.qc.ca/rapport.html?elD=tx_rtgfiles_download&tx_rtgfiles_pi1%5Buid%5D=187.

Canadian Bar Association, *Federal Judicial Appointment Process*, October 2005. Online version: www.cba.org/cba/submissions/pdf/05-43-eng.pdf.

Canadian Bar Association, *Resolution 05-02-A on the Appointment of Bilingual Judges*, August 2005. Online version: www.cba.org/resolutions/pdf/05-02-A.pdf.

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

Cardinal, Linda et al., *French-language Services in Ontario's Justice Sector: Environmental Scan*, Research Chair in Canadian Francophonie and Public Policies, for the Ontario Ministry of the Attorney General, 2005. Online version: www.sciencessociales.uottawa.ca/crfpp/pdf/environmental_scan_12-2005.pdf.

Chartier, Richard (Hon.), *Above All, Common Sense: Report and Recommendations on French Language Services within the Government of Manitoba*, May 1998. Online version: www.gov.mb.ca/fls-slf/report/toc.html.

De Fillipis, Joe, "Ontario: Judicial Appointment Process", in *Provincial Judges' Journal*, summer 2011, Volume 34, No. 1, p. 38. Online version: www.judges-juges.ca/sites/default/files/publications/Journal%20Vol%2034%20No%201.pdf.

Department of Justice Canada, Canada-Wide Analysis of Official Language Training Needs in the Area of Justice, 2009, Ottawa. Online version: www.justice.gc.ca/eng/csj-sjc/franc/justice/analys.html.

Federation of Law Societies of Canada, *Submissions to the House of Commons Standing Committee on Justice and Human Rights for its study on the recent changes to the process by which judges are appointed by the federal government*, 2007. Online version: www.flsc.ca/_documents/Judicial-Appointments-Process-2007.pdf.

French Language Services Bench And Bar Advisory Committee, *Access to Justice in French: Report to the Attorney General of Ontario*, June 25, 2012. Online version: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/bench_bar_advisory_committee/default.asp.

GTA Research, *Environmental Scan: Access to Justice in Both Official Languages*, Final Report submitted to Justice Canada, May 10, 2002.

House of Commons Standing Committee on Official Languages, *Evidence,* Parliament of Canada, May 8, 2008, 1st Session, 39th Parliament.

House of Commons Standing Committee on Official Languages, *Evidence,* Parliament of Canada, April 21, 2004, 3rd session, 37th Parliament.

Jourdain, Guy, *Le groupe de travail sur l'amélioration des services en français au sein du système judiciaire du Manitoba : outil efficace pour faciliter le long périple menant de la parole aux actes en matière d'administration de la justice dans les deux langues officielles*, 1999. Online version: www.mondroitmonchoix.com/pdf/ressources/groupe_travail_fr.pdf (French only).

McCormick, Peter, *Selecting Trial Court Judges: A Comparison of Contemporary Practices*, Study commissioned by the Commission of Inquiry into the Appointment Process for Judges in Quebec, September 1, 2010.

Office of the Commissioner of Official Languages of Canada, *Annual Report 2004-2005*. Online version: www.ocol-clo.gc.ca/html/ar_ra_2004_05_v1_e.php.

Office of the Commissioner of Official Languages of Canada, *Annual Report 2003-2004*. Online version: www.ocol-clo.gc.ca/html/ar_ra_2003_04_e.php.

Office of the French Language Services Commissioner of Ontario, *Annual Report 2010-2011*. Online version: http://www.csf.gouv.on.ca/en/rapport-annuel-2010-2011-un-engagement-partage.

Office of the French Language Services Commissioner of Ontario, *Annual Report 2008-2009*. Online version: http://www.csf.gouv.on.ca/en/rapport-annuel-2008-2009-une-voix-des-changements-3.

Office of the French Language Services Commissioner of Ontario, *Annual Report 2007-2008*. Online version: http://www.csf.gouv.on.ca/en/rapport-annuel-2007-2008-ouvrir-la-voie-3.

Quenneville, Diane, "Quebec: Judicial Appointment Process", in Provincial Judges' Journal, Summer 2011, Volume 34, No. 1, p. 37. Online version: www.judges-juges.ca/sites/default/files/publications/Journal%20Vol%2034%20No%201.pdf.

Richards, Mary Jane, "New Brunswick: Judicial Appointment Process", in *Provincial Judges' Journal*, Summer 2011, Volume 34, No. 1, p. 39. Online version: www.judges-juges.ca/sites/default/files/publications/Journal%20Vol%2034%20No%201.pdf.

Standing Committee on Justice and Human Rights, *Report: Preserving Independence in the Judicial Appointment System,* May 2007. Online version: www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2970953&Mode=1&Parl=39&Ses=1&Language=E.

Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, May 10, 2007, Number 068, 1st Session, 39th Parliament.

Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, April 18, 2007, Number 061, 1st Session, 39th Parliament.

Standing Committee on Justice and Human Rights, Evidence, Parliament of Canada, March 28, 2007, Number 058, 1st Session, 39th Parliament.

Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, March 20, 2007, Number 054, 1st Session, 39th Parliament.

Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, February 5, 2007, Number 045, 1st Session, 39th Parliament.

Standing Senate Committee on Official Languages, *Third Report: Environmental Scan: Access to Justice in Both Official Languages,* May 28, 2003. Online version: www.parl.gc.ca/Content/SEN/Committee/372/offi/rep/rep03may03-e.htm.

Subcommittee on the process for appointment to the Federal Judiciary, Standing Committee on Justice and Human Rights, *Process for Appointment to the Federal Judiciary*, Parliament of Canada, November 2005. Online version: www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2146810&Mode=1&Parl=38&Ses=1&File=18&Language=E.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, November 22, 2005, Number 012, 1st session, 38th Parliament.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, November 15, 2005, Number 009, 1st session, 38th Parliament.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, November 14, 2005, Number 008, 1st session, 38th Parliament.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, November 1, 2005, Number 007, 1st session, 38th Parliament.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, October 25, 2005, Number 004, 1st session, 38th Parliament.

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice and Human Rights, *Evidence,* Parliament of Canada, October 3, 2005, Number 002, 1st session, 38th Parliament.