



Office of the
Commissioner of
Official Languages

Commissariat
aux langues
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IMPLEMENTING SECTION 91 OF THE *OFFICIAL LANGUAGES ACT*: **A SYSTEMIC PROBLEM**

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INTRODUCTION

It is reasonable to assume that employees who do not have the skills required for their position will be unable to perform their duties properly. Therefore, it is every manager's responsibility, when staffing a position, to properly identify the essential skills applicants need, based on the tasks to be performed, in order to ensure that the successful candidate meets the needs of the institution and can perform the duties of the position (e.g., providing information technology support, human resources services and other services). However, the concept of essential requirements for a position—which would seem to be self-evident—becomes less essential when it comes to second official language skills.

An employee who does not have the necessary language requirements for a position will not be able to provide members of the public or federal employees with quality service in the official language of their choice. One can therefore reasonably expect that when this situation is replicated on a large scale, it can have a substantial impact on a federal institution's ability to meet its obligations under the *Official Languages Act* (the Act).

The Office of the Commissioner of Official Languages of Canada (the Office of the Commissioner) regularly receives a high volume of complaints under section 91 of the Act, which states that language requirements of federal public service positions must be established objectively for staffing actions. These complaints represent a considerable percentage of the total number of complaints filed under all parts of the Act combined, which is particularly worrisome because they involve a large number of federal institutions and because they are nearly always founded.

Given the recurring nature of complaints filed under section 91 of the Act, as well as the importance for Canada to have a public service that has the necessary skills to respect and promote both official languages throughout the country, the Commissioner of Official Languages of Canada (the Commissioner) decided that an in-depth analysis of the problem was needed in order to determine its scope, identify its causes and propose solutions. This report contains the results of that analysis and the Commissioner's recommendations to help federal institutions resolve the problem.

The Commissioner hopes that this analysis will motivate all stakeholders to take a serious look at this problem, and that the recommendations he has made in this report will lead to better implementation of section 91 of the Act and to a public service that can fulfill its mandate in both official languages for all Canadians.

1. SECTION 91 OF THE *OFFICIAL LANGUAGES ACT*

Before proceeding to our analysis of the problem, we first need to focus on what section 91 is. This chapter describes the content of section 91 of the Act, the obligations it imposes and the institutions that are subject to it. It also provides clarification on the implementation framework of section 91 within the federal public service and a description of the key stakeholders directly or indirectly involved in implementing it.

a. Context, requirements and implementation

Section 91, which is in Part XI of the Act (entitled “General”), reads as follows:

Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.

This provision applies to all federal institutions and other organizations subject to the Act, with a few exceptions. The term “staffing” refers to the means used to staff a position, including but not limited to the following: selection process, transfer, deployment, assignment or acting appointment. Staffing is completed when an individual takes up the duties of a position.

Section 91 refers to parts IV and V of the Act, which govern communications with and services to the public (Part IV) and language-of-work rights in federal institutions (Part V). It sets out the framework for the review of a position’s language requirements. These language requirements must be objectively necessary to perform the duties of the position, primarily with respect to service to the public in both official languages and compliance with language-of-work requirements.

The goal of section 91 was explained in 1988 by the Honourable Douglas G. Lewis, then Minister of State for the Treasury Board of Canada:

New clause 85 [now 91] would ensure that language requirements cannot be set arbitrarily or unfairly when staffing. The Commissioner of Official Languages is to investigate complaints in this area. If the complaint has not then been resolved, it can be taken to the Federal Court. This clause reflects long-standing government policy in the public service that language requirements can only be identified and applied for bona fide occupational reasons flowing from service-to-the-public or language of work obligations.¹

The term “objectively” refers both to the method used to determine the language requirements of a position and to the requirements themselves.

¹ Parliament of Canada, House of Commons Legislative Committee on Bill C-72, [*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72, an Act respecting the status and use of the official languages of Canada*](#), Vol. 2, No. 14-23, 33rd Parliament, 2nd Session, Issue 17, Ottawa, May 31, 1988, p. 17:5. Online version accessed August 1, 2020.

Regarding the method, “objectively” implies the use of criteria that relate to the duties of the positions and the linguistic composition of the clientele, not to potential candidates for these positions.

In terms of the requirements themselves, “objectively” implies that each element of the language requirements can be justified in terms of the duties of the position and the linguistic composition of the clientele to which the incumbent provides service.

The term “official language requirements” refers to three elements:

1. the linguistic identification of positions based on the required knowledge of one or both official languages,
2. the level of language skills required in one or both official languages, and
3. whether the individual must meet the language requirements of the position at the time of appointment to a Bilingual position.

b. Framework for implementing section 91 of the Act in the core public administration

Within the core public administration, which includes the institutions listed in schedules I and IV to the *Financial Administration Act*, the following instruments provide guidance to federal institutions on establishing language requirements for positions, particularly with regard to the three elements listed above: the Treasury Board of Canada’s *Policy on Official Languages* (the Policy) and *Directive on Official Languages for People Management* (the Directive), and the Treasury Board of Canada Secretariat’s *Qualification Standards in Relation to Official Languages* (the Standards).

Within the core public administration, the three elements listed above correspond to:

1. identifying positions as “English Essential,” “French Essential,” “English or French Essential” (either/or) or “Bilingual”;
2. determining a linguistic profile composed of levels B, C or a special P code for written comprehension, written expression and oral proficiency; and
3. staffing on an imperative or non-imperative basis.

Both the Directive and the Standards state that the language requirements of a position (e.g., unilingual or bilingual) must be objectively established based on the duties to be performed. Once the requirements have been established, the level of language skills required for Bilingual positions must then also be objectively established, based on complexity, for written comprehension, written expression and oral proficiency.

Complexity levels are indicated by letters, ranging from simple to complex (A, B or C). In general, simple or routine tasks correspond to a level B, while complex tasks and abstract concepts correspond to a level C. Level A is used only in assessing individual skills; it is not used in establishing the level of language skills required for a position. Code P is reserved for language specialists, such as translators, editors and interpreters.

It should also be noted that since 2004, the Directive has required that, as a general rule, Bilingual positions be staffed with candidates who meet the language requirements of the position at the time they are appointed—that is, on an imperative basis. In certain

exceptional circumstances, a position may be staffed by a candidate who does not meet the language requirements at the time of appointment, but who commits to acquiring the requisite language skills within a certain period of time. This type of appointment, which is made on a non-imperative basis, requires that administrative measures be put in place to ensure that the bilingual duties or functions of the position are performed equally well in both official languages until the incumbent has acquired the necessary second-language skills. Non-imperative appointments are governed by the *Public Service Official Languages Exclusion Approval Order* and the *Public Service Official Languages Appointment Regulations*.

c. Framework for implementing section 91 of the Act in separate agencies

Institutions listed in Schedule V to the *Financial Administration Act* (e.g., Parks Canada Agency), also called “separate agencies,” are subject to section 91, the Policy and the Directive, but not to the requirements contained in Appendix 1 of the Directive (Linguistic identification of position) or the Standards. These agencies generally take into account the three elements of the official language requirements described above, but they sometimes use terminology or standards that are specific to them.

d. Framework for implementing section 91 of the Act in other institutions

Institutions outside the public service,² such as VIA Rail, are also subject to section 91, the Policy and the Directive, but not to the requirements contained in Appendix 1 (Linguistic identification of position) or Appendix 2 (Staffing rules) of the Directive. Here again, these institutions generally take into account the three elements of the official language requirements described above, but they sometimes use different terminology or standards.

e. Stakeholders responsible for implementing section 91 of the Act

Four main stakeholders are directly or indirectly involved with implementing section 91 of the Act: deputy heads of federal institutions, the Treasury Board of Canada (the Treasury Board), the Public Service Commission of Canada (the Public Service Commission) and the Canada School of Public Service (the School of Public Service).

i. Deputy heads

Under subsection 30(2)(a) of the *Public Service Employment Act*, deputy heads establish the “essential qualifications . . . including official language proficiency” for all appointments to the public service. Subsection 31(2) stipulates that deputy heads must ensure that these essential qualifications “meet or exceed [the] qualification standards established by the employer.” Section 91 of the Act applies here because establishing official language requirements for staffing purposes corresponds to the qualification standards and essential qualifications cited in sections 30 and 31 of the *Public Service Employment Act*.

² Those not listed in Schedules I, IV or V of the *Financial Administration Act*.

It can therefore be concluded that deputy heads of federal institutions subject to the *Public Service Employment Act* are ultimately responsible for establishing the language requirements of positions within their institution, an authority that is then delegated to managers at various levels. For institutions that are not subject to the *Public Service Employment Act*, such as separate agencies, this responsibility falls to the institutions themselves.

ii. Treasury Board of Canada

Under subsection 31(1) of the *Public Service Employment Act*:

the employer may establish qualification standards, in relation to . . . language . . . that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

As previously stated, the essential qualifications established by deputy heads for any appointment must meet or exceed these standards. If the federal institution in question is listed in Schedule I or Schedule IV to the *Financial Administration Act* (i.e., those that are part of the core public administration), the “employer” under section 2 of the *Public Service Employment Act* is the Treasury Board. For the most part, the two schedules list federal government departments.³

It is also important to note that the Treasury Board has a specific role in implementing the Act: section 46 of the Act identifies this institution as being responsible for the general direction and coordination of the federal policies and programs that relate to the obligations set out in parts IV, V and VI of the Act. This is why the preambles to the Policy and the Directive state that these documents have been issued under section 46 of the Act.

As of 2012, the rules established by the Treasury Board in relation to section 91 of the Act (i.e., the Policy and the Directive) apply not only to the core public administration, but also to any institution subject to parts IV, V and VI of the Act.

iii. Public Service Commission of Canada

The Public Service Commission is an independent government agency whose mission includes appointing or providing for the appointment of persons to the public service or from within it. This involves providing staffing and assessment functions and services to support staffing in the public service. Typically, the Public Service Commission’s appointment authority is delegated under section 15 of the *Public Service Employment Act* to the deputy heads of federal departments and institutions to which that act applies. This authority is often then further sub-delegated within the organization, usually to the hiring manager, under subsection 24(2) of the *Public Service Employment Act*.⁴

³ [Canada \(Attorney General\) v Shakov](#), 2017 FCA 250, para. 20. Online version accessed August 1, 2020.

⁴ [Canada \(Attorney General\) v Shakov](#), 2017 FCA 250, para. 22. Online version accessed August 1, 2020.

The Public Service Commission is also responsible for assessing the second language skills of candidates seeking employment in the public service. The hiring manager is responsible for assessing a candidate's first official language in the selection process. The deputy heads of government departments and institutions are responsible for applying the established criteria to determine the linguistic identification, the level of language proficiency required, and the staffing rules for positions within their institution.

The Public Service Commission is mandated to safeguard the integrity of staffing in the public service, which includes interpreting the *Public Service Employment Act*, the *Public Service Official Languages Exclusion Approval Order* and the *Public Service Official Languages Appointment Regulations*. It also has the discretionary authority to investigate any external appointment process (or internal if the process was not initiated by the deputy head of a federal department or institution). The Public Service Commission may conduct investigations of internal appointments made by a deputy head only if the deputy head requests it.

iv. Canada School of Public Service

The School of Public Service's mandate includes objectives to:

support the growth and development of public servants; help ensure that public servants have the knowledge, skills and competencies they need to do their jobs effectively; assist deputy heads in meeting the learning needs of their organization; and pursue excellence in public management.⁵

It is in this capacity that the School offers a selection of courses, tools and training activities for federal public servants, some of which relate to the implementation of section 91 of the Act.

⁵ Canada School of Public Service, "[About the School: Mandate](#)," Ottawa, 2019. Online version accessed August 1, 2020.

2. ANALYSIS OF THE PROBLEM

Data collection and analysis were carried out in a twofold process. First, a literature review of the investigations completed by the Office of the Commissioner since 2014 was conducted in order to compile overall findings. Second, interviews were held with a number of institutions that were selected because of the high volume of complaints filed against them under section 91 of the Act since 2014. Interviews were also conducted with the stakeholders listed in Chapter 1—the Treasury Board of Canada (as represented by the Treasury Board of Canada Secretariat), the Public Service Commission and the School of Public Service—because of their central role in ensuring the implementation of section 91 in the public service and in other organizations subject to the Act.

a. Review of investigations completed between April 1, 2014, and March 31, 2020

A review was conducted of the 616 section 91 investigations completed between April 1, 2014, and March 31, 2020, covering a period of 6 fiscal years. These investigations, which were conducted under the Office of the Commissioner's formal investigation process, related to 713 complaints (the difference is explained by the fact that an investigation may involve several complaints on similar or identical issues).

The investigations were reviewed and analyzed according to the following criteria:

- Institution against which the complaint was filed
- Findings of the investigation (i.e., whether the complaint was founded)
- Location of the position cited in the complaint
- Position type (e.g., supervisor or analyst) and classification (e.g., CS-03, AS-06 or IS-04)
- Recurring problems
- Whether the supervision of employees in a region designated as bilingual for language-of-work purposes (designated bilingual region) was involved

This review helped to compile and quantify the observations made by the Office of the Commissioner over the past six years in its section 91 investigation reports. Below are our findings.

i. A significant proportion of complaints

The six years between April 2014 and March 2020 was identified as a critical period not only because of the large volume of complaints filed under section 91 of the Act, but also because of the significant proportion of the total volume of complaints filed with the Office of the Commissioner that they represent. Table 1 shows the number of complaints filed under section 91 between April 2014 and March 2020.

Table 1: Complaints filed under section 91 of the Act, 2014–2015 to 2019–2020

Fiscal year	Number of complaints filed under section 91 (and percentage of total number of complaints, all parts of the Act combined)
2014–2015	45 (8%)
2015–2016	156 (22%)
2016–2017	192 (19%)
2017–2018	222 (25%)
2018–2019	285 (26%)
2019–2020	420 (31%)

As Table 1 shows, the number of admissible complaints filed under section 91 of the Act averaged an annual 22% of all admissible complaints filed with the Office of the Commissioner during this period, which is a significant proportion.

ii. Most complaints were founded

Filing a complaint is one thing, but only founded complaints indicate a problem. Our review of the admissible complaints filed in recent years revealed that most were founded.

As shown in Table 2, from April 1, 2014, to March 31, 2020, the Office of the Commissioner processed 878 complaints related to section 91 of the Act, meaning that the investigations of the complaints were either completed or discontinued. Of these complaints, 122 were investigated using the facilitated resolution process, which seeks to resolve the problem to the satisfaction of the complainant, the institution and the public interest without determining whether the complaint is founded.

Of the remaining complaints, which were investigated using the formal investigation process, 664 were deemed to be founded and 49 were unfounded. Thus, formal investigations completed during this period found that, in approximately 93% of the incidents described in the complaints, the language requirements of one or more positions had not been established objectively.

Table 2: Admissible complaints processed under section 91 of the Act between 2014–2015 and 2019–2020

Complaints	Processed	Founded	Unfounded	Discontinued	Resolved through facilitated resolution process
Number	878	664	49	43	122

iii. Regions designated as bilingual for language-of-work purposes, especially the National Capital Region, are particularly at issue

As shown in Table 3, the positions involved in approximately 90% of complaints founded under section 91 of the Act were in the National Capital Region. Complaints about positions in other designated bilingual regions, such as New Brunswick and parts of Ontario and Quebec, accounted for only 7% of the total. Only 3% of complaints came from regions not designated as bilingual for language-of-work purposes.

Table 3: Complaints founded under section 91 of the Act by region between 2014–2015 and 2019–2020

Region	Founded complaints
National Capital Region – Ottawa	489 (73.6%)
National Capital Region – Gatineau	110 (16.6%)
Quebec	19 (2.9%)
Ontario	19 (2.9%)
Alberta	11 (1.7%)
New Brunswick	9 (1.4%)
Nova Scotia	3 (0.5%)
Saskatchewan	2 (0.3%)
Manitoba	1 (0.2%)
Prince Edward Island	1 (0.2%)
Total	664

The high volume of complaints in the National Capital Region compared to other designated bilingual regions is not surprising, because it is the region where most federal public servants work, where most federal institutions have their head offices and where most staffing actions happen.

The low volume of complaints from regions that are not designated as bilingual for language-of-work purposes under section 91 of the Act is not surprising either and can be explained by a number of reasons. Because federal public servants working in these regions do not have language-of-work rights under Part V of the Act, complaints from these regions usually involve a position that is required to provide bilingual services to the public under Part IV of the Act and are therefore filed by a member of the public.

However, a complaint under section 91 of the Act must involve a staffing action, something that the general public is not typically aware of because the public service's internal staffing mechanism is generally not of interest to them. Complaints from regions that are not designated as bilingual for language-of-work purposes under section 91 of the Act tend to involve a specific incident in which the public did not have access to adequate bilingual services. The investigation of these complaints is thus conducted under Part IV of the Act instead of under section 91.

As a result, there appears to be a blind spot when it comes to the problems associated with implementing section 91 in regions that are not designated as bilingual for language-of-work purposes. Therefore, we cannot conclude that there is no problem in these regions just because there are no section 91 complaints.

iv. Problem affects a significant number of federal institutions

Our review also showed that complaints founded under section 91 of the Act are not limited to a small number of institutions; rather, a wide range of organizations are involved. Over a 6-year period, 45 federal institutions were the subject of at least one founded complaint under section 91. Some institutions, however, generated more of these complaints than others. Of these institutions, 17 in particular stand out, as shown in Table 4.

Table 4: Federal institutions with more than 10 complaints founded under section 91 of the Act between 2014–2015 and 2019–2020

Institution	Founded complaints
Canada Border Services Agency	129
National Defence and the Canadian Armed Forces	67
Health Canada	52
Innovation, Science and Economic Development Canada	52
Shared Services Canada	37
Correctional Service Canada	32
Environment and Climate Change Canada	32
Public Services and Procurement Canada	26
Treasury Board of Canada Secretariat	22
Natural Resources Canada	21
Global Affairs Canada	19
Crown-Indigenous Relations and Northern Affairs Canada	17
Statistics Canada	16
Agriculture and Agri-Food Canada	14
Department of Justice Canada	12
Royal Canadian Mounted Police	12
Transport Canada	11

It is important to note that the problem exists in a large number of institutions, which means that it is widespread.

v. Complaints involving positions at various groups and levels

The federal public service is composed of a wide variety of different positions in various classification groups, which are further subdivided into several levels. Within these groups and levels are several different categories of positions that have work descriptions that vary from one organization to another.

Our review showed that complaints founded under section 91 of the Act did not concern only one type of position, but rather a wide variety of positions. However, some types of positions or classification groups were the subject of more complaints than others.

Of the 664 founded complaints, 30.4% involved CS (Computer Systems) positions, 17.6% AS (Administrative Services) positions, 10.7% EC (Economics and Social Science Services) positions, 5.6% PM (Program Administration) positions, and 5% FI (Financial Management) positions. Table 5 summarizes this information.

Table 5: Complaints founded under section 91 of the Act by position between 2014–2015 and 2019–2020

Category	Number of founded complaints	Percentage
CS-03 to CS-05	202	30.4%
AS-04 to AS-07	117	17.6%
EC-05 to EC-08	71	10.7%
PM-05 and PM-06	37	5.6%
FI-03 and FI-04	33	5.0%
Other	204	30.7%
Total	664	100%

1. The specific case of positions involving the supervision of federal employees in designated bilingual regions (Part V of the Act)

Our review showed that a large volume of section 91 complaints were about positions involving the supervision of employees in designated bilingual regions (Part V of the Act): namely, the National Capital Region, the province of New Brunswick, the bilingual region of Montréal, the bilingual regions of other parts of Quebec, and the bilingual regions of eastern and northern Ontario.

The Act stipulates that federal employees in these regions have the right to be supervised in the official language of their choice. Subsection 6.1.2 of the Directive stipulates that only public servants in Bilingual or Either/Or positions in these regions have this right. The Directive also states that if the supervisor or manager holds a Bilingual position, employees must be supervised in their preferred official language, regardless of the linguistic identification of their position. While this is a good start, it is not enough. The Commissioner is of the opinion that this part of the Directive does not comply with the Act, and that all federal public servants in designated bilingual regions

have the right to be supervised in the official language of their choice, regardless of the linguistic identification of their position or that of their supervisor or manager.

The Commissioner is also of the opinion that the level of second language skills required to supervise (e.g., assign work, set priorities, assess performance, provide day-to-day feedback) employees working in designated bilingual regions should be at least CBC in order to reflect the complexity of supervisory work. Supervisors must be able to understand nuances and complexities when reviewing employees' work, and have complex and abstract discussions on topics related to the team's work. In Appendix 1 (Part II) of the Directive, however, the Treasury Board states that BBB is the minimum level of second language proficiency for supervisory positions.

In 2011, the then Commissioner raised this issue with the President of the Treasury Board in accordance with the provisions of subsection 63(1)(b) of the Act, with a recommendation that the Directive be amended accordingly.

The Treasury Board of Canada Secretariat, in consultation with the Committee of Assistant Deputy Ministers on Official Languages and with federal institutions, decided to explore ways to implement the following recommendation issued in the Clerk of the Privy Council's 2017 report on language of work, *The Next level: Normalizing a culture of inclusive linguistic duality in the Federal Public Service workplace*:

That the Treasury Board Secretariat, in consultation with the Public Service Commission of Canada[,] take action to increase the linguistic profile for bilingual supervisory positions to a superior proficiency level (e.g., CBC or equivalent).

The Secretariat recently reported on the situation⁶ and stated that it was analyzing the impact of raising the linguistic profile of supervisory positions to CBC/CBC.

In light of the above and given the specific nature of this problem, in June 2016 the Office of the Commissioner started taking a different approach to handling complaints about positions involving the supervision of employees in designated bilingual regions.

Our review of section 91 investigations showed that of the 600 founded complaints processed since switching to this approach, 328 (54.7%) involved supervisory positions (see Table 6).

Table 6: Founded section 91 complaints about positions in regions designated as bilingual for language-of-work purposes, since June 2016

Complaints involving supervisory positions	328
Complaints involving non-supervisory positions	272
Total	600

Of the 328 founded complaints involving supervisory positions since 2016, 26.2% involved CS-03 and CS-04 (Computer Systems) positions, 22.9% AS-04 to AS-07 (Administrative Services) positions, 7.9% FI-03 and FI-04 (Financial Management)

⁶ Government of Canada, "[Increase the linguistic profile for supervisory positions](#)," *Dashboard on the status of the language of work recommendations*, Gatineau, 2019, last updated June 30, 2020. Online version accessed August 1, 2020.

positions, 7.3% EC-07 (Economics and Social Science Services) positions, 4.3% PM-05 and PM-06 (Program Administration) positions, and 3.7% CO-03 and CO-04 (Commerce) positions. Table 7 summarizes this information.

Table 7: Founded complaints involving supervisory positions in regions designated as bilingual for language-of-work purposes, by category of position, since June 2016

Category	Number of founded complaints	Percentage
CS-03 and CS-04	86	26.2%
AS-04 to AS-07	75	22.9%
FI-03 and FI-04	26	7.9%
EC-07	24	7.3%
PM-05 and PM-06	14	4.3%
CO-03 and CO-04	12	3.7%
Other	91	27.7%
Total	328	100%

It should be noted that our review of investigations did not turn up any section 91 cases involving senior management positions (i.e., EX level or equivalent). The problem of improperly assessing the language requirements of positions affects only positions at or below the EX-minus-one group and level.

vi. Recurring problems

Among the responses to the complaints founded under section 91 of the Act, our review found recurring sources of error in the rationales provided by institutions to support language requirements that were proven not to have been established objectively. These errors can be grouped into five types.

1. Using a work description that does not reflect the actual duties of the position

When establishing the language requirements of a position, the manager sometimes used an outdated work description or one that strayed too far from the incumbent's current duties. This was particularly prevalent in organizations that use generic work descriptions. Using a work description that does not accurately reflect the duties of the position makes it difficult to analyze language proficiency needs objectively. Sometimes the disparity is so great that one has to question whether the classification of the position is appropriate. This is a recurring problem in all institutions, given that under subsection 4.2.4 of the Treasury Board's *Directive on Classification*, managers are responsible for implementing interdepartmental and departmental standardized job descriptions wherever possible.

In general, it is reasonable to expect that the majority of the main activities described in the work description be performed by the incumbent of the position. Otherwise, there is a risk that the assessment based on the job description may be either arbitrary or incomplete.

2. Operational constraints

It is not uncommon for an investigation to reveal that operational constraints are often cited as the reason why the language requirements of a position were not established objectively. One example is a manager who, because of recruitment difficulties or a shortage of candidates for the position, identifies a position as unilingual or as Bilingual with a BBB/BBB linguistic profile to make it easier to staff the position with a candidate who meets all of the requirements except for the objectively established language requirements. This approach shows that, of all the essential qualifications related to the duties of a position, language skills are often considered less important despite their being just as relevant.

Another example is when the language requirements of a position are established with the objective of staffing a position with a specific employee or individual or of keeping an incumbent who does not meet the language requirements objectively needed to perform the duties of the position. This includes situations in which a manager would like to offer opportunities for advancement to employees who are limited by their second language skills, or cases in which the manager wants to ensure the continuity of a project or retain expertise and talent.

Although operational constraints are regularly used to justify establishing language requirements at levels lower than those objectively needed for the position, operational needs are sometimes used to justify establishing language requirements at levels higher than what are objectively needed to perform the duties of the position.

One example is a manager who establishes a CBC/CBC linguistic profile for a position and staffs it on a non-imperative basis solely for the purpose of allowing the new incumbent to take language training. Another example is a manager who wants to have a range of experienced and bilingual employees who can act as replacements for higher-level positions and so identifies positions as Bilingual even though bilingualism is not required.

Despite any recruitment difficulties institutions may be having or any good intentions managers may have to promote employees or increase their institution's bilingual workforce, language requirements can be established objectively only when the assessment is based on the duties *actually* required to be performed by an incumbent of the position, excluding all other factors. Institutions that lower language requirements to meet short-term operational needs are failing to meet their obligations under Part IV or Part V of the Act. And those that raise language requirements for the same reason may exclude deserving employees who would otherwise be qualified for the position, which would limit their career advancement.

There are other tools available to institutions to deal with recruitment issues, such as non-imperative staffing, provided that the non-imperative process is used only in exceptional situations, as set out in the Directive.

3. Incomplete assessment or faulty reasoning

Investigations into complaints that are eventually deemed to be founded often reveal that language requirements were not established objectively because the manager did not

know enough about the principles for implementing section 91 of the Act. The following are the most commonly observed areas of concern.

- *The manager does not take into account the institution's language obligations or consider the clients who benefit from them.*

In many cases, the incumbent's clients—whether they are members of the public (Part IV of the Act) or members of the federal public service (Part V of the Act)—and the language rights of those clients were not taken into account during the assessment of a position's language requirements. These assessments were then deemed to be arbitrary because they failed to take this essential criterion into account.

It is not always easy to determine just who the clients are. Any person who has the right to communicate with or receive services from a federal institution in the official language of their choice, either under Part IV or Part V of the Act, must be considered as a client when the language requirements of a position are being established. Whether the client is internal or external is irrelevant.

Under Part IV of the Act, clients include members of the general public; municipal, provincial or territorial public servants; suppliers of goods or services; citizens of other countries; academics; and professionals in the private sector.⁷

Under Part V of the Act, clients include recipients of individual or centrally provided services under subsection 36(1)(a)(i) of the Act; employees or contractors supervised by an incumbent of a position under subsection 36(1)(c)(i) of the Act; and employees of institutions who receive services from central agencies and common services (e.g., School of Public Service, Public Services and Procurement Canada, Treasury Board of Canada Secretariat, Public Service Commission, Statistics Canada) under section 37 of the Act. Other federal employees who receive services or communications that do not fall into the above categories but that must still be provided in both official languages must also be considered.⁸

Even if the incumbent's clients all have the same official language preference at a specific point in time—say, English—this situation could change at any point, so it is important that the incumbent be able to interact with clients in either language where required by the Act.

A position located in a designated bilingual region may also have to be identified as Bilingual because of federal institutions' obligation under subsection 36(2) of the Act to take all reasonable measures to create a work environment conducive to the effective use of both official languages. This could be the case, for example, for positions whose incumbents must lead projects; provide functional supervision, mentoring or coaching; facilitate meetings; give presentations to various audiences; represent the institution at events; or provide expert advice to other employees. In the vast majority of cases, these functions require creating a work environment where employees are comfortable using the official language of their choice.

⁷ See also the definition of "public" in the Treasury Board of Canada's *Directive on Official Languages for Communications and Services*.

⁸ Treasury Board of Canada, *Directive on Official Languages for Communications and Services*, subsection 6.3.

- *The manager thinks that a position located in a designated bilingual region does not have to be identified as Bilingual, because all workplace interactions are only in one language (“Everything happens in English”).*

The fact that the work environment is primarily English-speaking or French-speaking cannot be viewed as an objective factor when establishing the language requirements of a position located in a designated bilingual region, because the situation could change at any time, such as with the arrival of new employees, stakeholders or clients who wish to speak the other official language. This rationale also neglects to take into account the fact that some employees who want to speak their preferred official language ultimately give in and switch to the predominant language because it is just easier, because it will help them to integrate better, or simply because they are unaware of their language rights. A unilingual work environment in a designated bilingual region is not an objective factor; on the contrary, it raises a number of concerns.

- *The manager assumes that the position must be identified as English Essential because the incumbent does not provide services to clients, despite the fact that the position is located in a designated bilingual region.*

It is common, particularly in the National Capital Region, for managers establishing the language requirements of a position to identify it as English Essential when the duties of the position do not include providing services to clients. It even seems to be a reflex in this region to think that if a position is not identified as Bilingual, it should be identified as English Essential. Other times, it is argued that the incumbent does not have to speak French and therefore requires only a knowledge of English. The problem then stands out more clearly—the language of work is English, and French is the exception that must be accommodated.

Managers often forget that, just as “Bilingual” is a language requirement, English Essential and French Essential are also language requirements. Since they exclude members of either official language community who are not fluent in their second official language, they must be justified based on the obligations under parts IV and V of the Act. The primary language used for interactions at work in a designated bilingual region is not an objective factor in identifying a position as English Essential or French Essential, because the incumbents have the right to work in their preferred official language.

- *The manager claims that the incumbent is not required to use the second official language often enough.*

Another rationale often used by federal institutions to justify a unilingual language requirement is that the incumbent is not required to use the second official language often enough for the position to be identified as Bilingual. In other words, the demand for service in the official language of the linguistic minority is too low. This rationale is also used to justify a lower linguistic profile. This assessment is not considered to be objective, because the low frequency of a work task in no way reduces its complexity, especially when it is a matter of ensuring respect for the public’s rights in terms of communications and services (Part IV of the Act) or federal employees’ rights (Part V of the Act). Since the frequency of a task has no effect on its inherent complexity, the

frequency or rate of requests for services in either language should never be a factor in establishing a linguistic profile.

Therefore, even when a function is performed infrequently, an incumbent must have the necessary skills to be able to perform that function in both official languages, when required. The low rate of requests in either official language is, however, a relevant factor to take into consideration when determining whether the positions in a work unit have an appropriate mix of language requirements to provide service of equal quality in both official languages at all times.

This coincides with an observation the Commissioner made in his report, *A Matter of Respect and Safety: The Impact of Emergency Situations on Official Languages*, released in the fall of 2020, in which he stressed the importance for institutions to have a sufficient bilingual workforce in order to meet not only day-to-day language needs, but also needs that arise in emergency situations, particularly when they affect public health and safety and when it is more difficult to rely on auxiliary resources—such as financial or material resources, or translation and interpretation services—because these are less available than in normal times and cannot always respond to emergencies.

This means that when establishing the language requirements of a position, a manager must take into account not only the position's usual duties and responsibilities, but also those that the incumbent might be called upon to perform in situations that are less frequent or even exceptional, but where it is still necessary to communicate quickly and effectively with the public and federal public servants in both official languages.

By doing this, an institution can function and respond to these challenges in both official languages at all times while preventing an official language from being demoted to a “language of translation.”

- *The manager thinks that because the position does not have any supervisory duties, it can be identified as unilingual or as Bilingual with a BBB/BBB linguistic profile.*

Institutions often justify the English Essential language requirement of a position or the BBB/BBB linguistic profile of a Bilingual position solely based on the fact that the position does not include any supervisory duties, without considering the other duties and functions of the position. Once again, this assessment is not considered to be objective, because supervising employees is only one of the functions to be considered. Under no circumstances can all of the other duties related to the position be ignored. This type of rationale is therefore based on an incomplete assessment of the duties and functions of the position.

- *The manager explains that the tasks performed by the incumbent may be delegated to a colleague (whose position is at a different group and level) or to a manager, as required.*

It should first be noted that in a context of institutional bilingualism, it is common to have work teams composed of unilingual and bilingual positions, provided that the team is able to ensure the availability of services in both official languages when required by the Act—in other words, that it has sufficient bilingual capacity.

The Treasury Board's *Directive on Official Languages for Communications and Services* defines the concept of bilingual capacity as an office that is able to provide communications and services in both official languages through an appropriate mix of financial, material and human resources, including bilingual and unilingual positions.

In this context, it is common practice for the institution's activities to be organized in such a way that requests for services are handled by individuals who are proficient in the official language requested. However, organizing activities in this way cannot disregard the responsibilities of employees in different positions or the specific skills within a category of positions.

In other words, it is not appropriate to ask a colleague in a different position (at a different group or level) or with different responsibilities and skills to perform the tasks of a particular position that require bilingualism. Specifically, it is not acceptable to delegate tasks to a lower-level colleague or, conversely, a manager. These substitutes are being asked to perform tasks for which they are not responsible or for which they do not have the expertise, so they are likely to be unable to provide service of equal quality to the clients. In addition, an incumbent who does not have the second-language skills to provide a service may well be reluctant to ask for help from a colleague, particularly a manager, for fear of disturbing them or being judged less competent for the position. This incumbent may decide to simply provide the service in his or her first official language, in contravention of the Act.

In conclusion on this point, the possibility of delegating tasks to a colleague should be considered only when it involves colleagues from the same group and level who have the same or very similar responsibilities. It goes without saying that in a work unit that has a position with unique duties and responsibilities, delegating tasks may never be an acceptable solution.

- *The manager underestimates the level of complexity in terms of language skills when establishing the linguistic profile.*

Not so much a rationale as an incomplete understanding of how to interpret the Standards and their application to concrete tasks, it sometimes happens that the complexity of the tasks to be performed by a position justifies a higher linguistic profile than what was established by the institution—for example, a position with a BBB/BBB linguistic profile that should be CBC/CBC or CCC/CCC. On rare occasions, institutions have established the linguistic profile of a position at a higher level, for example CBC/CBC, when the duties could very well be performed by an incumbent with BBB second-language skills. It is important to remember that simple or routine tasks correspond to a B level. Complex tasks and abstract concepts, on the other hand, correspond to a C level. As mentioned above, it is also important to remember that neither the frequency at which the incumbent uses the official language nor the prevalence of a certain official language in the workplace is a relevant criterion for analysis in establishing a linguistic profile.

- *The manager thinks that a BBB/BBB linguistic profile is appropriate for a position, even though other positions at the same group and level within the work team have a higher linguistic profile.*

As stated above, it is common for a work unit to be composed of a combination of bilingual and unilingual positions, provided that there is sufficient bilingual capacity. That said, the bilingual capacity of a work unit for a specific type of position should be determined on the basis of an appropriate combination of language requirements, such as Bilingual, English Essential and French Essential. It should not be based on the diversity of linguistic profiles of Bilingual positions, because the level of second official language skills should not vary from one position to another at the same group and level.

For similar positions with similar duties, particularly those that have the same work description, the complexity of the tasks should not vary from one position to another and, consequently, neither should the level of language skills required. An objective assessment should therefore normally yield similar results for similar positions.

- *The manager thinks that the BBB/BBB linguistic profile is sufficient for a position because the incumbent is English-speaking, and the duties to be performed in French are simple in nature.*

An element often overlooked when establishing the linguistic profile of a position is the fact that a position identified as Bilingual can just as easily be filled by a person whose preferred official language is French. It is wrong to assume that a position identified as Bilingual with a linguistic profile of BBB/BBB, for example, will always be held by an employee whose second language is French. In cases where the language skills required to perform duties in French are at the BBB level, managers must keep in mind that at any given time, the position could be filled by a person whose second official language is English, in which case that person might find it difficult to perform the duties in English. It is always important not to make assumptions about the first official language of an incumbent and to remember that the linguistic profile serves as a minimum proficiency for both English and French. A good question to ask when establishing a linguistic profile is, "In a position with this linguistic profile, would an English-speaking candidate and a French-speaking candidate be able to perform all the duties of the position equally well?"

4. Using the minimum requirements contained in the Directive

It is difficult to blame federal institutions when they cite the Directive—which sets BBB as the minimum level of second language proficiency for supervising employees in designated bilingual regions, while at the same time stating that employees in unilingual positions do not have the right to be supervised in the official language of their choice unless the supervisor's position is identified as Bilingual and is in a designated bilingual region—to justify the language requirements of a supervisory position. Since the Directive is issued by the employer, to whom they ultimately answer, it is understandable that institutions feel they need to comply with it.

Many institutions told us that they feel frustrated being caught between the Directive issued by the Treasury Board of Canada Secretariat and the requirements promoted by the Office of the Commissioner. However, it is important not to overlook the text of the Directive itself, which states that the second-language proficiency levels of positions

involving the supervision of employees must be established at the BBB level “or higher,” which means that a BBB/BBB linguistic profile is a minimum level for positions with supervisory duties. In other words, the Directive in no way excludes the possibility that the language requirements of a position may be at a higher level and, above all, does not exempt institutions from the obligation to conduct an objective assessment of the language requirements of the position.

The Office of the Commissioner is confident that the work of the Treasury Board of Canada Secretariat currently under way in response to the recommendations in the Clerk of the Privy Council’s report on language of work will resolve this issue.

5. No formal, documented mechanism for assessing the language requirements of positions

In many cases, the federal institution had no formal, documented mechanism for assessing language requirements: that is, a mechanism where the stakeholders to be consulted and the process to be followed are well defined and where the decisions and rationales are recorded in writing. In some cases, the institution simply had no rationale to justify the language requirements called into question in the complaint.

In addition to guiding managers and helping them establish the language requirements of positions more objectively, this type of mechanism ensures that the rationale for those requirements is recorded and accessible so that it is always possible to review and understand the reasoning and the process that led to the establishment of specific language requirements at any given time. This is particularly useful for an institution’s internal monitoring purposes and for acting or subsequent managers, especially when it comes time to staff the position again and a new assessment needs to be done.

vii. Findings of the review of completed investigations

Our review of investigations conducted under section 91 of the Act resulted in several findings. First, a significant number of admissible complaints were filed with the Office of the Commissioner each year under section 91 of the Act, and the vast majority of them were founded. Second, the problem is not limited to one institution; rather, it affects a good many of them, making it a widespread problem throughout the public service.

Although most of the positions targeted by the complaints were in the National Capital Region, there were also others in other designated bilingual regions and a few in regions designated as unilingual for language-of-work purposes. This is therefore a problem that is particularly prevalent in designated bilingual regions.

The complaints covered a wide range of positions, but it is worth noting the large volume of founded complaints involving positions in the CS, AS, EC, PM and FI classification groups and involving supervisory positions in designated bilingual regions. Although particular attention should be paid to positions in these classification groups, the other groups must also be taken into consideration in any approach to fix the problem.

Our review showed that investigations into managers’ assessments of the language requirements of positions revealed many recurring problems, ranging from rationales based on principles that deviate from an objective assessment, to using inaccurate work

descriptions when establishing language requirements, to basing assessments on operational needs.

At this point, and as a result of the findings above, we can conclude that there is a widespread problem in the federal public service when it comes to implementing section 91 of the Act. This is reflected in a number of recurring incidents that affect a wide variety of federal institutions and that have an impact both on the delivery of services to the public under Part IV of the Act and on respect for the language-of-work rights of federal public servants under Part V of the Act. This is also an indication that the root of the problem is not the poor practices of, say, one or two institutions, but rather lies within the system itself.

b. Interviews with federal institutions on implementing section 91 of the Act

To learn more about the relevant factors in implementing section 91 of the Act within federal institutions and also to provide federal institutions with an opportunity to express their perceptions and views on this issue, we interviewed a number of institutions between April and July 2019.

First, we identified and met with five federal institutions based on the high volume of complaints filed against them under section 91 of the Act since 2014. These institutions were the Canada Border Services Agency, Correctional Service Canada, the Department of National Defence, Health Canada and Shared Services Canada. It is important to stress the importance of putting the number of complaints received about these institutions into perspective in relation to the size of these organizations and the number of staffing actions carried out there.

Second, interviews were conducted with the key stakeholders identified at the beginning of the analysis (the Treasury Board of Canada Secretariat, the Public Service Commission and the Canada School of Public Service) because of their central role in implementing section 91 within the public service and other organizations subject to the Act.

i. Implementing section 91 of the Act in federal institutions

In the interviews conducted with the above-mentioned five federal institutions, we were able to meet with various representatives, all of whom were actively involved in official languages. The purpose of these interviews was, on the one hand, to learn about how section 91 was implemented in these institutions and what measures they had in place and, on the other hand, to give the institutions an opportunity to tell us about the specific difficulties they are having.

Given the volume of information provided by the institutions, which covered a variety of topics, we have made every effort to present a summary of these meetings in this section, while excluding information deemed less relevant to the nature and objectives of this report.

To make this report easier to read and to simplify the terminology used in it, the term “manager” will continue to be used to refer to all individuals responsible for establishing the language requirements of positions.

1. Delegation of authority to establish the language requirements of positions

On the subject of the institutions’ delegation instruments for the authority to hire employees and thereby establish the language requirements of positions, the interviews revealed that the level of delegation varied from one institution to another. While one institution said that the responsibility for establishing the language requirements of a position rested with the manager of the position, others said that this authority belonged to directors or to senior management. Some institutions said that the director relies on the recommendation of the position’s supervisor. In one of the institutions interviewed, the level of delegation varies from one branch to another, based on a risk management analysis. However, this same institution reported that lowering language requirements must be approved by the director general.

2. Other stakeholders involved in the assessment of language requirements

Although the delegated authority to establish the language requirements of a position may vary from one institution to another, the institutions we met with were unanimous in saying that managers receive support from human resources staff and official languages personnel, who are involved in the process to varying degrees.

However, the interviews revealed that it was not always mandatory to consult official languages personnel when establishing or reviewing the language requirements of positions. In all cases, the manager was not required to follow the advice of the official languages personnel. Their role is thus generally limited to providing advice, which is not always heeded by managers. Nevertheless, mechanisms are in place in some institutions to ensure that differences of opinion between managers and the official languages personnel are communicated to senior management, which then makes the decision.

3. Internal policies and directives

One of the institutions that provided information on this subject said that it has had a directive on determining linguistic profiles since 2016 that stipulates that supervisory positions at the EX-minus-one level in designated bilingual regions must be identified as Bilingual with a CBC/CBC linguistic profile. This institution also said that it has another directive that addresses the issue of non-imperative staffing, among other things. Another institution said that a directive issued by the deputy minister in 2015 was in place to explain how to assess the language requirements of a position, to provide a framework for the process of assessing language requirements, and to define the key personnel and their responsibilities.

One institution we met with stated that it relies solely on the Directive and the Standards.

4. Internal tools and instruments

The information provided on this subject again revealed a certain diversity in the internal tools that had been developed within the institutions we interviewed. For example, some official languages personnel stated that they had developed various grids or forms to be used by managers when assessing the language requirements of positions. These tools were not always mandatory, however. In some cases, the form or information grid was only a guidance tool for managers, while in other cases, it was an administrative document that was required to be completed and subsequently reviewed and signed by various stakeholders, such as the director, a human resources officer or an official languages representative. In several cases, these documents were an integral part of the approval mechanism for language requirements and, in the event of disagreement between the manager and the official languages personnel, the arguments would be communicated to senior officials, which would then be responsible for making the decision.

One institution reported having prepared a separate form on which the tasks performed by the incumbent of the position must be specified in cases involving the use of a generic work description. The official languages personnel of another said that a guide was being developed to help managers in assessing language requirements. A third said that it also has a form, which is currently being updated, to guide the use of non-imperative staffing.

One institution sent a list of its additional tools, including a decision tree for language requirements of supervisory positions, a list of questions and answers on the language requirements of positions and the staffing of Bilingual positions, presentations on establishing the language requirements of positions and on the staffing of Bilingual positions, and a rationale form for assigning a BBB/BBB linguistic profile to a Bilingual position requiring a CBC/CBC linguistic profile.

5. Language requirements of positions requiring the supervision of employees in designated bilingual regions

The information obtained during the interviews showed that, generally speaking and at least in principle, institutions recognized and accepted the fact that a CBC/CBC linguistic profile should be established for positions requiring the supervision of employees in designated bilingual regions. Some of the institutions we met with pointed out the challenges that come with this approach, particularly in terms of resources, language training and recruitment. One institution questioned the need for all supervisors, without exception, to have second-language skills at the CBC level, stating that some supervisory positions—in maintenance, for example—would not require a CBC/CBC linguistic profile.

We were pleased to see that several of the institutions we met with had developed action plans or strategies to raise the linguistic profiles of some supervisory positions to CBC/CBC. One institution's initiative generally targeted all supervisory positions, while others' specifically targeted supervisory positions at the EX-minus-one level, which is a good start, but not enough. In at least one case, some branches had taken the lead with more proactive approaches.

One institution stated that requiring a CBC/CBC linguistic profile for all supervisory positions was not an objective approach. This institution explained that to ensure that the assessment has been done objectively, it has a directive in place that requires staffing personnel to review the language requirements for any supervisory position that does not have a CBC/CBC linguistic profile (and that has not already been reviewed).

6. Training for managers

The information institutions provided on this topic revealed that, in general, managers receive little or no internal training on how to establish language requirements of positions. When training is provided, the topic is addressed generally or in passing among other topics related to management or official languages. Institutions tend rather to rely on the training offered by the School of Public Service. At least one institution reported that its training is quite general and that the topic of language requirements of positions is addressed only briefly. In several institutions, official languages representative sometimes give presentations or information sessions—to human resources staff or to management.

7. Other initiatives

One institution reported having sent out an action plan to all staff in 2019 to increase employee awareness of official languages and reduce the number of complaints. The plan includes official languages awareness communications, changes to the internal procedure for handling complaints filed under section 91 of the Act, a reminder to the various key players of their responsibilities and the importance of following the directive already in place within the organization, and other measures. The plan also includes the creation of mechanisms to ensure that official languages personnel are systematically consulted when the language requirements of positions are assessed. In addition, this institution is planning an overall review of the classification and language requirements of all positions in the organization.

8. Seeking guidance from the Treasury Board of Canada Secretariat and the Public Service Commission of Canada

One institution reported that it consults with the Treasury Board of Canada Secretariat and the Public Service Commission only occasionally, as it is not necessary most of the time. Another institution stated that it sometimes e-mails questions to the Treasury Board of Canada Secretariat for advice and guidance, but admitted that it sometimes takes a long time before answers are received and that, on occasion, its questions go unanswered. This institution also said that there is less and less relevant information coming from the Treasury Board with each revision of its policies. Managers feel that they are left to their own devices on this issue. This institution added that it does not contact the Public Service Commission unless it needs information about the *Public Service Official Languages Exclusion Approval Order*. Another institution told us that some people say that official languages are not a priority for the Treasury Board of Canada Secretariat and that discussions on this subject move slowly.

However, one institution said that it has frequent discussions with the Treasury Board of Canada Secretariat, particularly in the wake of the Clerk of the Privy Council's report on language of work or during meetings of the Committee of Assistant Deputy Ministers on

Official Languages. Other forums are also held, such as human resources or staffing advisory boards, working groups and committees.

9. Challenges

The information obtained on this topic has been grouped into the following themes:

– *Recruiting bilingual employees*

The institutions we met with all said that they are having recruitment problems, which is a challenge that is affecting the entire public service. These problems are particularly challenging when employees are needed for specialized positions in a field that requires technical knowledge and when the goal is to find candidates who are fluent in both official languages, especially when the position is not located in a designated bilingual region.

In these cases, managers may decide to focus on operational needs and make staffing easier by reducing the level of bilingualism required or eliminating it altogether. The institutions' official languages personnel talked about managers who ignore or refuse to follow their recommendations when establishing the language requirements of positions.

The main tool used by institutions to meet this challenge is non-imperative staffing, but it was pointed out that this is not a miracle cure because of the associated costs and the need to replace the appointed employee who is on language training.

– *“Unfair” competition between institutions in terms of staffing*

Inconsistent language requirements for the same or similar positions in institutions can lead to “unfair” competition between the institutions that are trying to comply with the Act and those for whom it is not a priority, for whatever reason. For example, it is not uncommon for candidates to choose to work for another institution because it has lower language requirements for the same position. Sometimes a candidate will be trained in one institution and then leave for another institution because of easier career advancement in terms of language requirements. It is therefore important to ensure that the implementation of section 91 of the Act is consistent throughout the public service.

– *Need for awareness of the importance of language requirements*

The federal institutions we met with were also unanimous in stating that simply providing a better framework for the implementation of section 91 of the Act will not be enough to solve the problem. There is also a need to increase awareness among public service employees and managers of the importance of bilingualism and its usefulness.

It was reported that employees sometimes question the need for bilingualism for a position because of a unilingual work environment, without taking into account the language rights of the public or the language-of-work rights of public servants. Others think that establishing a CBC/CBC linguistic profile for supervisory positions in designated bilingual regions is arbitrary and they do not understand the reason for its being a requirement.

Organizational culture can also be a barrier to implementing section 91 of the Act, particularly in work environments that have always operated in only one official language. This type of culture can be resistant to change, particularly when there is a perception that language requirements limit opportunities for advancement, which can create disagreements between managers or employees and official languages personnel. However, one institution said that it was confident that the more bilingual employees there are, especially managers, the more likely it is that the existing culture will change.

– *Need for a review of the Treasury Board's tools and guidelines*

Some institutions were of the opinion that the Treasury Board was providing less and less relevant information and that managers were being left to their own devices, particularly since the central agencies have adopted a more enabling and less prescriptive approach to the rules to be followed.

A number of institutions expressed the need for more tools from the Treasury Board or for a review of those already in place so that managers can get better guidance. For example, some institutions said that it would be a good idea to prepare things like workshops, information capsules, videos, conferences and online tools. Institutions also said they need better guidance on some of the elements of an objective assessment of a position's language requirements, such as what constitutes service to clients, when a service must be bilingual, what constitutes a bilingual workforce, when a workforce is considered to be sufficiently bilingual, and the impact of generic work descriptions. These are the things that managers have trouble understanding. Moreover, according to one institution, some consider the Office of the Commissioner to be too strict on these issues.

A number of institutions also reported problems using the Treasury Board's tool called *Determining the Linguistic Profile of Bilingual Positions*. In fact, the tool is not well known or understood by managers, which can lead to incorrect results based on the subjective choices that are made. In other words, it is possible to obtain the results you want based on the information you enter. The tool was also criticized for not asking the right questions and for being too vague, especially when assessing the complexity of tasks. One institution suggested that the tool be revised to make it more dynamic and more comprehensive.

One interviewee argued that the current principle of assigning linguistic profiles is not sufficiently flexible and nuanced, especially because it does not allow managers to take employees' first official language into account when creating a sufficiently bilingual workforce. While managers may want to build a team that includes a sufficient number of English speakers and French speakers with an intermediate level of proficiency in their second official language (BBB), the current system requires them to staff all positions with candidates who have an advanced level of proficiency in their second official language (CBC), since it is not otherwise possible to ensure a sufficiently bilingual workforce because the first official language of candidates cannot be taken into consideration when staffing. The interviewee proposed having "English Essential/BBB" or "French Essential/BBB" linguistic profiles, which would make it possible to have a bilingual workforce without requiring an advanced level of proficiency in the second official language.

One institution also commented on non-imperative staffing, stating that the rules were neither clear nor explicit and that the usage requirements needed to be clarified.

Another institution said that the Treasury Board should amend the Directive to require a CBC/CBC linguistic profile for supervisory positions in designated bilingual regions.

Most of the institutions agreed on the need for balance between institutional guidance and room for flexibility. This would make it possible to take into account the diversity of institutions and their needs instead of being disconnected from them, hence the need for generic tools that can be applied to all institutions but that are specific enough to provide answers to questions.

- *Need to review Canada School of Public Service training for managers on language requirements*

At least two institutions said that they needed more training on how to assess language requirements. In particular, it was noted that this issue was barely addressed in the School of Public Service's training for managers, which focuses more on the financial aspects of human resources. More emphasis needs to be placed on language requirements.

10. Findings

There are two reasons why it is difficult to draw conclusions on the sufficiency and appropriateness of the internal mechanisms, guidelines and tools of the institutions we met with.

First of all, several of them have been put in place only recently or are in the process of being put in place for the specific purpose of responding to the issues raised in the many complaints on this issue. In other words, the current portrait of the institutions we met with may not be the one that existed at the time the problem arose, although the results of the measures taken by the institutions have yet to be seen if we consider the steady number of complaints that are filed each year.

Second, we met with only a few large institutions that received a significant number of complaints. We therefore do not have information on the perspective of smaller institutions with fewer resources or of other institutions that received fewer complaints but where there could still be a problem.

However, what we did find was that there is no consistency in the measures institutions have put in place for establishing language requirements. Some institutions have internal directives (whose content varies); others do not. Some institutions have developed tools; others have not. In some institutions, the managers establish the language requirements of positions; in others, the directors are responsible for this. Some institutions have an action plan to assign a CBC/CBC linguistic profile to supervisory positions in designated bilingual regions; others do not.

Of course, the institutions that have adopted concrete measures—whether they be directives or tools—to try to solve the problem and better manage language requirements within their institutions are to be commended. The Commissioner hopes

that the Treasury Board and other institutions will be able to draw inspiration from these initiatives and best practices.

That said, the variations in the measures in place are a problem because one would reasonably expect that the ways language requirements are established objectively would be substantially the same in every institution and that there would be some consistency, but this is far from being the case. There is also a general lack of internal training on the subject, and institutions are relying almost solely on the School of Public Service.

The interviews highlighted the relevance of official languages personnel when establishing the language requirements of positions, given that they generally have the greatest expertise on the subject. This finding was also supported by our investigations. However, they also revealed that the procedures in place within the institutions do not always include a requirement to consult official languages personnel and that, in cases where they are consulted, it is not mandatory to follow their recommendations.

Another finding from the interviews was the institutions' view that the Treasury Board's policies, standards and tools need to be revised.

Last but definitely not least, we found that there is a great need among institutions to raise employees' and managers' awareness of the reason for language requirements, and that the challenges institutions are experiencing recruiting bilingual employees are having an impact on how language requirements are being established for positions.

ii. Treasury Board of Canada

As mentioned above, the Treasury Board has a very specific role in implementing section 91 of the Act. First of all, it is the employer for the public service and is responsible for ensuring that there are rules governing the language requirements of positions that institutions must follow, such as the Policy, the Directive and the Standards. Second, subsection 46(1) of the Act makes it responsible for the general direction and coordination of the federal policies and programs relating to the implementation of parts IV, V and VI of the Act in federal institutions.

With this perspective in mind, we met with representatives of the Treasury Board of Canada Secretariat to discuss these issues and to assess the Treasury Board's involvement and the actions it takes in ensuring that federal institutions implement section 91 of the Act. The information obtained on this topic has been grouped into the following themes.

1. Treasury Board's role in implementing section 91 of the Act

According to the Treasury Board of Canada Secretariat, deputy heads are accountable for ensuring that their institutions meet the obligations set out in section 91 of the Act. The Policy seeks to explain this accountability and clearly set out the obligations that deputy heads are responsible for meeting within their institutions.

The Treasury Board adopts official languages policies and directives under the authority granted to it by Part VIII of the Act in order to operationalize the obligations to which

institutions are subject and to provide more details to deputy heads on how they should implement the Act. In other words, the goal is to provide guidance to institutions.

The scope of these policy instruments is twofold: first, they describe the responsibilities of the core public administration; second, they also serve as general benchmarks for other organizations that are subject to the Act but are not part of the core public administration. These other organizations may set their own standards to meet their obligations. However, some choose to follow the model proposed by the Treasury Board and then adapt it to their own situation. Whereas Treasury Board policies were more specific and prescriptive in the past, they are less so today in response to the need for flexibility in staffing expressed by institutions. The Treasury Board therefore tries to ensure a balance between flexibility in staffing and a binding framework against which institutions can be assessed.

In principle, the Treasury Board's policies and directives are reviewed every five years and are regularly updated. The Policy and the Directive were last revised in 2012 to clarify the responsibilities of deputy heads and thereby facilitate implementation.

The Treasury Board of Canada Secretariat stated that there is no obligation for institutions to establish internal frameworks for implementing section 91 of the Act. It is therefore up to deputy heads to decide whether to adopt their own official languages policies or directives.

2. Support to institutions

The Treasury Board of Canada Secretariat provides support to institutions in interpreting and implementing the rules. For example, when the Standards were adopted, the Secretariat gave presentations to introduce them to institutions.

Regular meetings of departmental and Crown corporation advisory committees on official languages are organized by the Secretariat, as well as teleconferences on specific topics. Meetings are also held several times a year between the Secretariat and the functional communities of institutions (departments and Crown corporations), as part of workshops or forums on good staffing practices, for example. Institutions can also use the GCcollab web platform to ask questions of Treasury Board of Canada Secretariat representatives and official languages personnel from other institutions, share good practices and find solutions that have been proven in the field.

The Policy requires every institution to have a person or team responsible for official languages (referred to in this report as "official languages personnel"). The size of the team is appropriate to the institution's mandate. Official languages personnel are also a good source of initiatives and innovative ideas when it comes to implementing section 91 of the Act, and they may contact the Treasury Board of Canada Secretariat at any time for help in interpreting its policies. The Secretariat will not act as a stand-in for institutions' official languages personnel, particularly when questions are asked about specific staffing actions (e.g., What are the appropriate language requirements for this position?), but will provide assistance when the issue is more complex.

The Treasury Board of Canada Secretariat also stated that it sometimes invites the Public Service Commission and the School of Public Service to give presentations on specific topics. This was the case, for example, when the Public Service Commission

adopted its New Direction in Staffing. The three organizations also work together on course offerings and pilot projects.

The Treasury Board of Canada Secretariat also monitors reports and recommendations from parliamentary committees and section 91 investigation reports from the Office of the Commissioner so that it can better understand the issues and target its support to institutions.

The Treasury Board of Canada Secretariat said that it takes every opportunity to remind institutions of their obligations under section 91 of the Act.

3. Monitoring the implementation of section 91 of the Act

The Treasury Board of Canada Secretariat explained that guidance on monitoring and reporting and on deputy head accountability is set out in the *Foundation Framework for Treasury Board Policies*. The consequences of non-compliance with Treasury Board policy instruments are listed in the *Framework for the Management of Compliance*.

As part of their official languages reporting, a joint exercise with Canadian Heritage that takes place over a three-year cycle, the approximately 200 federal institutions subject to the Act must report on its implementation to the Treasury Board of Canada Secretariat at least once during the cycle, and 18 of these institutions must produce a report every year. The information collected is used in preparing the President of the Treasury Board's *Annual Report on Official Languages*. This reporting ensures accountability for the official languages programs of institutions subject to the Act, as required by section 48 of the Act.

The official languages reporting focuses on various aspects of official languages: governance, monitoring, communications with and services to the public, language of work, equitable participation, leadership, human resources management, promotion of English and French, and the development of official language minority communities. One of the things institutions are asked to confirm is whether language requirements are established objectively within their organization. For example, in the *Annual Report on Official Languages for Fiscal Year 2017 to 2018*, the Treasury Board reported that 81% of institutions had responded that the language requirements of positions were nearly always established objectively—that is, that they “reflect[ed] the duties of employees or their work units and [took] into account the obligations related to services to the public and language of work”⁹ in 90% or more of cases. The Treasury Board of Canada Secretariat reviews its monitoring tools and indicators every year and added a question on section 91 of the Act in the 2019–2020 reporting exercise to better survey federal institutions on this issue.

Although the official languages reporting exercise is still a self-assessment questionnaire, the data is cross-checked and triangulated to validate the results provided by the institutions and to focus the Treasury Board of Canada Secretariat's actions. For example, in 2016–2017, the Secretariat augmented some of the questions by asking for evidence to support institutions' responses on the mechanisms they use to measure the

⁹ President of the Treasury Board of Canada, [Annual Report on Official Languages for Fiscal Year 2017 to 2018](#), Table 4, p. 31. Online version accessed August 1, 2020.

availability and quality of services to the public. A number of key questions in the reporting exercise now require institutions to include supporting documents or evidence.

The Treasury Board of Canada Secretariat can also look at other data sources to validate the institutions' reporting, such as the results of surveys conducted by external firms or the results of the Public Service Employee Survey. The Survey results show, for example, public servants' level of satisfaction with being able to be supervised in their preferred official language. The Survey results can also be broken down by province and territory, by respondents' first official language, by institution, by branch and by sector.

For the 2019–2020 reporting exercise, the Treasury Board of Canada Secretariat will also use the data collected as part of the public consultations on the review of the *Official Languages (Communications with and Services to the Public) Regulations* to validate the institutions' information.

In addition, the Treasury Board of Canada Secretariat can access statistical data from central systems so that it can track certain key indicators in order to get a broad overview, such as the number of positions identified as Bilingual, including those with supervisory responsibilities; the number of employees who meet the language requirements of their position; the number of positions that provide services to the public; and the language requirements of positions, including the linguistic profiles of Bilingual positions. The data is also used when preparing the *Annual Report on Official Languages*.

According to the Treasury Board of Canada Secretariat, the Management Accountability Framework also makes it possible to track several management components related to the accountability of deputy heads, monitor major trends, provide an objective view of the situation, and validate the results of the institutions' reporting. Most of the management components are included in the appendices to the annual reports published by the Treasury Board. The results of the tracking can be used to assess the performance of deputy ministers.

The information obtained from all of these various sources helps the Treasury Board of Canada Secretariat to monitor institutional performance, address policy gaps and identify opportunities to support continuous improvement. This information is discussed with institutions at several events aimed at supporting the official languages community of practice, such as the Departmental Advisory Committee on Official Languages, the Official Languages Good Practices Forum and the Crown Corporations Advisory Committee on Official Languages. If the Secretariat identifies a widespread problem in a group of institutions, it will discuss that problem with those institutions.

In 2015, the Office of the Auditor General conducted an audit of the Treasury Board of Canada Secretariat's reporting requirements for federal organizations and highlighted the Secretariat's efforts to reduce the administrative burden.

4. Treasury Board of Canada Secretariat's comments on certain issues

The interview with the Treasury Board of Canada Secretariat also included the following specific issues raised by institutions or revealed during investigations:

- *High volume of complaints filed under section 91 of the Act*

The Treasury Board of Canada Secretariat stated that it takes great interest in the investigation reports provided by the Commissioner as part of his quarterly reports on the implementation of section 91. It has also noted a real willingness on the part of institutions to address the problem.

However, according to the Secretariat, the institutions said that they lack the resources, such as human resources staff, to address this issue. They also reported having major problems recruiting staff. The Treasury Board of Canada Secretariat pointed out that federal language policy requires institutions to be pragmatic in identifying positions and providing services in both official languages, and that a balance is needed when it comes to requiring bilingualism for positions, as set out in section 91 of the Act. The objective is to meet a need, not to establish language requirements for positions that are too high or too low.

- *Use of non-imperative staffing*

When asked whether it anticipated an increase in the use of non-imperative staffing, the Treasury Board of Canada Secretariat explained that non-imperative staffing exists for good reasons, such as to allow members of the public to join the federal public service. Although the provinces and territories all have different ways of approaching second-language learning, the public service is required to recruit its employees from all parts of the country; therefore, policies need to be in place that allow people to join the federal government, provided they agree to learn the second official language within a reasonable period of time.

However, imperative staffing has been the standard since 2004. The Treasury Board of Canada Secretariat considers the training costs associated with non-imperative staffing to be sufficient incentive to avoid resorting to it unnecessarily and to staff positions on an imperative basis whenever possible.

- *Use of generic work descriptions*

The Office of the Chief Human Resources Officer encourages the use of standardized work descriptions, which results in significant economies of scale. Although there are links between the classification of positions and the official languages requirements for positions, the Treasury Board's *Directive on Classification* and *Directive on Classification Oversight* do not address the language requirements of positions, as this is outside the mandate of the classification program. Therefore, determining the language requirements of a position is not included in the job evaluation standards. Therefore, standardizing job descriptions does not automatically lead to standardizing language requirements, and managers are still responsible for establishing the appropriate language requirements for positions.

Positions in the CS (Computer Systems) group are the subject of numerous section 91 complaints, and there is often a considerable gap between the duties described in the generic work description and the duties performed by the incumbent of the position. The Treasury Board of Canada Secretariat stated that the problem had been brought to its attention and that institutions had told them of the difficulties they were having recruiting bilingual employees with the technical skills for this type of position. The Office of the

Chief Human Resources Officer and the Office of the Chief Information Officer have partnered to update a set of relevant work descriptions. The Secretariat expects organizations in the core public administration that adopt these work descriptions to ensure that they are used properly, as they form the basis for establishing or reviewing the language requirements of positions.

Nonetheless, the Treasury Board of Canada Secretariat stated that much of the work of incumbents of CS-03 positions is to provide advice to clients and, at times, to supervise employees, the latter of which requires the incumbent to be bilingual when supervising a bilingual team (one that includes a Bilingual position or one in which at least one member's preferred language is French and at least one member's preferred language is English).

- *Language requirements within virtual work teams*

When asked about the issue of the growing presence of virtual work teams, where employees from different regions may be called upon to work together or be supervised by a manager located in a different region, the Treasury Board of Canada Secretariat stated that although the workplace is constantly evolving, it should not affect federal employees' right to be supervised in the official language of their choice. In other words, geographic proximity (or distance) between a supervisor and an employee is not a relevant factor.

- *Concept of sufficient bilingual capacity in Treasury Board instruments*

The Treasury Board of Canada Secretariat emphasized that an institution can have bilingual and unilingual employees as long as it respects the principle of institutional bilingualism. However, the Secretariat leaves it to the institutions' discretion to determine, on a case-by-case basis, what constitutes sufficient bilingual capacity, based on the definition of bilingual capacity in Appendix 2 of the *Directive on Official Languages for Communications and Services*.

- *Unfair competition between institutions*

The Treasury Board of Canada Secretariat said that it had heard about the problem of competition between institutions resulting from inconsistent language requirements between positions, but that no analysis of the issue had been conducted.

- *Follow-up status of the recommendations contained in the Clerk of the Privy Council's 2017 report on language of work*

The Treasury Board of Canada Secretariat stated that since 2011–2012 there has been an increase in the number of supervisor positions identified as Bilingual with a CBC/CBC linguistic profile. No review of existing policies on this subject has yet been conducted, and the Secretariat is currently in the process of consulting with federal institutions to evaluate the potential impact of raising the minimum second-language requirements for Bilingual supervisory positions in designated bilingual regions. It is estimated that this change would affect approximately 9,000 positions. Although institutions indicated their overall support for this proposal, they also raised a number of issues. The Secretariat is therefore considering a middle-ground approach that would make it possible to raise

second-language requirements while mitigating the impact of the issues raised by federal institutions.

The Treasury Board of Canada Secretariat has also initiated a review of the official languages qualification standards.

5. Findings: Significant gaps in the Treasury Board of Canada Secretariat's framework for federal institutions

Several findings can be drawn from the above information regarding the Treasury Board's role in implementing section 91 of the Act.

First, the information provided by the Treasury Board of Canada Secretariat shows that it considers the implementation of section 91 of the Act to be the responsibility of institutions, specifically deputy heads.

While the Treasury Board is fulfilling its responsibility to provide guidance to departments and Crown corporations—for example, through the Policy, the Directive and the Standards—its monitoring of how they comply with these instruments is superficial. Of course, the statistical data compiled as part of the *Annual Report on Official Languages* can provide an overview of some of the factors related to official languages in the public service. However, the Office of the Commissioner finds it difficult to see how this type of data can provide anything more than a quantitative overview of a problem that is primarily qualitative. For example, the number of Bilingual positions in the public service does not matter if the appropriate positions are not identified as Bilingual. On the contrary, this could be counterproductive and affect the chances of advancement for unilingual employees. The same can be said of positions that are incorrectly identified as English Essential or French Essential in designated bilingual regions.

The reporting exercise institutions undertake is primarily a self-assessment exercise. It is hard for the Commissioner to see how this information can give the Treasury Board an accurate and complete picture of the issue, particularly since this self-assessment exercise is based on the assumption that institutions understand the fundamental concepts involved in assessing the language requirements of positions, an assumption that has been brought into question in this report. However, it must be acknowledged that requesting supporting documents or evidence and validating results using other data sources are practices that can add a degree of reliability to the exercise and increase analytical perspectives.

It would be wrong to say that the Treasury Board lacks leadership when it comes to implementing section 91 of the Act. Based on the information reported by the Treasury Board of Canada Secretariat, the institution oversees many multilateral initiatives—such as forums, meetings and workshops—with federal institutions and Crown corporations to ensure cooperation in resolving various staffing problems on a case-by-case basis.

It must also be borne in mind that the Treasury Board has the arduous task of translating legal, often abstract, obligations into broad frameworks that apply to many institutions with different situations and operational needs. In addition, it has to reconcile numerous factors besides official languages, such as cultural diversity, the duty to accommodate, technical skills, advancement opportunities, labour shortages, the need for staffing

flexibility, and sound fiscal management. It is an important responsibility that cannot be ignored.

With respect to the need for the flexibility, pragmatism and balance cited by the Treasury Board of Canada Secretariat when establishing language requirements, it seems that these needs led the Treasury Board to adopt a less restrictive framework for the language requirements of positions in institutions. The Secretariat also cites this less restrictive framework for other issues, including non-imperative staffing, the challenges that come with using generic work descriptions, and the concept of sufficient bilingual capacity.

Flexibility, pragmatism and balance are principles that must be encouraged as long as they do not impede the achievement of the Act's objectives, which are to ensure that the language rights of the public and of public servants are respected.

Our analysis showed, however, that the implementation of section 91 of the Act is currently incomplete and inconsistent throughout the public service. Given the widespread problem with establishing the language requirements of positions, and given the information we obtained during our interviews with the institutions, it is clear that there are shortcomings in the policies, standards and tools—which date back to 2012—that the Treasury Board provides to institutions to support them and help them meet their obligations.

iii. Public Service Commission of Canada

As stated in section 1 of this report, the Public Service Commission is responsible for ensuring compliance with the *Public Service Employment Act* and for “promoting and safeguarding a merit-based, representative and non-partisan public service that serves all Canadians, in collaboration with stakeholders.”¹⁰ Because of this staffing responsibility, which is closely tied to establishing the language requirements of positions, it was important to meet with the Public Service Commission to learn more about its role.

The following information was provided during two meetings: one with a representative from the Services and Business Development Sector, and the other with representatives from the Policy and Strategic Directions Directorate.

1. Responsibility for ensuring the integrity of the staffing system

At first, the representatives at both meetings told us that deputy heads are responsible for everything related to staffing and for establishing the staffing frameworks for their institutions, including anything to do with hiring authority. Deputy heads are also required to send their framework to the Public Service Commission and to conduct their own internal monitoring.

However, both the Treasury Board and the deputy heads are responsible for classifying positions and establishing their language requirements and essential qualifications. Although the Public Service Commission's authority to make appointments is delegated

¹⁰ Public Service Commission of Canada, [Home page](#), Gatineau, 2020. Online version accessed August 1, 2020.

to the deputy heads, the authority to establish the essential qualifications for a position is not. The deputy heads and the employer are by right responsible for establishing the essential qualifications of a position. This authority is therefore not delegated. The Public Service Commission's responsibility in this regard is limited to assessing employees' and candidates' language proficiency.

Federal institutions have been subject to the New Direction in Staffing since April 1, 2016, the objective of which is to maximize the delegation of the authorities in the *Public Service Employment Act* to lower levels.

2. Support for institutions

The President of the Public Service Commission meets all deputy heads when they take up their positions to discuss delegation and to provide an overview of the important information about their institution in order to ensure that they understand their responsibilities in terms of staffing.

The Public Service Commission also sometimes provides training for managers to explain the New Direction in Staffing and to work with federal institutions on this issue. The training used to be mandatory for managers, but now the Public Service Commission lets the deputy heads decide what training is needed.

The Public Service Commission also has teams of staffing support advisors who provide staffing guidance and support to institutions. These advisors also provide information sessions to discuss staffing-related topics such as the New Direction in Staffing, flexibility in staffing or other issues specific to institutions. The Public Service Commission does not, however, help institutions with interpretation, especially when it comes to establishing the language requirements of positions. Although the support advisors can provide anecdotal advice—when, for example, an institution makes the common error of mistaking the Public Service Commission for the Treasury Board of Canada Secretariat—they usually redirect any queries on language requirements to the Secretariat.

The Public Service Commission works with the School of Public Service and the Treasury Board of Canada Secretariat to develop human resources training that addressed staffing in general. The Public Service Commission also works with the Secretariat in guiding, coordinating and developing policies for federal institutions.

3. Monitoring mechanisms

Under the *Appointment Delegation and Accountability Instrument from the Public Service Commission to Deputy Heads*, deputy heads are required to monitor their staffing systems and ensure that regulations are followed. Every federal institution has a staffing support officer, who becomes the department's subject matter expert.

The Public Service Commission also monitors the integrity of the staffing system through several mechanisms. In the past, this monitoring seemed to be based on cyclical organizational audits, but now it is a system-wide process that uses a variety of mechanisms.

- *Investigations*

The Public Service Commission conducts investigations to ensure the integrity of the staffing system. This is a discretionary authority that is exercised either upon request from an institution or a candidate, or on its own initiative. Deputy heads can also conduct internal investigations without the Public Service Commission's involvement.

Investigations are conducted to determine whether there was an error, omission or improper conduct—including cases of fraud or favouritism—that affected a selection process and had an impact on the selection of the appointed person.

- *System-wide staffing audits*

System-wide staffing audits are another monitoring mechanism used by the Public Service Commission, which recently just completed one across the public service in December 2018. During these staffing audits, the Public Service Commission verifies whether institutions have a framework in place and are meeting the minimum requirements of its delegation instrument with respect to managers, executives, assistant deputy ministers, and others. The Public Service Commission does not, however, assess the quality of the training provided by institutions because that falls under the responsibility of the School of Public Service.

- *Other monitoring mechanisms*

Horizontal risk-based audits and biennial staffing and non-partisanship surveys are other mechanisms the Public Service Commission uses to monitor the staffing system. In addition, every five years, deputy heads are required to conduct assessments of their systems and report any issues to the Public Service Commission. All these mechanisms provide the Public Service Commission with a regular and ongoing overview of the entire staffing system.

The Public Service Commission itself must report annually to Parliament on the integrity of the staffing system. For the report, it compiles and provides statistics on such things as the number of Bilingual positions staffed during the year, the number of incumbents who meet the language requirements of their positions, and the number of appointments made on a non-imperative basis.

The Public Service Commission also gathers data during selection processes, including those conducted as part of the Federal Student Work Experience Program, such as the self-reported language proficiency of candidates. In conjunction with the Office of the Chief Human Resources Officer, information on the first official language of incumbents is also gathered.

The Public Service Commission does not monitor the use of non-imperative staffing. It pointed out that the Treasury Board, as the employer, makes the rules on the use of non-imperative staffing. The Public Service Commission is responsible only for monitoring exemptions requested under the *Public Service Official Languages Exclusion Approval Order* and compliance with language training time frames. The Treasury Board is responsible for determining whether the use of non-imperative staffing was justified. Thus, institutions report to the Public Service Commission annually on the use of the *Public Service Official Languages Exclusion Approval Order* but not on the rationale behind it.

4. Other issues noted

During the interviews, the Public Service Commission talked about certain observable staffing issues, including some involving the implementation of section 91 of the Act. For example, they stated that people often confuse the language requirements of a position with the employee's second official language skills. They also talked about the results of the public service staffing audit in 2018, which showed that staffing files were poorly documented in general, and said that although deputy heads are required to provide the Public Service Commission with their staffing frameworks, they do not always do so.

5. Findings: Limited responsibility

Based on the information provided by the Public Service Commission, its responsibility is limited to the appointment process in the public service, which includes safeguarding the integrity of that process and ensuring compliance with the merit principle and with the delegation frameworks in place in the institutions. In terms of the language requirements of positions, the Public Service Commission only assesses candidates' second-language skills and ensures that the language requirements established by the deputy head and the employer—just like any other essential qualification for the position—are met by the individuals who are hired.

Federal institutions are therefore responsible for establishing the language requirements and the other essential qualifications. It is also important to note that, although the Public Service Commission's authority to make appointments is delegated to the deputy heads, the authority to establish the essential qualifications of a position is not, because that responsibility rightfully belongs to the deputy heads and the employer, as confirmed in sections 30 and 31 of the *Public Service Employment Act*.

The Public Service Commission is of the opinion that the conditions for the use of non-imperative staffing are governed by the rules, including the Directive, established by the Treasury Board as the employer, and this is reasonable. The Public Service Commission's role is limited to ensuring that the conditions set out in the *Public Service Official Languages Exclusion Approval Order* and in the *Public Service Official Languages Appointment Regulations* are met. In other words, its job is to ensure that the incumbent signed an agreement to become bilingual and that the incumbent attained the required level of bilingualism in the agreed-upon time frame.

Therefore, the Public Service Commission cannot and should not be criticized for not providing the proper support for processes that do not come under its jurisdiction. That said, the Commissioner strongly encourages the Public Service Commission to take note of the issue and its importance, and to use all reasonable means at its disposal, given its mandate, to monitor federal institutions' implementation of the Act and to support the Treasury Board and the deputy heads in their respective roles and responsibilities.

iv. Canada School of Public Service

Given the School of Public Service's roles and responsibilities, we decided that an interview with the organization would help us to learn more about the efforts made to

train federal public servants, and managers in particular, to ensure that they have the proper knowledge and skills they need to objectively establish the language requirements of positions.

The School of Public Service used the opportunity to clarify some important concepts relating to training for public servants. Under the *Directive on Mandatory Training*, the Treasury Board can impose training requirements that are deemed obligatory. This is what is known as “mandatory training.” For example, classification experts must take mandatory training to become classification officers. Deputy heads of institutions also have the authority to determine what training their employees, groups of employees or functional communities are required to take. This is referred to as “required courses.” All other training falls under the category of optional courses or voluntary training.

1. Courses on section 91 of the Act

The School of Public Service offers four training products with content on section 91 of the Act. They are all available on the GCcampus platform.

– *Official Languages Series (P312)*

This online course is for managers responsible for official languages programs and for human resources advisors. It covers material such as responsibilities with regard to language-of-work obligations, the steps to take to establish the linguistic identification of positions, and the conditions for staffing Bilingual positions. The course is not mandatory or required, and not many people take it. Participants are mainly official language representatives or specialists.

An analysis of the documentation submitted by the School of Public Service showed that this course is by far the most comprehensive among the courses offered by the School on assessing the language requirements of positions. It refers to the relevant Treasury Board instruments and tools and discusses topics like when to review the language requirements of a position, how to determine whether bilingualism is required for a position, what types of services can justify the need for bilingualism (e.g., services to the public, central services), and how to establish the linguistic profile and the levels of complexity of second-language skills.

– *Authority Delegation Training (G110) – Module 7: Human Resources Responsibilities*

This course is mandatory training for managers, directors, directors general and assistant deputy ministers. It is the most important course for managers in the federal public service. Every year approximately 10,000 managers take the course, and they are required to take it every five years.

The objectives of the course are to identify the human resources responsibilities of managers and employees, including those that involve official languages, and to define managers’ responsibilities when it comes to employees’ language-of-work rights. Module 7 covers human resources and classification topics, as well as section 91 of the Act, in just a few slides. It is therefore merely an overview.

A review of the documentation provided on this course showed that the course essentially summarizes the content of the Directive, and refers to the Standards and to the Treasury Board's *Determining the Linguistic Profile of Bilingual Positions* tool.

- *Organizational Design and Classification: Tools and Methods – Part 1A (P911), and Introduction to Organization and Classification (P930)*

The P911 course is for classification specialists. A review of the facilitator and participant manuals showed that the content on section 91 of the Act is limited to a few lines. The P930 course is for managers and introduces them to the classification basics. The course is required only in certain institutions.

- *Staffing: A Resourcing Tool for Managers (P901)*

This is the most popular in-class course, especially with employees at the EX-minus-one level, and is a required course in several federal institutions. Several topics are covered in a general manner, and emphasis is placed on the Act. Reference is made to section 91 of the Act. A review of the documentation on this course submitted by the School of Public Service, including the instructor and participant manuals, showed that although the language requirements of a position are referenced several times, the topic is mainly addressed from the standpoint of the language skills required of candidates for a position, and how they must be assessed. The topic of how to assess the language requirements of a position is not really addressed, except in a very vague way.

The course does, however, contain a very relevant statement about language requirements: that language requirements can only ever be an essential qualification for a position, never an asset qualification. This eliminates the possibility of using a person's official language proficiency to make an arbitrary selection decision.

2. Course design and evaluation

The School of Public Service stated that its learning experts work together with policy centres such as the Treasury Board, the Public Service Commission and the Office of the Chief Human Resources Officer. The School also has partnership agreements with these organizations. The School explained that it does not assess people with respect to its training offerings, but that it does assess user satisfaction and the application of courses in the workplace to ensure monitoring of course quality and the need for any changes.

3. Findings: Gaps in the training on implementing section 91 of the Act

Based on the above information, a few conclusions can be made about the training on implementing section 91 of the Act. A review of the School of Public Service's training products showed that only one course that is currently being offered, the Official Languages Series (P312), actually covers the topic, and that the other courses only briefly touch on it.

Although this course is for managers responsible for official languages programs and for human resources advisors, it is not mandatory or required training. There is therefore no requirement for people involved in assessing language requirements to take this course.

Furthermore, as the School of Public Service stated, few people take it except for official languages personnel.

Therefore, the Commissioner is of the opinion that there are currently significant gaps in the training for managers, for those responsible for official language programs, and for human resources advisors in terms of assessing the language requirements of positions.

3. CONCLUSIONS

Assessing the language requirements of positions in the public service is an important responsibility that federal institutions—and managers, in particular—have to shoulder, and it requires the same level of diligence and effort as any other essential qualification of the position.

When the language requirements of positions are not assessed properly, the result is a workforce that is insufficiently bilingual to fully meet the institution's obligations to the public. It also invariably leads to a work environment that is not conducive to the effective use of both official languages and where one language, at best, is accommodated, as is currently often the case.

This is but one aspect of a larger problem concerning linguistic duality in the public service. The Clerk of the Privy Council's comprehensive 2017 study of language of work in the federal public service details the weaknesses in federal institutions' implementation of Part V of the Act, including the fact that some managers cannot supervise their employees in the employees' preferred official language, a clear link to the Commissioner's own findings in this analysis. More recently, the Commissioner's report, *A Matter of Respect and Safety: The Impact of Emergency Situations on Official Languages*, presents an in-depth analysis of the major shortcomings in federal institutions' ability to meet their language obligations with regard to the provision of communications and services to the public during emergency situations involving public health and safety.

However, as this analysis has shown, there is a significant and pervasive gap between what should be done and what is being done in institutions in this regard, particularly in the National Capital Region and in the other designated bilingual regions. Furthermore, the fact that most section 91 complaints involve positions in the National Capital Region, taken together with the findings of the investigations into those complaints, shows that not only is language of work not respected at the very heart of Canada's public service, neither is the equal status of both official languages. This reflects badly on the federal public service's commitment to official languages.

Although there are many factors involved in this problem, our review of the investigations and our interviews with institutions showed that the shortcomings in the system governing the assessment of language requirements make it a systemic problem. There is a disparity in governance, internal directives, tools and control mechanisms in place in federal institutions that reflects the disparity in the understanding and operationalization of both section 91 of the Act and the Treasury Board's rules. And then there is the general tendency for institutions not to provide managers with internal training on section 91 of the Act, relying instead on the training provided by the School of Public Service. Added to that is the fact that the only training the School offers that effectively addresses the issue of the language requirements of positions is not mandatory, is not considered to be essential, and is taken mainly by official languages personnel and only rarely by managers.

Our analysis also showed that managers are generally not required to consult with the institution's official languages personnel when establishing the language requirements of a position, despite the fact that official languages personnel have the most extensive

skills and knowledge in this area. And even if they do consult with their official languages personnel, managers do not always follow the advice they are given.

It should be noted that gaps were also found in the support provided by the Treasury Board in terms of policies, standards and tools available to help institutions implement section 91 of the Act consistently and effectively.

We would like to draw attention to two other important factors reported by several of the institutions we interviewed. The first is the lack of awareness among employees and managers about the reason for language requirements, about public servants' language-of-work rights under Part V of the Act and about the public's language rights under Part IV of the Act. The second is the difficulty institutions are having finding a skilled bilingual workforce, particularly when it comes to specialized or technical positions.

4. RECOMMENDATIONS

Unless concrete measures are taken to address the causes of the systemic issues affecting the effective implementation of section 91 of the Act, the Commissioner is convinced that the problem will continue. To address this systemic problem, which affects Canada's public service and federal institutions' ability to meet their obligations under parts IV and V of the Act, the Commissioner has decided that it is time to make some recommendations for both the Treasury Board and for the deputy heads of federal institutions responsible for implementing the Act.

The Commissioner of Official Languages of Canada recommends that within two years of the date of this report, the Treasury Board of Canada:

- review its policies and tools on establishing the language requirements of positions, taking into account the issues raised in this report and the needs expressed by the federal institutions; and
- review, together with the Canada School of Public Service, the courses the latter provides on section 91 of the *Official Languages Act* to ensure that the training is sufficient (number and content of courses, and target audience) according to the needs identified in this report.

The Commissioner of Official Languages of Canada also recommends that within two years of the date of this report, federal institutions:

- adopt internal policies, procedures and tools, or review those already in place, on establishing the language requirements of positions, taking into account the issues raised in this report;
- implement a control mechanism to ensure that managers understand the policies, follow the procedures, use the tools and consult their official languages personnel when establishing the language requirements of positions;
- conduct regular assessments of the language requirements of positions and of the policies, procedures and tools, and remedy any shortcomings;
- ensure that official languages personnel and delegated managers take the appropriate training; and
- develop and implement a plan to increase awareness among managers and employees of section 91 of the *Official Languages Act*.