

Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary

HIGHLIGHTS

Background

- The matter of access to justice in the superior courts requires action by both the federal government and the provincial governments, the latter being responsible for operating these courts and the former for appointing the judges.
- For the two million Canadians who are members of Anglophone or Francophone minority communities to have access—**at all times and without additional cost**—to judges with the language skills necessary to hear cases in the minority language, the federal Minister of Justice must appoint an appropriate number of bilingual judges.
- In a criminal case, Canadians are entitled to a preliminary hearing and a trial in the official language of their choice, regardless of where in the country the case will be heard.
- In the superior courts, approximately 2/3 of the judges (648 out of a total of 1,017) hear cases in provinces and territories that require them to respect the language rights of citizens in non-criminal cases, including in the areas of family law, wills and estates law, contract and commercial law, and bankruptcy law.

Scope of the study

- The purpose of the study was to determine the extent to which the process for appointing judges to superior courts guarantees an appropriate number of bilingual judges. Its aim was not to determine whether there is a shortage of bilingual judges.
- The study deals solely with the bilingual capacity of judges sitting in “superior courts,” meaning (1) superior trial courts, the names of which vary across Canada and include courts of Queen’s Bench, provincial supreme courts and provincial superior courts; and (2) courts of appeal. The study does not examine the bilingual capacity of the Supreme Court of Canada.
- The expression “bilingual capacity of the judiciary” is defined as the presence of an appropriate number of bilingual judges in the superior courts, in other words, judges with the necessary language skills to preside over hearings in the minority official language.
- To get a sense of the challenges related to the bilingual capacity of superior court judges on a national scale, the study looked at the situation in the superior courts of six provinces: Ontario, Quebec, Manitoba, Alberta, New Brunswick and Nova Scotia.

Methodology

- In support of the study, the Office of the Commissioner of Official Languages formed an advisory committee of representatives from the legal community, including the Canadian Judicial Council, the Canadian Bar Association, the Barreau du Québec, the Fédération des associations des juristes d'expression française de common law and the Centre canadien de français juridique.
- The study is based on quantitative and qualitative information gathered through on-line surveys of members of French-language jurists' associations and a sample of members of the Quebec bar, along with interviews designed to elicit more detail on the results of the survey.

Findings

- Consultations during the study showed that the judicial appointment process does not guarantee the presence of an appropriate number of judges with the necessary language skills if the superior courts are to respect the language rights of Canadians at all times.
- This finding is based on three key observations:
 - 1) There is no objective analysis of needs in terms of access to the superior courts in both official languages in the different districts and regions of the country.
 - 2) There is no coordinated action on the part of the federal Minister of Justice, his provincial and territorial counterparts and the chief justices of the superior courts to establish a process that would ensure, at all times, that an appropriate number of bilingual judges are appointed.
 - 3) The evaluation of superior court judicial candidates does not allow for an objective verification of the language skills of candidates who identify themselves as being able to preside over proceedings in their second language.

Recommendations

- The study contains 10 recommendations that are addressed primarily to the federal Minister of Justice, but also to his provincial and territorial counterparts as well as the chief justices of the superior courts. The Commissioner of Official Languages **recommends that the federal Minister of Justice:**
 - 1) Take measures, by September 1, 2014, in collaboration with his provincial and territorial counterparts, to ensure appropriate bilingual capacity in the judiciary of Canada's superior courts at all times;

- 2) Establish, together with the attorneys general and the chief justices of superior courts of each province and territory, a memorandum of understanding to:
 - set the terms of this collaborative approach;
 - adopt a common definition of the level of language skills required of bilingual judges so that they can preside over proceedings in their second language;
 - identify the appropriate number of bilingual judges and/or designated bilingual positions;
- 3) Encourage the attorneys general of each province and territory to initiate a consultation process with the judiciary and the bar, with the participation of the French-speaking common law jurists' association or the legal community of the linguistic minority population, to take into consideration their point of view on the appropriate number of bilingual judges or designated bilingual positions;
- 4) Re-evaluate the bilingual capacity of the superior courts, periodically or when changes occur that are likely to have an impact on access to justice in the minority language, together with the attorneys general and chief justices of the superior courts of each province and territory;
- 5) Give the Office of the Commissioner for Federal Judicial Affairs the mandate of implementing a process to systematically, independently and objectively evaluate the language skills of all candidates who identified the level of their language skills on their application form.