

Minister of Justice  
and Attorney General of Canada



Ministre de la Justice  
et procureur général du Canada

The Honourable / L'honorable Jody Wilson-Raybould, P.C., Q.C., M.P. / c.p., c.r., députée  
Ottawa, Canada K1A 0H8

The Honourable Denis Paradis  
Chair  
Standing Committee on Official Languages  
Ottawa, Ontario  
K1A 0A6

**MAR 29 2018**

Dear Mr. Chair,

Pursuant to Standing Order 109 of the House of Commons, and on behalf of the Government of Canada, I am pleased to present the Government's response to the report of the Standing Committee on Official Languages (the Committee) entitled "Ensuring Justice is Done in Both Official Languages" (the Report).

The Government would like to thank the Committee for its diligent work on this important issue and for its helpful recommendations. As the Committee notes, the Report is the culmination of a study launched in early 2017 on access to justice in both official languages. It represents the Committee's analysis of the evidence and submissions of dozens of knowledgeable witnesses, appearing either as individuals or as representatives of various organizations, who are interested in furthering matters relevant to the justice system and the ability of all Canadians to participate in it, regardless of where they live or what official language they speak.

The Government lauds the engagement and commitment of all Committee members. Your work very much embodies the spirit of linguistic duality that is one of Canada's animating features. The Committee's recommendations span a broad spectrum of stakeholders and areas of responsibility – from legislative amendments to language testing, from translation to legal proceedings. This implicates many actors, including me, my provincial and territorial counterparts, chief justices and their courts, the Commissioner for Federal Judicial Affairs, the Department of Justice and the Courts Administration Service. This demonstrates the degree to which ensuring access to justice in both official languages is a shared enterprise.

The Government is therefore grateful for the variety of perspectives represented in the Report. The testimony of the witnesses was thoughtful. They spoke from their diverse knowledge bases and experiences as members or observers of official language minority communities. As evidenced in the Government's Action Plan on Enhancing the Bilingual Capacity of the Superior Court Judiciary announced on September 25, 2017 (Action Plan), the Government shares the Committee's overall vision of equal access to justice in both official languages. In addition, Budget 2018 proposed increased funding for the Access to Justice in Both Official Languages Support Fund (an additional \$10.0 million over five years, starting in 2018-2019, and \$2.0

Canada<sup>ca</sup>

million per year ongoing). This represents a 25% increase in funding for measures to support access to justice in the official language of one's choice.

The Government will respond to the Committee's recommendations in order, referring to linkages and overlap between them where appropriate. Moreover, given the overlap between the Committee's recommendations and the Action Plan, the Government will start by discussing the Action Plan in order to inform this response.

### **Government's Action Plan on Enhancing the Bilingual Capacity of the Superior Court Judiciary**

On September 25, 2017, I announced the Action Plan on behalf of the Government of Canada. This multi-faceted approach is designed to ensure that people dealing with Canada's court system have improved access to justice in both of Canada's official languages.

These measures build on the reforms to the superior courts appointment process introduced in October 2016, which were aimed at reinforcing public confidence through openness, increased transparency and accountability, and by promoting diversity and gender balance on the bench. Among the reforms was a requirement for greater detail regarding applicants' self-identified bilingual capacity, the possibility of language assessments, and a new reporting requirement. The Action Plan builds on those changes and takes important new steps in the areas of information gathering, training, and collaboration for and among many stakeholders.

The seven-point action plan includes strategies for enhanced tools to verify and assess the bilingual capacity of judicial applicants, examine language training for current members of the judiciary, and confirmation of my commitment, as the Minister of Justice, to collaborative consultations with Chief Justices with respect to the bilingual capacity needs of their courts. The Government is also committed to consulting with provinces and territories on relevant bilingualism initiatives. The seven point Action Plan commits to the following:

1. The assessment of candidates for superior court appointment will be enhanced in two ways:
  - Questionnaires will include an additional two questions for candidates who have self-identified as having bilingual capacity.
  - The Judicial Advisory Committees will be directed to verify the answers to these questions to ensure they align with the candidates' declared language ability. The Commissioner for Federal Judicial Affairs will also be authorized and encouraged to conduct language assessments and/or spot checks.
2. The CFJA has been asked to develop recommendations for the Minister of Justice for an **assessment tool** that could be implemented in the future to objectively assess **all candidates** who self-identify as having bilingual capacity, with a view to identifying relative levels of proficiency. The CFJA's recommendations will address any additional resources required to operationalize the assessment tool.

3. The CFJA is **examining the delivery of existing language programs**, including enhancement of the **applied component** focused on courtroom-based skills.
4. The CFJA is making available **training and information to JACs on linguistic rights of litigants**. The Department is providing support as appropriate.
5. In my capacity as the Minister of Justice, I have asked the Canadian Judicial Council to develop **training modules for federally-appointed judges on the linguistic rights of litigants**, to be delivered through the National Judicial Institute.
6. The Department is working with interested jurisdictions and the courts to develop the **means for assessing existing bilingual capacity of superior courts**.
7. The Department is **consulting with provinces and territories** to examine possible ways of assessing the needs of Canadians in accessing superior courts in both official languages.

The Government is pleased to note that this approach addresses many of the recommendations made by the Commissioner of Official Languages in his 2013 report, and many of the recommendations made by this Committee in its Report. The intersectionality between the Action Plan and the Committee's recommendations is analyzed in more detail below.

#### **Recommendation 1**

The Government is fundamentally committed to appointing only functionally bilingual judges to the Supreme Court, so that litigants appearing before Canada's highest court can present their arguments in the official language of their choice, confident they will be understood without the need for interpretation or translation.

The Government has delivered on this commitment. The Government introduced a functional bilingualism requirement when it reformed the Supreme Court appointment process. Two appointments have taken place under the new process since our Government came into office. Jurists were tested on their bilingual capacity by the Independent Advisory Board for Supreme Court of Canada Judicial Appointments. The Independent Advisory Board provided the Prime Minister with a shortlist of functionally bilingual candidates. Justices Malcolm Rowe and Sheilah Martin, the two appointees selected under the new process, made public appearances in which parliamentarians were able to ask questions about their official language capacity and converse with them in both official languages.

As the Committee heard, legislative amendments would raise constitutional questions surrounding the capacity of the Parliament of Canada to amend the *Supreme Court Act*. The Government remains committed to improving Canadians' day-to-day access to the courts in the official language of their choice. As discussed further below, the Government is making efforts to enhance the bilingual capacity of superior courts across Canada. This will serve both to

broaden the pool of judges from which Supreme Court of Canada judges are frequently drawn, and to increase access to justice in both official languages for all Canadians, whether their legal issue brings them to their local court house or to the Supreme Court of Canada.

The Government takes this opportunity to reaffirm its commitment to appoint only functionally bilingual judges to the Supreme Court of Canada. This commitment sends a strong message to those who may aspire to the Supreme Court of Canada that functional ability in both official languages should be an important part of their professional development.

### **Recommendation 2**

Given the importance of the cases they hear, the Supreme Court of Canada's nine judges often all sit together; an institutional requirement of bilingualism could thus effectively translate into an individual eligibility requirement. That said, the Government remains open to considering ways to ensure the bilingual capacity of the Supreme Court of Canada on an ongoing basis. It will determine its position on how best to achieve this goal in the context of specific proposals. In the meantime, the Government will continue to adhere to its policy of ensuring that those appointed to the Supreme Court are functionally bilingual, and otherwise reiterates its observations in relation to Recommendation 1.

### **Recommendation 3**

At the heart of this recommendation is the objective of ensuring a sufficient number of superior court judges who possess the linguistic capacity necessary to hear the matters Canadians bring before them in the official language of their choice. The Government fully shares the Committee's view as to the importance of achieving equal access to justice in both official languages. In making judicial appointments, the Government must consider the needs of the court and the community which it serves. Relevant to this analysis is the court's current official language capacity, the subject matter needs of the court, and the needs of the community. This is why, after careful consideration, the Government released the seven point Action Plan.

The Committee's recommendation that certain judicial positions be designated as bilingual echoes the approach adopted for the federal public service, and for provincially-appointed judges in some jurisdictions. The Government observes that the number and geographical scope of judicial appointments made to provincial and territorial courts are far smaller than those within the authority of the federal government. The Government respectfully suggests that while designating bilingual positions may be effective for a provincial court or another organizational setting, applying that approach to superior courts would not necessarily achieve the policy goal and would create delays in the judicial appointment process. Nor would it be consistent with the vacancy-by-vacancy basis upon which judicial appointments are made at the federal level.

Currently, I carry out robust consultations with chief justices, my provincial and territorial counterparts and local law societies, in the context of each individual appointment. This confirms the language needs of the court at that particular time and allows for maximum alignment between a judge's skills and the court's needs. In the context of these consultations,

chief justices and representatives of official language minority communities (OLMC) request the appointment of bilingual candidates where needed. This, combined with chief justices' power of assignment, allows for the flexibility necessary to respond to particular needs, regions, and cases. This is preferable to a system of legislated designated bilingual positions that would fix a number based on a specific point in time, but would limit a court's ability to address the actual needs of litigants over time.

On the question of judicial candidates' language proficiency, Points 2 and 3 of the Action Plan specifically ask the Commissioner for Federal Judicial Affairs to examine existing language practices and programs, and develop recommendations for necessary adjustments, including recommendations regarding an objective assessment tool. Applicants will be required to demonstrate their bilingual capacity by (1) disclosing matters litigated in their second official language in the Questionnaire; and (2) applicants will be called upon, at random, to complete language testing in their second official language. The results of these tests will be provided to the Judicial Advisory Committees and subsequently shared with me should the candidate be recommended or highly recommended.

These changes to the judicial appointment process complement those introduced in October 2016. At that time, four questions were added to the Questionnaire that must be answered by anyone who indicates they possess linguistic capacity in both official languages. Applicants must disclose their competency in the four identified abilities (reading, discussing, conversing, and comprehension). In October 2017, in response to the Action Plan, two questions were added to direct candidates to specify whether, without further training, they are able to (1) write decisions and (2) conduct hearings in both French and English. In addition, candidates are advised that the Commissioner for Federal Judicial Affairs may conduct random verifications and assessments of candidates' language proficiency, as contemplated in Point 1 of the Action Plan.

In addition, the bilingual capacity of individual judges is being included in the publication of excerpts from judicial Questionnaires that accompany judicial appointments announcements.

The Government affirms its ongoing engagement in and commitment to such consultation and language testing. I note our successful track record to date, a track record which predates the release of the Government's Action Plan. Since introducing reforms to the judicial application process in October 2016, the Government has appointed over 100 judges across the country. Fully 33 percent indicated that they were able to read court materials, discuss legal matters, converse with counsel, and understand oral submissions in both official languages. This number will increase over time as bilingual jurists are encouraged to apply under the new judicial appointment process.

In addition to the appointment of bilingual *puisne* justices to our superior courts, our Government has also appointed bilingual administrative justices. The recent appointment of the Honourable Mary T. Moreau as Chief Justice of the Alberta Court of Queen's Bench on October 17, 2016 further demonstrates the Government's commitment to bilingual capacity.

Chief Justice Moreau has presided over French and bilingual trials throughout her judicial career and has led a National Judicial Institute project responsible for the creation of an electronic bench book for judges on the language rights of the accused. Chief Justice Wagner, appointed to the Supreme Court of Canada, is also known for his achievements as a jurist in both official languages.

In light of these developments, and in recognition of the Commissioner for Federal Judicial Affairs' ongoing activities relevant to Recommendation 3, the Government regards it as premature to consider adopting the Committee's proposal to legislate a language testing requirement on the Office of the Commissioner. The Commissioner remains seized of this matter and the Government looks forward to receiving his recommendations.

#### **Recommendation 4**

In Point 2 of the Action Plan, the Government specifically mandated the Commissioner for Federal Judicial Affairs to provide recommendations for an assessment tool to objectively evaluate judicial candidates. The Government is confident that the Commissioner's knowledge and expertise in this area will inform his recommendations based on the full array of factors that are relevant to the specific context of the superior court judicial appointments process. The Government agrees with the Committee that this is an important element of the process and, as noted in the Action Plan, looks forward to receiving the Commissioner's recommendations in this regard.

#### **Recommendation 5**

The Committee asks that the Department of Justice implement directions 1 and 2 and the initiatives proposed by the Réseau national de formation en justice (RNFJ) in its recent report.<sup>1</sup> The Government recognizes the importance of increasing the capacity of the justice system and its stakeholders to offer services in both official languages. The Department of Justice works closely with OLMC representatives and organizations, such as the RNFJ, to ensure that they have the means to develop projects and initiatives aimed at improving access to justice in both official languages. Specifically, the Department of Justice's Access to Justice in Both Official Languages Support Fund provides financial resources to OLMC organizations and provinces and territories to develop legal and linguistic tools, workshops, and training to improve the language proficiency of justice system stakeholders, and to provide public legal education and information in the minority official language. As mentioned, a 25% increase in funding for the Support Fund was included in Budget 2018 (an additional \$10 million over five years beginning in 2018-2019, and \$2 million ongoing).

With respect to the RNFJ's report more specifically, it was presented to the Department during a formal consultation process in which Justice Canada officials were given the opportunity to discuss the document's conclusions and proposals. As with all submissions received from justice

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<sup>1</sup> Giving True Meaning to Equality: A New Approach to Standardization, Training and the Development of Legal and Jurilinguistic Tools to Ensure Equal Access to Justice in Both Official Languages.

sector stakeholders during the consultation process, the Department has given careful consideration to the RNFJ's report.

In 2017, the Department of Justice launched the *Annotated Language Laws of Canada*, a freely accessible, comprehensive, and evergreen legal reference tool hosted on CanLII and the Open Government Portal that provides an inventory of all constitutional, federal, provincial, and territorial legislation relating, in whole or in part, to the use of language(s) within government institutions and in commercial and/or private activities, in addition to the case law relevant to the legislation.

Moreover, since the adoption of its Policy on Legislative Bijuralism in 1995, the Department of Justice has also worked to provide Canadians with federal legislative texts that reflect, in each linguistic version, the legal system in use in their province. The Department also provides regular training to law students and other legal actors, and has developed tools that contribute to compiling and elaborating legal vocabulary in both official languages. The Government notes that these resources are accessible to the public, and is pleased with the important contributions they represent to the development of standardized legal vocabulary in respect of the two official languages and two legal traditions that comprise the Canadian legal system.

#### **Recommendation 6**

The Government is committed to increasing access to family justice in both official languages. It supported this commitment in Budget 2017 by announcing funding for the Canadian family justice system in the amount of \$107.8 million over five years beginning in 2017-2018, and \$21.1 million on an ongoing basis thereafter. The new Canadian Family Justice Fund has five priority areas, one of which is extending the reach of family justice programs, services, and information to meet the needs of diverse and underserved populations, including OLMCs. Budget 2018 also committed to enhancing Canadians' access to justice through a 25% increase in funding for the Support Fund.

The Government also continues to work with its provincial and territorial partners to improve access to justice for OLMCs in the area of family law. In June 2017, the Ministerial Conference on the Canadian Francophonie, which includes the Minister of Canadian Heritage, agreed to review, with the ministers responsible for justice in their jurisdictions, measures to be taken to allow and facilitate the use of French in family law matters and to share the results at their next annual meeting to develop potential solutions.

#### **Recommendation 7**

The Committee has raised concerns about the availability of court decisions across the country in both official languages, and has made recommendations aimed at ensuring more widespread translation of judgments. As the Committee correctly notes, the administration of these courts falls under the responsibility of the provinces and territories. This includes decision-making around the publication of judgments emanating from these courts, regardless of the subject matter involved. Such decisions are taken by the responsible chief justices and court administrators.

The Government of Canada supports the principle of promoting the wider availability of key court decisions in both official languages. Although the identification of such decisions must necessarily be left to the courts themselves, the Government stands ready to work with interested jurisdictions – and third-party entities, as appropriate – to help advance such an initiative.

### **Recommendation 8**

In recommendation 8(a), the Committee refers to OLMCs' capacity to intervene in terms of both claims and legal training and information. The Government is committed to enhancing the vitality of the English and French linguistic minority communities in Canada and to supporting and assisting their development. To this end, the Department of Justice provides support to OLMC organizations and networks dedicated to improving access to justice in both official languages.

Notably, the Government's decision to reinstate and modernize the Court Challenges Program will provide financial support to Canadians to bring cases of national significance related to constitutional and quasi-constitutional human rights, including official language rights, before the courts. In addition, through the work of the Advisory Committee on Access to Justice in Both Official Languages, OLMC spokespersons and legal representatives help the Department of Justice identify and take into account access to justice issues that particularly affect OLMCs, such as the availability of legal information in the minority official language, and training of justice system stakeholders.

In Recommendation 8(b), the Committee raises the role of the Judicial Advisory Committees (JACs), which evaluate judicial applications and provide lists of highly recommended and recommended candidates to the Minister of Justice. The JACs are supported in their work by the Commissioner for Federal Judicial Affairs and his staff.<sup>2</sup> In October 2016, the Minister of Justice implemented important reforms to the judicial appointments process to increase transparency and accountability, and to increase the diversity of the superior court judiciary.

Among the reforms, the composition of the JACs was adjusted to include seven members nominated by the following entities: one by each of the province or territory's chief justice, the law society, the Minister of Justice or Attorney General of the JAC's jurisdiction, and the Canadian Bar Association; and three by the Minister of Justice Canada. To the greatest extent possible, I sought to ensure that each JAC had broad regional, subject matter, and linguistic representation. I emphasized representation from OLMCs in key jurisdictions with significant minority-language communities. Currently, the following JACs have one or more members who belong to OLMCs: the Yukon, Manitoba, Ontario – East and North, Quebec – West, Quebec – East, New Brunswick, and the Tax Court of Canada. Judicial candidates in all jurisdictions are

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<sup>2</sup> The Department of Justice has no role in the administration of the JACs. Decisions affecting any aspect of the judicial appointments process are within the authority of the Minister of Justice, and would be implemented by the Commissioner for Federal Judicial Affairs.



welcome to submit their applications in the official language of their choice. Where necessary, the Office of the Commissioner for Federal Judicial Affairs can arrange for the translation of judicial applications, and indeed has a budget earmarked for that purpose.

Moving forward, when it comes time to reappoint JAC members, the Government commits to reaching out to organizations that represent OLMCs to ensure, to the extent possible, that their interests are represented on the JACs through the Minister of Justice's nominees. The Government will also encourage the other nominating entities to consider this in making their own nominations.

### **Recommendation 9**

Since coming to office in October 2015, the Government of Canada has sought to encourage a practical and cost-effective approach to ensuring greater access to the decisions of Federal Courts in both official languages. To this end, Budget 2017 provided \$2.0 million to the Courts Administration Service over two years. This was intended to help chart the path toward a successful and sustainable approach going forward.

The Government continues to believe that the foregoing represents the best approach. With greatest respect to the Committee, the Government does not share its view that prescribing additional criteria at this time would be helpful. It is for the Courts Administration Service, working with the courts themselves, to determine how the *Official Languages Act* requirements are to be applied. For its part, the Government will continue to work with the Courts Administration Service with respect to resources to fulfill its obligations.

### **Recommendation 10**

The Committee's final recommendation relates to the Court Challenges Program, specifically the component on the clarification of official language rights. As mentioned in the Government's response to the House of Commons Standing Committee on Justice and Human Rights' Report on Access to Justice, Part 1: Court Challenges Program,<sup>3</sup> the intent of the Government remains the same, which is to maximize funding toward the clarification of human rights and official languages rights.

Funding for the Program will be \$4.97 million annually from 2018-2019. The \$1.5 million minimum annual guarantee for language rights cases includes cases funded under the former Court Challenges Program, the Language Rights Support Program and the Modernized Court Challenges Program. This amount could be revised annually based on requests made under the Program, as long as it remains within the entire Program envelope.

The Government shares the Committee's view that it will be important to monitor and evaluate funding levels on an ongoing basis. To ensure that the Program meets its objectives effectively, an evaluation will be conducted during the first five years of the Program's activities. This will

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<sup>3</sup> "Government Response to the Report of the Standing Committee on Justice and Human Rights," 13 December 2016, available at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/JUST/report-4/response-8512-421-88>.

ascertain whether there are sufficient resources for the clarification of official languages rights.

On behalf of the Government of Canada, I would like to thank you and the other members of the Committee for undertaking this study, and for your thoughtful observations and recommendations.

Respectfully,

A handwritten signature in blue ink, appearing to read "JWR", enclosed within a large, loopy blue oval.

The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.  
Minister of Justice and Attorney General of Canada