House of Commons
CANADA

Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

SMFJ • NUMBER 012 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Tuesday, November 22, 2005

Chair

Mr. Richard Marceau

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● (1535)

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Good afternoon, ladies and gentlemen. Welcome to the 12th meeting of the Subcommittee on the Process for Appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

Before handing the floor to our witnesses, who have kindly agreed to participate in our debate, I just wanted to mention that the bells will ring at 5:15 for a 5:30 vote. If everybody is in agreement, I would suggest that we end our meeting at 5:00 p.m. That will give us 15 minutes with Robin, our analyst. We had discussed this as being a possibility earlier. It will give us the opportunity to provide him with instructions on drafting the document.

Is that okay with everybody?

Mr. Macklin?

[*English*]

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): I guess my problem is simply this. Within 15 minutes, can we give instructions that meet our needs? That's my only concern.

[*Translation*]

The Chair: Mr. Robin MacKay has been kept informed of the discussions that have been held, be it between you and me, or between the Conservative Party, the NDP and the Bloc Québécois. He is aware of the points on which we may be able to reach consensus. Throughout this process, from the very beginning, he has been informed of any discussions that we have had that seemed to be leading us to a consensus, including those that we had this morning.

Let us give it a try, even if we have to come back to it later. Are you amenable to such an approach?

[*English*]

Hon. Paul Harold Macklin: I'm not averse to giving it a try. I'm only saying that I don't know whether it's enough time.

[*Translation*]

The Chair: Today, we shall hear from witnesses representing three organizations. Firstly, we have the Indigenous Bar Association, represented by Mr. Jeffery Hewitt. Secondly, we will hear from Mr. Rénald Rémillard, Executive Director of the Fédération des associations de juristes d'expression française de Common Law Inc. And lastly, we will hear from Ms. Diane Côté, Director, Community and Government Liaison for the Fédération des communautés francophones et acadienne du Canada.

My apologies, I had understood that Ms. Côté was going to make the presentation. Apparently, that is not the case.

As I am sure you already know, you have 10 minutes to make your presentation. We will then move on to a question and answer period, for which each member of the committee will have seven minutes.

The floor is yours, Mr. Hewitt.

[*English*]

Mr. Jeffery Hewitt (President, Indigenous Bar Association): Thank you very much. Merci beaucoup.

Mr. Chair and honourable members, thank you for the opportunity to address you today on the issue of the federal judicial appointment process.

The Indigenous Bar Association in Canada is a non-profit professional organization of first nations, Métis, and Inuit persons trained in the field of law. Our numbers have grown from a mere handful of indigenous lawyers in the 1970s to several hundred now. We have a very rich history in this country of indigenous law; however, we are relative newcomers in the past few decades to the Canadian legal profession.

We read with interest the comments of the former chief justice of Nova Scotia, Constance Glube, to this very committee last week, in which she indicated that there's a political process by which many appointments are made. She had asked this committee to try to keep politics out of that process.

As you already know, aboriginal people are on the outside edges of the political process in Canada, and they don't have a lot of the political currency that may be required to seek federal judicial appointments. While our legal community is growing, we remain largely unrepresented in the key mainstream legal institutions of Canada.

Given the manner in which appointments are made to the judicial advisory committees that recommend judicial appointments, we are underrepresented in the federal sphere. As a result of the existing process, there are less than two dozen aboriginal judges in Canada, and most of them are only appointed to the provincial courts. Indeed, the first indigenous jurist appointed to a court of appeal was the Honourable Justice Harry LaForme, who was appointed to the Ontario Court of Appeal in 2004.

Like many others who have come before this committee, the IBA is promoting the principles of judicial independence, transparency, and merit in the federal judicial appointment process. We believe that in order to achieve this, change is needed. To that end, we recommend that the federal judicial appointment process be amended to ensure that an Indigenous Bar Association representative be included in the composition of all judicial advisory committees.

Having reviewed the information available on the website of the Office of the Commissioner for Federal Judicial Affairs, there are many advisory committees with vacant positions that are currently set aside for Minister of Justice nominees. We recommend that the Minister of Justice take immediate steps, as a gesture of good faith, to fill all of those vacancies with indigenous appointments.

With respect to merit, the current federal judicial appointment process includes an advisory committee assessment of each candidate in one of three categories, as you know: highly recommended, recommended, or unable to recommend. With respect, we believe that candidates should either be recommended or not recommended to serve on the bench. Offering a third preferred category seems to serve to foster an environment of preferential treatment of certain candidates.

We recommend, therefore, that the federal government provide the independent judicial advisory committees with instructions to categorize applicants as either unable to recommend or recommended, and that there be very clear hallmarks provided to the committees when categorizing candidates. Simply put, either you are fit or you are not fit to sit on the bench.

It is the Indigenous Bar Association's submission that Canadian legal pluralism dictates that legal institutions, including the judiciary, must recognize and respect indigenous laws, customs, and traditions, which go directly to the issue of merit. Indigenous peoples indeed have a unique relationship with Canada and a unique constitutional status, reaching as far back as the Royal Proclamation and coming as far forward as the Constitution of Canada of 1982. Indeed, indigenous legal customs and traditions existed prior to contact and continue on today.

Many have joined the Indigenous Bar Association in our effort to promote a discourse in Canada on the issue of indigenous appointments to all appellate level courts, in particular the Supreme Court of Canada, including the Canadian Bar Association, the Canadian Association of Law Teachers, Professor Peter Hogg, Professor Peter Russell, whom you heard from a couple of weeks ago, the National Secretariat Against Hate and Racism in Canada, and the National Anti-Racism Council of Canada.

The IBA recommends that the Minister of Justice immediately make it a priority to increase the number of indigenous judges in all levels of courts, including appellate courts and the Supreme Court, and simultaneously create an aboriginal-inclusive appointment process that supports this priority.

● (1540)

As part of any good plan to increase representation, it is imperative to not just focus on getting indigenous jurists appointed to the bench, but also to ensure that those jurists succeed once appointed.

It is clear to the Indigenous Bar Association, both empirically and anecdotally, that indigenous law students and practitioners are not part of the mainstream of the legal profession. One of the collateral impacts of such marginalization is that the profession remains typically not well educated about indigenous people, our culture, laws, traditions, or our history. Too often our students and lawyers, and even our judges, are left with the additional burden of educating their peers on the basic values and customs and laws of indigenous people.

We therefore also recommend that the federal government mandate and fund a mandatory national training program for existing and future judges in relation to the legal, social, and economic history of aboriginal people.

Once we have a representative and well-educated bench and bar, we will see a true change in Canada. The recognition and respect for indigenous legal traditions will take its place with the other two founding partners of confederacy.

We agree with the many witnesses that decreasing political association and involvement in the process is needed. To that end, given aboriginal people's general lack of political experience and currency, by focusing on a diversity of the bench and by seeking more aboriginal candidates, the effect would be necessarily to decrease political involvement. We want to be clear, as we have been throughout the submissions that we provided to you, that we are not just talking about aboriginal appointments for an identity representation or a racial representation, but we are talking about full representation of the three distinct legal systems of the three founding partners of confederacy.

Those are my submissions for today. I look forward to responding to your questions. Thank you all for your time.

[*Translation*]

The Chair: Thank you very much, and congratulations, you took less than 10 minutes to make your presentation. You are one of but a few to achieve such a feat.

The floor is yours, Mr. Rémillard.

Mr. Rénald Rémillard (Executive Director, Fédération des associations de juristes d'expression française de Common Law Inc.): Thank you. I too hope to keep my remarks to 10 minutes.

The Chair: Do not worry, I will keep you on a tight leash.

Mr. Rénald Rémillard: Mr. Chairman, members of the committee, good afternoon.

My name is Rénald Rémillard and I am the Director General of the Fédération des associations de juristes d'expression française de Common Law, or to use our acronym, FAJEFCL.

Unfortunately, our president, Mr. Roger Lepage, who comes from Regina, and Ms. Louise Aucoin, our vice-president, are not able to be here today. However, they have asked me to present their apologies. I believe that you have already been introduced to Ms. Diane Côté, from the Fédération des communautés francophones et acadienne du Canada, who is here with me today.

The FAJEFCL consists of seven associations of French-speaking lawyers and its mission is to promote and defend the language rights of francophone minorities, including but not exclusively in the area of the administration of justice. I should point out that there are associations of French-speaking lawyers in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia that represent a total of some 1,100 lawyers. The FAJEFCL is also a member of the Fédération des communautés francophones et acadienne du Canada.

My presentation today will focus on the question of the appointment of bilingual judges in the federal judiciary, especially to the provincial superior trial courts. We shall not discuss the appointment of judges to the Federal Court and the courts of appeal of the different provinces. As you already know, the superior trial courts hear cases dealing with the criminal law, family law and civil law. These courts accordingly deal with questions that affect every one of us.

What are the linguistic obligations of the provincial superior trial courts? The degree of bilingualism in the courts varies from one province to another in this country. For example, the provincial superior courts in Manitoba, Quebec and New Brunswick all have to operate in both official languages. In Ontario, the same principle applies in those areas that have been designated bilingual, and that includes approximately 90 per cent of the province's population. Since 1990, in the non-designated areas of Ontario, British Columbia, Alberta, Saskatchewan, Nova Scotia, Prince Edward Island and Newfoundland and Labrador, obligations with respect to bilingualism in the courts have generally been limited to criminal trials, in other words part XVII of the Criminal Code. In 2005, all the provinces and territories accordingly were suppose to have a minimum number of bilingual judges. This was not true, however, when the current process for appointing judges was adopted in the late 1980s.

What is the current process for appointing judges to the federal judiciary in terms of access to justice in French? In our opinion, in too many cases, the current process produces unacceptable results. Some jurisdictions are truly bilingual but others can barely accommodate proceedings in French, even with considerable advance notice. Moreover, this observation is confirmed by our members who have over the last several years now reported a number of alarming situations that have arisen in some of the provinces. Let me give you a few examples:

In Manitoba, people have the constitutional right to use the language of their choice in all courts. Despite this right, there was no bilingual judge siting in the Family Division of the Court of Queen's Bench until February 2005. That situation had just been corrected with the recent appointment of Madam Justice Rivoalen, although for years francophone litigants in Manitoba who wished to be divorced in French had to appear before a judge of the General Division of the Court of Queen's Bench. This meant in concrete terms that a litigant wishing to proceed in French in Manitoba often had to wait longer for a divorce than if his or her proceedings had been heard in English, because of the lack of bilingual judges. In many cases, this also resulted in additional costs for francophone litigants.

The current system of appointing judges to the federal judiciary has clearly not encouraged respect for language rights in Manitoba for many years. Even with the recent appointment of a bilingual judge, the constitutional language rights of francophones in Manitoba are nevertheless still always fragile since they depend on the presence of a single judge, who could be in a conflict of interest, ill or on leave.

In Ontario, the Superior Court must be able to hear trials in French in the designated areas. Despite this right, in Windsor and Welland, the Ontario Superior Court lost its bilingual abilities some time ago. In London, only one judge out of about 30 is bilingual. Therefore, all francophone litigants in London who seek an interim custody or a provisional support order on an emergency basis must wait for this bilingual judge to be available or waive their right to have the proceedings conducted in French.

● (1545)

In Toronto, bilingual capacity is also clearly unsatisfactory. For example, we were told a few weeks ago that some francophone litigants from Toronto sustained substantial harm because of the delays and additional appearances resulting from the fact that they wanted their proceedings to be conducted in French.

Since there are no official statistics on the number of bilingual judges on the federal bench in Canada, we are not sure of the number of bilingual judges there are in Prince Edward Island and Newfoundland. In Alberta, there are two judges who speak fluent French, but in Saskatchewan there is only one bilingual judge in the Court of Queen's Bench. If that judge is on sick leave, vacation or in a conflict of interest situation, the right to a trial in French under the Criminal Code disappears in that province. We are talking about a very precarious right.

There are no bilingual judges in the Northwest Territories. Moreover, this fall, a bilingual judge from Alberta had to travel to Yellowknife for two months to hear a trial in French.

Given this situation, FAJEFCL feels that the current process of appointing judges to the federal judiciary does not take sufficient notice of language rights. Moreover, we find it significant that there are no official statistics concerning the number of truly bilingual judges in the federal judiciary. This tells us that the bilingualism of the judges is not a sufficiently important factor to be measured.

The lack of mechanisms to assess the level of bilingualism of candidates for the federal judiciary also confirms in our judgment the lack of importance placed on the criterion of bilingualism when judges are appointed to the federal judiciary. Reform of the current appointment process is necessary at least with respect to official languages.

The following are some reforms or possible solutions to the problem that might be explored.

The number of bilingual judges who would be required to ensure equal access to justice in French in Canada should be regularly assessed by the federal Department of Justice for each of the provinces or regions in order to take into account, among other things, the constitutional and non-constitutional linguistic obligations of the province or region and the principle of equal access. When this assessment is made, the minister must necessarily consult the associations of French-speaking lawyers because they know whether the number of bilingual judges is affecting access to justice for francophone litigants in their province. This information is not always available to the other parties involved, including the chief justices, who often rely on actual demand and not necessarily on possible demand in making their decisions.

The process should specifically provide that the minister may require the committees to provide a list of recommended bilingual candidates when a shortage or lack of bilingual judges is observed.

The bilingual ability of candidates should be assessed, something which is not done at the moment, as a person may claim to be bilingual on the form without really being bilingual. Moreover, experience shows that people fairly blithely claim to be bilingual when in fact they are not particularly bilingual. One means of assessing the bilingual capacity of candidates for the bench would be to conduct interviews with the candidates and to ensure that at least one of the members of the selection committee is fluently bilingual so that he or she can assess the candidate's bilingualism. In some provinces, of course—New Brunswick and the Ottawa area spring to mind—a minimum of one bilingual member would be unacceptable.

The advisory committees should necessarily indicate whether the recommended or highly recommended candidates in their province or area are bilingual. At the present time, there is nothing to suggest that a candidate's bilingual ability is indicated when his or her name is listed among the recommended candidates.

At a minimum, there should not be any loss of bilingual capacity when a bilingual judge retires or leaves. Any bilingual judge who retires should automatically be replaced by another bilingual judge. This would at least have the advantage of avoiding any backsliding with respect to judicial bilingualism, such as we have seen in some areas, especially Ontario.

● (1550)

In our judgment, the Government of Canada must respect its linguistic obligations and ensure that francophone justiciables can gain equal access to justice in Canada. The current appointment process dates from 1988 and the time has come to modernize it so that it will clearly reflect existing language rights.

To conclude on a very practical note, I should say that it is also important to state that a bilingual judge does not cost any more that an unilingual judge.

Thank you.

The Chair: You took 11 minutes, Mr. Rémillard. Evidence, is it not, that I am a man of exceptional generosity?

We shall now proceed to the question and answer section of our meeting. Each committee member has seven minutes.

The floor is yours, Mr. Moore.

● (1555)

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): Thank you.

Mr. Rémillard, on your last point, you said a bilingual judge does not cost any more; according to some of your testimony, it may cost less, if we're talking about situations in which, to fulfill legal obligations, the courts are forced to delay hearings, bring in someone from outside, or have a hearing in a court that's not set up for that situation.

We've heard a lot of talk on how important merit is in this process for all nominees. Mr. Hewitt made the point on the three groupings of recommended, highly recommended, and not recommended, and you would like to.... Do I understand you correctly? In those groupings, you would like to see someone's language or the fact that they're bilingual included as a notation when this is presented to the minister. Is that the process that...?

We're looking at this in a broader way. All options are on the table right now. Should a committee be able to narrow a list down to, say, two or three people and present that to the minister? You would like to see their capabilities noted—is that your position?

[*Translation*]

Mr. Rénald Rémillard: Essentially, the idea is to ensure that we can identify whether the various candidates on the list are bilingual. To be honest, I have never seen such a list, and I certainly do not have one here.

However, I think that, for clarity's sake, if it has not already been done, the process should be adjusted to identify whether a candidate is bilingual. When the list is drawn up, it should include an annotation as to whether the candidate is bilingual. This is one of the pieces of information that should appear on the list of recommended and highly recommended candidates.

[*English*]

Mr. Rob Moore: Would you also want a requirement that if the vacancy that opens up had been a bilingual position, it should be filled by someone who is also bilingual, so that you didn't lose that capability?

One of the things some prior witnesses mentioned is how to judge whether someone is bilingual for the purposes of working as a judge. Obviously that would require the highest proficiency in both languages, because of the technical nature of the job. Do you have any thoughts on how we would test for someone's ability to work in both official languages?

[*Translation*]

Mr. Rénald Rémillard: On the matter of bilingual judges, rest assured that legal terminology training programs are available. In the past, many French-speakers chose to study law in English; they were able to speak English, but they were not necessarily familiar with all of the legal and technical terminology required.

Indeed, provided that the judge in question has a strong enough command of the language to be able to hear testimony and fully understand what has been said, it is easy enough to learn the legal terminology. With a little bit of effort, it can be done.

Moreover, I could provide you with examples of mother tongue French-speakers, who studied in English and went on to become judges, and who have had to take classes in French legal terminology. Although they had to take these classes, they were perfectly able to hear witnesses in French. In some cases, drafting written submissions may be more difficult, more time-consuming, etc. However, this too is a skill which can be developed by taking courses in French-language legal terminology.

Acquiring the requisite technical vocabulary is not, therefore, a major concern, provided that the judge has a solid enough grounding to be able to hear cases and work as a bilingual judge.

[*English*]

Mr. Rob Moore: Thank you.

I have a quick question for Mr. Hewitt.

You mentioned having indigenous people on these advisory committees, on these candidate selection committees, and also to encourage, I believe you said, indigenous lawyers. You distinguished between someone's background and their training in indigenous law. Can you talk a little bit about that? What about the person who is, say, from a first nation but has no training whatsoever in indigenous law? How do we handle the case of someone who goes to law school but knows no more about that subject than anybody else? What are your thoughts on that?

● (1600)

Mr. Jeffery Hewitt: That is very much the case now and is up and coming with students who are presently in law school and those who apply. What we are recommending, because not everybody is going to be particularly steeped in their own ways, is that they at least have the ability or they be assessed on their ability to access that as well. So it's a demonstration of a connection to a community.

Mr. Rob Moore: Okay, thank you.

[*Translation*]

The Chair: Thank you very much, Mr. Moore.

Mr. Lemay, you have seven minutes.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chairman.

Thank you for having accepted to come along today to participate in this very interesting debate which is so important to us. It is certainly a subject that is near and dear to my own heart. I imagine that it is not always easy to practise law in French outside of Quebec. I imagine that life is even more difficult for aboriginal lawyers and judges.

I am not quite sure how to word my questions, because I would actually prefer to speak about real life experiences.

Mr. Hewitt, I am convinced that your organization should set up a Quebec association. We have a high number of aboriginal communities, and we are starting to see a fair number of aboriginals in our ridings. I was not aware of your association until I read your brief. I am very happy to hear that it exists. As I used to be the president of the Quebec Bar, I will send them your brief so that they can see for themselves that it would be a good idea to have such an association.

Recommendation 5 of your brief states the following:

> [...] that the federal government mandate and fully fund a mandatory national training program for all existing and future judges in relation to the legal, social and economic history of aboriginal people [...]

In Quebec, we have what it is known as the itinerant court, which goes from village to village, from the James Bay Coast, to the Hudson Bay Coast, Kuujjuaq, etc. I had a few opportunities to travel with the itinerant court as a defence lawyer for legal aid.

How do you think we could introduce mandatory training in aboriginal history, when we already have enough problems getting judges to give up their weekends to take development courses, training courses on new tax law, new criminal law, etc. It is very difficult to get people to go to such courses at the end of a day's work in court. I do not know whether you have any practical suggestions as to how we could implement your recommendation. I am in full agreement with the rest of your recommendations, but I have to admit that number 5 raises questions for me. I do not know whether you have a solution.

How could we implement such a recommendation?

[*English*]

Mr. Jeffery Hewitt: To a smaller degree, it has been done with the national judicial council. They have worked in the past on some training programs with judges to deal with aboriginal issues, not so much aboriginal history and our legal history with the country.

But how can it be done? I'm sure there are a number of methods. We could think of delivering part of the judicial training from the beginning, when they are appointed to the bench. That could have a component. If we are able to find a way to train all of the students in the bar examinations course in the country, through the law societies, with an aboriginal component in those materials, then we're certainly able to find a way to train judges similarly as well, even if it's in the upfront portion of their overall training at the beginning, when they are going to judges' school. That would be a start.

● (1605)

[*Translation*]

Mr. Marc Lemay: I'd also like to understand the Fédération des associations de juristes d'expression française de Common Law's position.

Obviously, I agree with your recommendations. I agree with the fact that there must be bilingual judges in some areas. Clearly, that's a fact, especially for criminal matters. I come from the Abitibi—Témiscamingue region, which is right next to northeastern Ontario, close to Hearst, Timmins, Kapuskasing, etc. Several people have been unable to get a French trial over there because there are no bilingual judges. You say that there needs to be an assessment of the number of bilingual judges needed to ensure equal access to the law in French. I don't see how we could do that.

Take the following example. A number of Quebec workers have gone to work in Calgary and in the Northwest Territories. Some of them have run afoul of the law and wanted a French trial, but no one would ever have thought there would come a day when a francophone judge would be needed in Calgary.

Since labour market factors generally cause people to look for work in Saskatchewan or elsewhere, how does one assess the number of bilingual judges needed? I have no idea.

Mr. Rénald Rémillard: There's a very good way to do that: have a mathematical formula. But we don't believe that would be the best way to proceed, because provinces are different from one another. There may be francophone communities in some regions of a given province, or in some cases, the crime rate may be far higher or lower. Provinces have different needs. Moreover, those may change over the years. People change. The labour market changes. From time to time, people migrate or come to the province from elsewhere. That is why it is important to have periodic assessments.

The second part of the problem is that we often hear there isn't enough of a demand.

Mr. Marc Lemay: Yes, that's the main factor.

Mr. Rénald Rémillard: I asked several of our jurists that question. The issue of demand is the following. As a judge, you assess demand based on what you see, in other words the number of litigants before you. However, if you were to ask lawyers who have clients what they think of the demand, they would come up with a very different answer. They tell their clients never to ask for divorce proceedings in French, because it would be more costly and more lengthy. Judges may never get wind of the demand, because lawyers tell their clients not to ask for French trials, which may be more costly or lengthy. So, if the client wants a ruling in the next few months, the ruling simply won't be in French, because there's no judge to write it.

It's a chicken and egg problem, but it is a symptom. I often put the question to lawyers to know what the situation is. They say that they do indeed recommend that their clients not ask for French rulings for those reasons.

The Chair: Mr. Lemay.

Mr. Marc Lemay: Except for English criminal law trials.

Mr. Rénald Rémillard: In that case, there are other reasons.

The Chair: Thank you, Mr. Lemay. Your time is up.

Mr. Comartin, you have seven minutes.

● (1610)

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chairman.

Does the same apply to criminal court? Do clients get the same advice from their lawyers? I know divorces are dealt with by civil courts.

Mr. Rénald Rémillard: It depends. In some cases, people do not want to proceed in French because they want to remain anonymous. That can happen.

The situation varies. You have to ask the question each time, because of that. If it is a heinous crime and the entire community is aware of the case, people may prefer to proceed somewhere where the accused is less well known.

Mr. Joe Comartin: Mr. Rémillard, are you originally from Ontario?

Mr. Rénald Rémillard: No, I'm from Winnipeg.

Mr. Joe Comartin: I'm from Windsor and I've been trying to understand this problem since we lost our candidate for a judicial appointment. I studied at the Windsor Law Faculty. The problem you mentioned is real, I've seen it myself. I spent three years there and didn't speak a word of French, because there were no courses offered in French. I had studied in French in university, but not in law school.

Do you know if there are recommendations for Ontario and for other provinces so that at least one course be given in French per year in law faculties, even within anglophone institutions?

Mr. Rénald Rémillard: I know that at Western University in London, for instance, a French legal language course is offered, and has been for several years. Some law faculties offer similar courses but certainly not all. So it is a problem, because in some faculties there are bilingual people, perhaps the result of immersion programs, who after law school become a bit rusty. Some universities do offer this type of training, but not all.

Mr. Joe Comartin: Has your association adopted a policy to request this from the provinces?

Mr. Rénald Rémillard: We haven't issued such a request to the provinces. However, there are French legal terms training sessions for judges and all officers of the courts, for instance. Bilingualism amongst judges is an important issue, but in a more general sense, a bilingual court is what we're aiming for, including the court clerk, etc.

Capacity building to provide services in French is one aspect of the challenge, but the matter of bilingual judges is a more specific and more long-standing problem.

Mr. Joe Comartin: My francophone colleagues in Windsor spoke some French, but not very well. Had they had the chance to speak French in law school, before they became lawyers, I think they could have improved.

[*English*]

Mr. Hewitt, if I can switch to you, something's not clear. Does the association take in Métis and Inuit?

Mr. Jeffery Hewitt: Yes.

Mr. Joe Comartin: So “indigenous” partakes of all of these groups.

Do you have any sense of the numbers here? I feel like I'm going through what I went through twenty to thirty years ago, when we were fighting to get women some gender balance on the courts. We had to look at this because it was the reality of whether or not we had serious enough numbers to be able to meet the requirements we had at the judicial level.

I think of my class coming out. There was one woman out of 47 students. Now well over 58% in law schools right across the country are women.

Can you give us some sense of the numbers of students, lawyers, and academics as well? I think that last one is a bit of a crucial one. Can you give us some sense of where we are in terms of capacity?

Mr. Jeffery Hewitt: Yes, thank you for the question.

We are not yet at 50%. We're looking forward to the day. Right now we have probably about 70 students across the country in the 11 law schools. We have 400 to 500 lawyers across the country, and about 22 or 23 judges, so less than two dozen. There are maybe about the same number of academics right now, between 20 and 30.

I think those numbers are fairly conservative. Of course, they're difficult to track. There's a general mistrust of many institutions. Many aboriginal people don't self-identify when going into law school, so it's difficult for us to track later, but we tend to find out and welcome them into the indigenous bar, in order to track the numbers.

I think those numbers are fairly accurate for you. They're accurate enough that we certainly believe enough candidates have been practising— certainly over the last decade—to allow for a choice of potential candidates.

● (1615)

Mr. Joe Comartin: I'm only aware of three judges in the country who are above the provincial level. Is that figure accurate, two in Ontario and one in Manitoba?

Mr. Jeffery Hewitt: Absolutely, yes. The vast majority are at the provincial level.

Mr. Joe Comartin: I'm going to suggest something to you. One of the things, obviously, is to press the federal government to take a more active role in promoting not only indigenous judges but all judges from the provincial court. I think we've identified in the course of these hearings that this is a real failing, that we're not taking advantage of the talent we have at the provincial level, and I think that may be one way of getting indigenous people onto the upper levels faster than we would otherwise.

Mr. Jeffery Hewitt: It certainly would be. Interestingly enough, many of our judges apply to the provincial level because that's often the first intersection of aboriginal people in the court system.

That being stated, in the federal sphere, tax is an enormous issue that impacts our communities across the country, and yet very little application is there. Certainly from our submissions, you will see we've canvassed our membership and are of the view that there's very little reflection of our people in the process, so there are few applications coming forward without any sort of encouragement that their application wouldn't just go into a black hole while they sit on their hands and wait for a couple of years.

Mr. Joe Comartin: I hadn't thought of that. Are there any judges at the federal court level?

Mr. Jeffery Hewitt: No, not that we know of.

Mr. Joe Comartin: That's all, Mr. Chair. Thank you.

[*Translation*]

The Chair: Thank you, Mr. Comartin.

Mr. Macklin.

[*English*]

Hon. Paul Harold Macklin: Thank you very much, Mr. Chair.

Thank you for being with us today.

You really do challenge us, Mr. Hewitt, when you bring forward your requests, because as we look at what we're trying to achieve, we're trying to achieve primarily a merit-based system that looks to the best of the best within the practising bar and within academia as well. For each of us who receive the request from any cultural or minority group within our society to have a representative bench, it certainly does create for us, I think collectively, a very difficult situation.

How do you suggest that we could do what you're asking, but also reflect other cultural interests within our society at the bench in a way that would still reflect merit, getting the best of the best? I think that's a bit of a problem for us to try to come up with a suggestion as to how to do that—-in other words, how to get the best and yet have a reflection of the society. In particular, let's say in Saskatchewan you might expect that you would have a higher aboriginal bar and bench, and in Toronto it might be something different in terms of getting a culturally representative bench.

Do you have a way in which you think we might be able to achieve your goal and other cultural interest goals at that level?

Mr. Jeffery Hewitt: Thank you for the question. I recognize it as a challenge and a very difficult thing to do, and yet I would say two things to that.

First, it's imperative that the federal government look to its own constitutional history, which will reflect the necessity for aboriginal appointments to the bench to be opining and developing legal pluralism in our jurisprudence in this country.

Aboriginal people are specifically set out, from the Royal Proclamation all the way up until the Constitution Act of 1982. So it can't be a surprise or a particular challenge beyond the challenge of giving life to the Constitution of this country. So to that end, I would say it's an imperative more than it is a challenge to ensure aboriginal reflection on the bench to be informing the law.

With respect to other communities, I would say this. There is an organization the IBA is working with, a multi-party organization from various communities across the country: the National Secretariat Against Hate and Racism. That organization includes B'nai B'rith and other faith-based organizations and community-based ones. It is their collective view that until we deal with the first peoples' issues first, there is little hope that we'll be dealing with anyone else's.

My suggestion would be that the federal government look to its Constitution first, and that it also look to ensuring that there is diversity among the bench. There are certainly lawyers out there beyond the aboriginal community who are reflective of this country's social and cultural composition who are meritorious to be appointed to the bench.

There's often this soft underbelly to the notion of merit that seems to imply anybody outside of the mainstream of the profession with enough political currency to entrench themselves is somehow affecting merit in a negative way. We say that the case of our members, because we have gone to law school in the mainstream, because we have earned our degrees and practise the same law as everybody else practises but we also maintain the history and the customs and laws of our own people, is merit-plus, not merit-minus—that we add to the merit principle, that we inform and increase the merit for all appointments to the bench.

● (1620)

Hon. Paul Harold Macklin: Well, I don't disagree with the principle you raise, but it still is problematic as other groups come forward asking for representation as well.

Let me turn now to you, Mr. Rémillard. With respect to the need for a bilingual judge, how do you believe we should determine the need? Should it be through consultations with the chief judge? Are there ways in which we should be examining the general population in that area? How do you believe we should try to determine what would be an appropriate level for achieving a balance that reflected the community, in the case of bilingual judges?

Mr. Rénald Rémillard: I think consultation with chief justices is certainly one solution; however, I think it would have to be broadened. As I mentioned earlier, the issue of, or the number of....

I'm sorry; I lost my train of thought here.

[*Translation*]

I'll speak French.

You also have to measure potential demand. The demand a lawyer may see at his office, with his clients, is not the same as that a chief justice may see. To get a truer picture of access to justice, the consultative process must be broader than it has been in the past. That is one of the goals of equal access to justice for francophone community members who want to access services. If you just consult chief justices, you will only have a partial picture of reality. It is important to hold broader consultations.

● (1625)

The Chair: Thank you very much, Mr. Macklin.

Mr. Toews.

[*English*]

Mr. Vic Toews (Provencher, CPC): Thank you very much, witnesses, for coming here today.

Mr. Rémillard, there was one matter that I had some concern about. Your heading in the English version I'm looking at says, “No backsliding in terms of bilingualism of the judiciary”. Let's say we identify objectively, however we do that.... If we have 30 judges in a jurisdiction, we identify a need for five bilingual judges, let's say. Now, if the Attorney General were sitting there and saying, “I've got a very good bilingual individual here. I'd like to appoint that individual even if it makes it six out of 30 judges”, I would think on the basis of merit, all of us would agree that is the right thing to do.

What I'm concerned about is if one of those six then retires. Your suggestion is that you could never have less than six; therefore, you would have to appoint a perhaps less than meritorious bilingual judge.

So I'm wondering if there shouldn't be a little more flexibility in the proposition you're bringing forward to us.

[*Translation*]

Mr. Rénald Rémillard: I understand your objection, but the problem this recommendation tries to address is caused by the fact that the bar is set very low, too low. We cannot lose ground where the needs already exist. The current process has not protected the hard-won gains in some regions, like Windsor and Welland.

[*English*]

Mr. Vic Toews: I appreciate and sympathize very strongly with that concern, coming from Manitoba as I do and given the importance of the French language in my own constituency of Provencher. I probably have 15% to 20% francophones in my riding, one of the highest percentages of francophones in rural western Canada.

What I'm asking is, once we set the floor, does that floor keep on moving up at the expense of the merit principle? I think that's what the parliamentary secretary was getting at. That's my concern with your position, and maybe you could think about that.

I also want to deal with Mr. Hewitt's concern about making the bench more representative. In terms of indigenous lawyers—first nations, Métis, or others—I agree we do have that very rich heritage of first nations in our society, and you point out that appointing these individuals would be a case of merit-plus. It's not a loss if in fact all of the candidates meet that acceptable or recommended level we look for when we look for federal judges. My concern is specifically about saying we want to reserve a certain number for people of a certain cultural, indigenous, or racial background, for example.

My concern is this. As important as the first nations people are to our history and to our understanding of law, the interaction that is now going on in many of the provinces where we don't have, for example, settled treaties.... British Columbia would be a prime example of how important that is.

I look at the situation in Manitoba, for example—again, where I come from—where of the 1.1 million people, about 100,000 people come from a Mennonite or German background. There's not one judge on the provincial bench and not one judge in the superior court who comes from a Mennonite background. I come from a Mennonite background myself, but I'm not suggesting that 10% of the judges should now come from a Mennonite background.

What I am concerned about is that judges who come onto the bench should perhaps have a sensitivity to certain very important issues the Mennonite population brought to Manitoba when they came in the 1870s: the guarantee of language rights that was never honoured, the guarantee of educational rights that was never honoured, all those kinds of things. I know the witness, a lawyer from Manitoba, understands that in terms of the French population as well, how not only francophones but other minorities were robbed of their linguistic and educational rights.

Isn't there something more important than looking at the actual cultural and racial background of someone? It's that people want somebody who understands what their people have come through and who is sensitive to those issues. If we're looking at appointing judges in a place like Manitoba, where we have, I think, 178,000 first nations people, Métis, and non-treaty aboriginals, I want people on the bench who understand the struggles. I'm not particularly concerned about what cultural or racial background they come from.

Am I way off base here? Do we need to adjust my thinking a bit?

● (1630)

Mr. Jeffery Hewitt: Well, I hope to adjust your thinking just a little bit, and I would say this. I think we're clear in our submissions and I was clear earlier today, I hope, but I'll say it again: we aren't seeking appointments from a racial perspective or an ethnic perspective. But first, let me also say we won't speak for any other community or their history. It is up to them to give themselves a voice.

As to groups who moved into Manitoba in the 1800s, our folks were there about 10,000 years before that, and we still haven't gotten our treaty rights recognized. That's probably an important aspect, and we know that the bench right now isn't doing that.

What we are saying is, at the time of Confederation we were one of the three founding partners of this country, yet we are not recognized in the development of jurisprudence in this country. We are different and distinct from all of the other groups because we have a unique constitutional history with Canada that no other group has. All I am saying is, the IBA is seeking for life to be given to the constitutional history of this country, which would compel aboriginal appointments to the bench.

Mr. Vic Toews: Does that life then require the appointment of a person from an aboriginal background? I think that's again getting back to—and I don't want to put words in the parliamentary secretary's mouth—the issue of merit. We have that struggle here: how do we recognize individuals and groups in society yet ensure that the primary importance of the merit principle is respected? How do we balance that?

Mr. Jeffery Hewitt: Well, I would say there's not a lot of balance necessary for that.

You strike me as somebody who is fairly frank, so I will be that way in response.

Our people who make application to go on the bench and subsequently are on the bench are going to be scrutinized beyond what's done for any other appointment to the bench. We are certainly not going to put forward individual candidates or encourage applications from people who dilute or negatively impact the merit principle in any way. The Indigenous Bar Association has never taken the view that the merit principle needs to be changed. In fact, we support it. We are saying we should increase it.

Mr. Vic Toews: So what you're saying is that all things being equal in terms of the merit issue for recommended candidates, we should be appointing aboriginals to the bench.

Mr. Jeffery Hewitt: I am, and I think aboriginal people need to be part of the process of appointment as well.

Mr. Vic Toews: Thank you.

[*Translation*]

The Chair: Thank you very much.

Mr. Lemay, please be brief, we'll soon have to go in camera.

Mr. Marc Lemay: Mr. Hewitt, I have a hard time accepting the idea that an itinerant court in Quebec's Far North, in Kuujjuaq and Kuujjuarapik, presided by a white judge, is judging your brothers and sisters. We've been looking for years. I agree, there is some merit.

How can we urge your brothers and sisters to go to law school and apply to the bench? Two interviews were held and two positions filled, just before I was elected. These two judges will be going up North, and they are both white. Both judges are women, and I'm very happy for them. There were no aboriginal candidates. There is a gap there. As far as I'm concerned, this is a problem.

● (1635)

[*English*]

Mr. Jeffery Hewitt: It's our problem too. As we said in our recommendations, we think that aboriginal people need to be part of the appointment process as well as being encouraged to apply. If somebody in any community does not see themselves reflected in the institution, there's little encouragement or engagement for them so they want to apply. As I said to Monsieur Comartin earlier, if there is little reflection of who you are in the institution, there's little encouragement for applicants to apply, knowing that it will go into some place in outer space and they may never know about that appointment process.

To encourage it, I would say two things need to happen. First, aboriginal people need to be more involved in the selection and appointment process. Second, there needs to be an engagement in aboriginal communities and within the aboriginal bar to encourage those applicants. We think we do that the more we're reflected in the legal institutions in Canada itself.

[*Translation*]

The Chair: Thank you, Mr. Lemay.

Thank you to the witnesses for having appeared before us and for having taken the time to share their thoughts with us. Rest assured they will be taken into consideration in the drafting of our report, if we manage to draft one before the upcoming election. Thank you very much and have a safe trip home.

Our witnesses may now leave and we will be continuing in camera in a moment.

[*English*]

And then we'll try to find out if we can agree.

I'll suspend for two minutes.

[*Proceedings continue in camera*]

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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