House of Commons
CANADA

Standing Committee on Official Languages

LANG • NUMBER 031 • 2nd SESSION • 39th PARLIAMENT

EVIDENCE

Thursday, May 8, 2008

Chair

Mr. Steven Blaney

Standing Committee on Official Languages

Thursday, May 8, 2008

● (0905)

[*Translation*]

The Chair (Mr. Steven Blaney (Lévis—Bellechasse, CPC)): Good morning everyone. Welcome to this 31st meeting of the Standing Committee on Official Languages.

This morning, our meeting concerns access to justice in Canada's two official languages. We'll be hearing from some prominent witnesses, starting with our Commissioner of Official Languages, Mr. Graham Fraser.

Welcome to your favourite committee, Mr. Fraser.

Mr. Fraser is accompanied by Ms. Tremblay, Director of the Legal Affairs Branch.

Welcome, Ms. Tremblay.

We also have Mr. Michel Doucet, Professor at the Faculty of Law of the Université de Moncton, who is also a committee regular.

Welcome, Professor Doucet.

We also have Ms. Aucoin, President of the Fédération des associations de juristes d'expression française de common law.

Welcome, Ms. Aucoin.

These witnesses will be making presentations to us. Also present to answer parliamentarians' questions are two representatives of the Department of Justice, whom we welcome, Ms. Andrée Duchesne, Senior Counsel and Manager, Francophonie, Justice in Official Languages and Legal Dualism, who has previously appeared before the committee, and Mr. Tremblay, General Counsel and Director of the Official Languages Law Group. They'll be able to answer all questions from members on the subject.

Without further ado, let's listen to the presentations. First, I'll invite Mr. Fraser to say a few words.

Mr. Graham Fraser (Commissioner of Official Languages, Office of the Commissioner of Official Languages): Thank you very much, Mr. Chairman.

I would like to start off by thanking you for giving me the opportunity to speak to you today. I will use this occasion to share some thoughts on the judicial appointment process and the shortage of bilingual judges.

The shortage of bilingual judges in the superior courts of the provinces and territories is one of the main barriers to access to justice in both official languages. Yet, it is precisely these courts that are the ones who hear criminal law, family law and bankruptcy cases. Further, every Canadian's right to use English or French in Canadian courts is one of the basic language rights set out in our constitutional framework.

To ensure that all litigants have true access to the superior courts in the official language of their choice, it is essential that these courts have a sufficient number of bilingual judges at their disposal. The appointment process must therefore ensure the bilingual capacity of superior courts. Otherwise, access to justice in both official languages is compromised.

Since 1995, there has been much talk about the need to review the judicial appointment process. Some of my predecessors have raised the issue, as have French-speaking lawyers' associations and parliamentary committees.

I would like to briefly recall the efforts of these players in their attempts to convince the Government of Canada to take action.

[*English*]

In 1995, Commissioner Goldbloom published a study on the use of English and French before Canadian courts. In this study, he concluded that the linguistic abilities of superior courts and courts of appeal in the provinces and territories were unequal and insufficient. At the same time, the commissioner recommended that the federal government place considerable emphasis on language skills in selecting candidates for judicial appointment.

In 2003, the Standing Senate Committee on Official Languages recommended that bilingualism be recognized as a criterion for the selection of judges. In its response, the government merely stated that the advisory committees take into account the candidates' proficiency in both official languages.

In June 2005, the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness set up an ad hoc committee with a mandate to examine the nomination process for the federal judiciary. This subcommittee heard from a number of witnesses, including the Canadian Bar Association, la Fédération des associations de juristes d'expression française, and my predecessor, Commissioner Dyane Adam. All the witnesses attempted to make committee members aware of the problem of the shortage of bilingual judges and proposed changes to the appointment process.

● (0910)

[*Translation*]

In November 2005, the Standing Committee on Justice tabled its 18th report, detailing the proceedings of the ad hoc subcommittee. The subcommittee did not have the time to finish its work before the 38th session of Parliament ended, but it did identify a few promising courses of action.

For example, a consensus was reached on the fact that judicial candidates should be interviewed during the appointment process. In my view, this measure would ensure that language skills of candidates are assessed before candidates are appointed. The subcommittee members agreed that the Minister of Justice should consult with the chief justice of the jurisdiction in question regarding the specific language needs of the court that has the vacancy. In her annual report tabled in 2004, my predecessor, Commissioner Adam, recommended that the Government of Canada re-examine the appointment process of superior court judges in order to provide these courts with an adequate bilingual capacity.

[*English*]

To date, the federal government's response to the recommendations of my predecessors and the House of Commons and Senate committees has been timid and largely inadequate.

I recognize that Minister Nicholson's practice of consulting with the chief justices on their specific needs in terms of bilingual capacity is a step in the right direction. However, I encourage the minister to show leadership and explore other solutions in concert with his provincial and territorial counterparts.

The time is right because Chris Bentley, Ontario's Attorney General, is currently examining this issue. At the beginning of the year, he started consultations on the recommendations made by Justice Osborne in his report on Ontario's civil justice system reform. Justice Osborne recognized the problem of the shortage of bilingual judges and recommended that any future appointments to the Superior Court should expressly consider the need for bilingual judges within a given region. I took the opportunity to write to Mr. Bentley and encourage him to initiate a dialogue with all key actors, including our Franco-Ontarian community, to ensure access to justice in both official languages.

Last, I'd like to share my view on the appointment process for the next judge of the Supreme Court of Canada. On the eve of the 40th anniversary of the Official Languages Act, it seems to me that knowledge of both official languages should be one of the qualifications sought for judges of Canada's highest court. Setting such a standard would prove to all Canadians that the Government of Canada is committed to linguistic duality. I find it essential that an institution as important as the Supreme Court of Canada not only be composed of judges with exceptional legal skills, but also reflect our values and our Canadian identity as a bijural and bilingual country.

[*Translation*]

Access to justice is one of the cornerstones of our judicial system. The insufficient bilingual capacity of the superior courts and courts of appeal of the provinces and territories means that a significant segment of the Canadian population is being denied the right to access justice in the official language of its choice.

As the Ontario Court of Appeal recently ruled in Belende, violation of these rights "constitutes material prejudice to the linguistic minority." A review of the appointment process is essential to ensuring equal access to justice in both official languages.

Thank you. I am now prepared to answer your questions when the time is right.

The Chair: Thank you very much for that presentation, Commissioner. It's always appreciated.

Now we turn to our professor, Mr. Michel Doucet.

Mr. Michel Doucet (Professor, Faculty of Law, University of Moncton, As an Individual): Thank you, Mr. Chairman.

Once again, I would like to thank the Standing Committee on Official Languages for inviting me to meet with it today.

My presentation is in two parts. First, I'm going to talk about the legal framework for access to justice in Canada's two official languages. Second, I'll share with you my experience as a lawyer and counsel who has had to plead cases at all court levels and in a number of Canadian provinces, which will lead me to talk about the barriers that must be overcome when you have to present a case before a judge who doesn't directly understand the litigant's language.

I don't have to remind the committee that a country's legal system must reflect that country's values and culture. In a bilingual system, as is the case in Canada, it must therefore reflect not only the values of the majority, but also those of the official language minority. For the latter, the right to use its language in a legal proceeding is more than merely the right to procedural fairness and natural justice. Bilingualism in the courts requires that the official language minorities have a right to appear before judges who speak and understand their language.

By judicial bilingualism, I mean, in particular, the litigant's right to use either of the country's official languages before the courts. By courts, I mean the legal and administrative tribunals. The activities concerned include oral and written arguments, final decisions, judgments and orders, as well as communications between the judicial system and the public.

With respect to language rights concerning the judicial system, we must recognize that the courts have generally interpreted them in a restrictive manner. Section 133 of the Constitution Act, 1867 guarantees language rights before any court established by Parliament and before the courts of Quebec; section 23 of the Manitoba Act, 1970 and section 19 of the Canadian Charter of Rights and Freedoms guarantees litigants from Manitoba, New Brunswick and Quebec certain rights before the federal courts. The other provinces are not bound by those constitutional provisions, but they are nevertheless bound the provisions of section 530 of Canada's Criminal Code. Although it can be argued that the historical context that gave rise to each of those provisions is different, we must admit that those provisions are similar.

The Supreme Court moreover has had occasion to consider those provisions in three decisions, MacDonald, Société des Acadiens du Nouveau-Brunswick and Bilodeau, in 1986. In those decisions, the court held that the right to speak in one's language before the courts did not impose on the government or another individual the corresponding obligation to use the language thus chosen or any other obligation than that of not preventing those who wish to exercise that right to do so. It can only be hoped, following the Supreme Court's decision in Beaulac, that the courts will review those decisions and ultimately acknowledge that the right to use a language before a court also includes the right to be understood directly in that language.

I moreover note the remarks of the late Chief Justice Dickson in his dissenting opinion in Société des Acadiens. Chief Justice Dickson was a unilingual anglophone judge, but, in his dissenting opinion, he clearly understood the problem when he asked what good is a right to use one's language if those to whom one speaks cannot understand?

Parliament intervened in an effort to correct the harmful effects of the three 1986 decisions by passing subsection 16(1) of the Official Languages Act. That section provides that every federal court, other than the Supreme Court of Canada, has the duty to ensure that the language chosen by the parties is understood by the judge or other officer who hears those proceedings, without the assistance of an interpreter. Some justify the exception made for the Supreme Court by saying that, since it sits as a bench of nine judges, it does not have the organizational flexibility of other courts. In my opinion, that justification no longer stands in the present context.

Having established the legal framework, I will now consider what it means in practice.

● (0915)

My experience in the law shows me, for example, that, in New Brunswick, when the decision is made to proceed in French, that virtually eliminates two-thirds of the bench, that is to say two-thirds of the judges, because approximately 40% of the province's judges are bilingual. The choice of judges for francophone litigants is thus much narrower in a circumstance such as that than that of their anglophone fellow citizens, and that's in the only bilingual province in Canada.

As for the other provinces, I have had to plead cases concerning section 23, cases involving the right to minority language education. I have had to do it in English because those tribunals, those courts didn't have bilingual judges, or else the citizens did not have the right to use the official language of their choice.

I would especially like to talk about my experience before the Supreme Court of Canada. I have had to plead a number of cases before the Supreme Court of Canada. When you win a case by a nine to zero decision, that's far from being a dramatic situation, but when you lose a case in a five to four decision, as happened to me at one point, and you've pleaded that case in French, you then go home and listen to the English interpretation that was made of your argument before the court in which three judges didn't understand French. As the judges had to listen to the argument through the English interpretation on CPAC, you wonder about what they understood.

I listened to the English interpretation of my argument, and I understood none of it. I have a lot of respect for the interpreters and the work they have to do. It must be quite complicated to do it in a political context; I can imagine what it must be in a judicial context, where every word counts, where the interaction between bench and counsel plays a very important role, and where the questions put to counsel and the answers given can have an influence. In those circumstances, if I had to plead another case before a bench on which three judges did not directly understand the language in which I wanted to plead, I might suggest to my client that we proceed in the other language to ensure the nine judges were able to understand the argument.

I therefore believe that the Canadian context today is ripe enough with regard to bilingualism for an amendment to be made to the Official Languages Act to eliminate the exception made for the Supreme Court of Canada. It is also ripe enough for us to be able to require, if lawyers are warned long enough in advance, that any judge or person who would like to sit on or to be appointed to the Supreme Court of Canada be bilingual before his or her appointment.

In that respect, I agree with the comments made by the Association du Jeune Barreau de Montréal in an article published in *La Presse* a few weeks ago. It requested that, in the next round of Supreme Court appointments, it be ensured that judges are able to directly understand the French used in the arguments made by the parties, and not indirectly with the aid of interpretation or other means.

I also agree with the Commissioner's remarks concerning the obligation to have a sufficient number of judges in all Canadian provinces who can hear the trial in both languages. I'll go even further. It should now be required in New Brunswick, which is the only officially bilingual province, that, in judicial appointments, all individuals also be bilingual so that francophone litigants are not limited in their choice of judges before whom they appear.

Thank you.

● (0920)

The Chair: Thank you for that presentation, Mr. Doucet.

Now we'll hear from Ms. Aucoin, President of the Fédération des associations de juristes d'expression française de common law.

Mrs. Louise Aucoin (President, Fédération des associations de juristes d'expression française de common law inc.): Thank you, Mr. Chairman.

Thank you for this invitation.

Allow me to talk very briefly about the Fédération des associations de juristes d'expression française de common law. FAJEF represents seven associations of French-language lawyers and its mandate is to promote and defend the language rights of francophone minorities, particularly—although not exclusively—in the administration of justice. We represent 1,350 lawyers. A number of them are graduates of the University of Moncton and the University of Ottawa, that is to say of common law faculties. We nevertheless represent many francophone and francophile lawyers who are graduates of all law faculties in Canada. We have an excellent representation of lawyers across Canada. FAJEF is also a member of the Fédération des communautés francophones et acadienne du Canada.

Our presentation today will focus on the federal judicial appointment process in general, although we want to make a few comments and suggestions regarding the Supreme Court of Canada appointment process. I'm here today with Mr. Rénald Rémillard, Executive Director of FAJEF.

What are the provinces' judicial language obligations? As my colleague Mr. Doucet pointed out, the degree of judicial bilingualism varies from province to province in Canada. For example, the courts of Manitoba, Quebec and New Brunswick must all operate in both official languages. In Ontario, the same principles applies in the designated bilingual regions, which represent approximately 90% of the population of Ontario. Since 1990, in the undesignated bilingual regions of Ontario, British Columbia, Alberta, Saskatchewan, New Brunswick, Prince Edward Island and Newfoundland and Labrador, judicial bilingualism obligations have been largely limited, but not always exclusively, to criminal trials. One thing is certain: in 2008, all provinces and territories must have a minimum number of bilingual judges. That was not previously the case. There has been some progress since 1990, when the present judicial appointment process was adopted.

What have been the results of the federal judicial appointment process? In our opinion, the current process too often produces unacceptable results. That observation is confirmed by our members, who for a number of years have told us about certain alarming situations in a number of provinces. Here are a few examples.

The citizens of Manitoba have the constitutional right to use the language of their choice before all courts. Despite that right, there were no bilingual judges in the Family Law Division of the Court of Queen's Bench until February 2005. For years, Manitoban francophone litigants wishing to divorce in French had to appear before a judge of the General Division of the Court of Queen's Bench. In concrete terms, that meant that litigants wishing to proceed in French in Manitoba often had to wait longer for a divorce than if they had proceeded in English, as a result of an absence of bilingual judges. Thus the federal judicial appointment process has not ensured respect for language rights in Manitoba for years, and there are no guarantees that things will be better in future.

In Ontario, the Superior Court must be able to hear trials in French in the designated regions. Despite that right, the Superior Court of Ontario has lost its bilingual capacity in Windsor and Welland. In Toronto, its bilingual capacity is distinctly inadequate. The situation is scarcely better in other Ontario regions, such as Parry Sound, Sault Ste. Marie and Thunder Bay.

Since there are no official statistics on the number of bilingual judges on the federal bench in Canada, we are unsure of the number of bilingual judges in Prince Edward Island and Newfoundland and Labrador.

In Alberta and British Columbia, two judges per province speak fluent French in the provincial superior courts, but, in Saskatchewan, there is only one bilingual judge from the Court of Queen's Bench. If that judge is on sick leave or vacation leave, or if there is a conflict of interest, the right to a trial in French under the Criminal Code disappears in that province. This right is thus in a highly precarious position.

● (0925)

FAJEF is of the view that the current federal judicial appointment process does not take sufficient consideration of language rights. Furthermore, the absence of any mechanism to assess the degree of bilingualism of federal judicial candidates confirms, in our view, the lack of importance attached to the bilingualism criterion in the appointment of judges to the federal judiciary. The present appointment process must be reformed, at least with respect to official languages.

Here are some potential reforms or solutions to explore. We think it would be important to assess the number of bilingual judges necessary to ensure equal access in French. That number should be regularly reassessed for each of the provinces or regions, based, among other things, on the principle of equal access and on the constitutional and statutory obligations of the province or region. In such an assessment, the lawyers associations should be consulted because they know whether the number of bilingual judges affects access to justice for francophone litigants in their province. That information is not always known to other stakeholders or to chief judges, who often rely on actual demand in French, but not necessarily on potential demand.

Mechanisms that clearly enable the minister to request bilingual candidates on the committee would be another potential solution. It should be specifically provided that the minister be able to require a list of bilingual candidates from the committees, and that that be indicated on the lists of judges submitted to the minister. The bilingual capacity of candidates should be assessed because it is currently subject to no measurement. Individuals may declare themselves bilingual on an application form without actually being so. Experience moreover shows that people quite readily declare themselves bilingual, whereas they are much less so in actual fact. When it comes to hearing a trial, it is not enough to say: “Bonjour, comment allez-vous?”

To assess the bilingual capacity of judicial candidates, candidates could be interviewed and at least one of the members of the selection committee should be fluently bilingual. That member would thus be able to assess the level of bilingualism. Of course, in certain provinces, a minimum number of bilingual members would be unacceptable. We therefore support Mr. Doucet's suggestion.

Bilingual candidates should also be identified on a mandatory basis. It should be indicated whether the candidates recommended for their province or region are bilingual. There is currently nothing to suggest that a candidate's bilingualism is identified when that person's name appears on the list of recommended individuals.

● (0930)

With respect to the regression that has been noted in certain provinces, there shouldn't be any loss of bilingual capacity when a bilingual judge retires or leaves the bench. Every bilingual judge who retires should at least be automatically replaced by another bilingual judge. That would have the advantage of preventing judicial bilingualism from regressing, as we have recently witnessed in Ontario and New Brunswick.

The Chair: You have two minutes left, Ms. Aucoin. This is interesting, but I'm having a little trouble hearing you. I would ask the members having conversations to do so outside the room so that we can hear our witnesses' remarks clearly.

Mrs. Louise Aucoin: Thank you.

I'm going to talk about the Supreme Court of Canada right away. FAJEF considers it essential that all the justices of the Supreme Court of Canada be bilingual, for various reasons. English and French have constitutional or statutory status in the federal legal and judicial systems as well as in all the provinces and territories of Canada. The English and French versions of statutes are of equal weight at the federal level, in Quebec, Manitoba, New Brunswick and Ontario and in the three territories. In the circumstances, we feel that the ability of the nine Supreme Court justices to clearly understand both statutes is essential.

Canada's Official Languages Act already acknowledges the importance of being understood without the aid of interpretation in federal tribunals such as the Tax Court of Canada, the Federal Court and the Federal Court of Appeal. The same right should apply to the Supreme Court of Canada.

In Canada, French enjoys equality of status and use with English. No francophone litigant should therefore be heard through interpretation before Canada's highest court. For these reasons, FAJEF requests that bilingualism become a mandatory criterion for appointments to the Supreme Court of Canada.

● (0935)

The Chair: Thank you, Ms. Aucoin. I'm going to interrupt you. You'll have the opportunity to speak in answering parliamentarians' questions.

Now let's start on the official opposition side.

Mr. D'Amours, we're listening to you.

Mr. Jean-Claude D'Amours (Madawaska—Restigouche, Lib.): Thank you, Mr. Chairman.

I want to thank you all for being here this morning.

You mentioned that, to gain access to justice, you have to be able to be understood or at least have the impression that everything you say is understood. However, there does not appear to be any mechanism for ensuring that, when judicial candidates say they are bilingual, they in fact are. One wonders whether some aren't stretching the truth a little to ensure they get a position. I don't know whether you will venture an opinion on this, but from what can be seen, one would say that some are stretching the truth a little.

Furthermore, to secure certain positions in the Public Service of Canada—let's call them customer service positions—if people don't pass an exam, if they don't qualify linguistically, they won't get that position. But these are merely customer service positions, providing a service in both official languages. These are often extremely trivial matters. It's general information intended for the Canadian public.

However, when it comes to appearing before a court to assert one's rights, there's no procedure assuring citizens that they can be adequately understood. All this is a little ironic. In the case of a simple general information service, we ensure that people are bilingual; if they don't pass the test, they don't get the job. In the case of protecting citizens' rights, we aren't required to ensure that the people who make the decisions are bilingual.

When you think of these two extremes, do you find that ironic? Are you prepared to venture an opinion on what I talked about earlier, the truth that people are stretching in order to get a position? Then I'd like to know whether the most recent judicial appointments made by the federal government—I'm thinking of New Brunswick in particular—offer francophones a guarantee that they'll be able to be served more in the language of their choice.

Mr. Fraser, Mr. Doucet and Ms. Aucoin, I'll let you answer.

Mr. Graham Fraser: I'll answer very briefly, partly because I'm not a lawyer.

Like you, I find that very ironic, especially when you consider the other qualifications that are checked. When you apply for a judicial position, you need a set of qualifications, including membership in the bar association, which I assume requires some checking. I find it ironic that this is an element that isn't considered a qualification, but rather an asset. Like you, I'm surprised to see there isn't a process for checking whether the candidate has that asset.

Mr. Jean-Claude D'Amours: Mr. Doucet.

Mr. Michel Doucet: The candidate's application form is a matter of self-assessment. Candidates themselves decide whether or not they are bilingual. Earlier in my practice, I appeared before a judge, and neither counsel was sure that judge understood French very well. And yet the judge was convinced he understood it. In the middle of the afternoon, he admitted he was having some difficulty. Understanding French and functioning socially in the language is one thing. Functioning in a language in the legal argument is another. There obviously has to be a procedure.

● (0940)

Mr. Jean-Claude D'Amours: Mr. Doucet, do you think that the present situation regarding appointments in certain provinces, including our own, clearly shows that francophones are having increasing difficulty asserting their rights in their language? It isn't enough to say you're bilingual. We have to ensure that the individual before us is bilingual and adequately understands. As you say, it's not a social discussion. It's a matter for the future, of defence of one's rights and of the advancement of justice in one's language.

Mr. Michel Doucet: You may not like my answer. I'll simply say that it hasn't improved, but it hasn't gotten worse either. That problem has been around in New Brunswick for a long time, but its proportions have remained the same.

It's improved in the Court of Appeal in the past 10 years, I have to admit. However, when a francophone lawyer decides to institute proceedings in French in the Court of Queen's Bench, he has to eliminate nearly 60% of the judges. That causes a problem for the litigant, because of delays, for example. Sometimes, you have to wait a long time to get a francophone judge. That causes funding problems.

Mr. Jean-Claude D'Amours: My time is going quickly, but I'll give you the time to answer, Ms. Aucoin.

Earlier Mr. Doucet made a comment on the subject and explained his position. Personally, I think it's clear that all Supreme Court justices should be bilingual in all cases. They should be completely bilingual and pass examinations to guarantee that, when they subsequently hear your argument, you don't feel you weren't understood and that the decision wasn't rendered as it normally should have been. Supreme Court justices must definitely be bilingual. You must ensure that a mechanism provides for that.

Ms. Aucoin, I'm listening to you.

Mrs. Louise Aucoin: I think it's a systemic problem. Criteria should be established to ensure there are guarantees. That's what we would like. There should be language criteria. There should also be objective checks as to whether people in fact have that ability.

The Chair: Thank you very much, Mr. D'Amours.

I now turn the floor over to Mr. Nadeau, from the Bloc Québécois.

Mr. Richard Nadeau (Gatineau, BQ): Thank you, Mr. Chairman.

Good morning, everyone.

From what I've just heard, it appears that candidates for judicial positions cheat by saying they are bilingual. What troubles me is that these people will have to preside over a court of justice. It sends chills down my spine to think that future judges or perhaps people already in those positions would have done anything like that.

Another aspect emerges. If I understood correctly, Canada is still a so-called bilingual country that purportedly respects francophones. In this country, people who appear before judges may be heard by them, but not necessarily be understood by them. Is that still the situation in Canada? Did I understand correctly?

Mr. Fraser, Mr. Doucet and Ms. Aucoin, my question is for all of you.

Mr. Graham Fraser: First, I'd like to respond to the underlying assumption of your question. I don't think we can talk about cheating. When people say they are bilingual, they do so in good faith, without necessarily understanding that there are levels of linguistic understanding and that they are entirely capable of functioning to a certain degree.

The example that Mr. Doucet gave was not an example showing bad faith, but rather an example showing that the judge's understanding wasn't adequate.

Mr. Michel Doucet: I wasn't trying to say that it was cheating on the part of candidates, but that people often tend to overestimate their knowledge of the other language. If anyone had to evaluate my English, some people would say that I'm not completely bilingual.

As for the other aspect you talked about, that there are still situations in which we aren't directly understood in our language, the Supreme Court is the exception in the Official Languages Act. Section 16 states that, at the Supreme Court, they don't need to understand directly and that they can do it through interpretation. However, the act provides that all other federal courts have an obligation to understand directly.

● (0945)

Mrs. Louise Aucoin: I support my colleagues' comments.

Mr. Doucet talked about understanding. I did my first bachelor's degree in English. I studied law in French, and, when I started my master's, it took me a few months before I could start thinking about law in English. I think that examinations to verify language skills are essential because it isn't that easy to learn a language. That would be a solution to ensure greater respect for litigants' language rights.

Mr. Richard Nadeau: In the provinces where it is provided that individuals who appear before a judge have a right to be heard and understood in the language of their choice, are there still any situations in which people are heard and not understood? I'm talking about the provinces where there is that obligation.

Mr. Michel Doucet: In the case of New Brunswick, the answer is no because New Brunswick's Official Languages Act specifically provides that judges presiding over a court in New Brunswick must be able to hear and understand all stages of the proceeding without the help of translation.

However, a problem arises. As not all judges are bilingual, the number of judges to whom people have access is reduced.

Mr. Richard Nadeau: You're talking about New Brunswick, but what about the other provinces?

Mr. Michel Doucet: I can't state an opinion on them.

Mrs. Louise Aucoin: I think they are organized more or less satisfactorily. Sometimes they bring in judges from another province to hear a case. They manage.

Mr. Richard Nadeau: So it's still possible to be heard without being understood.

This is 2008 and we still don't evaluate the comprehension and subtlety of the second language of future judges by means of an examination. Can you suggest to us parliamentarians any amendments to an act so that francophones are finally respected and have before them not a judge who thinks he understands French, but one who will in fact respect the person and render a fair and equitable judgment?

Mr. Graham Fraser: I think the public service gives you a model for that. It's not a perfect model: improvements can still be made to it.

In another connection, I know that specialized French second-language courses are provided for judges or potential judges who have already achieved a certain level of French. I know that one specialized school in Quebec City offers an intensive specialized course for judges wishing to develop their French. For these institutions, we're not starting from scratch.

If we have a qualification, classification and examination system, there have to be training institutions. We can't suddenly decree that those who didn't plan for that in their youth are excluded from the process or have no opportunity to become judges.

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

Now we'll continue with Mr. Godin.

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Mr. Chairman. I'd like to welcome our guests this morning.

Listening to the testimony, I think this is becoming troubling in one sense. Mr. Doucet, when you talked about from "9 to 0", I thought you were talking about a Canadiens hockey game. I didn't really think that the Supreme Court had nine justices. However, the expression "9 to 0" meant there were nine judges and that, when they all shared the same opinion, there were fewer problems. Except that, when the score is five to four, it's a close game that could go into overtime, and then you said that the fifth point was due to the fact that the judge hadn't understood the argument, since you didn't understand your own argument when you listened to the interpretation, with all the respect you have for interpreters.

That's troubling. The Supreme Court is the court of last resort in Canada. It is the last stage of the justice process for Canadians. For those who are judged, it's their future that can be ruined. That's why we have a justice system.

What we're hearing from you this morning is appalling. I'm anxious to hear you on the subject. I wouldn't have liked to be your client, even though you are a good lawyer. You won a lot of cases in the Supreme Court with colleagues, but when you tell me about the interpretation service you received in the Supreme Court in a specific case, I think someone didn't have any luck in court that day.

I would like to hear you on that subject.

● (0950)

Mr. Michel Doucet: I would simply like to point out that the example I gave occurred at a time when three judges weren't bilingual. I didn't say those judges hadn't understood. I simply explained that I subsequently wondered about the situation. When the ratio was five judges to four, I wondered whether the situation would have been different if I had pleaded my case in English.

I think it's legitimate to ask yourself that question when translation is used. I myself have had to make submissions outside Canada where I had to listen through translation and where I sometimes lost the thread of the debate that was taking place. So I couldn't exactly follow what was being said. I'm simply saying that I asked myself the question.

The situation at the Supreme Court has vastly improved since that time, but there are still problems. It must be ensured that all the judges are in fact bilingual.

Mr. Yvon Godin: But, on the other hand, it's not up to a judge to explain—I'm trying to make myself understood—to another judge what the witness meant to say. I think that should be said directly to the judge, not interpreted by another judge who thinks he understood.

[*English*]

No, no, you didn't understand him correctly, because that's not what he meant. As for what he meant, well, he's not there anymore to explain it. I think that's a big problem.

[*Translation*]

Mr. Michel Doucet: That's often the problem: after the translation, if the judge wants clarification and to ask the lawyer a question, in the time it takes to get the translation and to be able to ask the question, they've already moved on to something else.

Mr. Yvon Godin: But the problem is that, if a judge asks another judge for an explanation, because he misunderstood, it's possible he may turn to a judge who has already formed an opinion. I don't mean that he would be nasty, but perhaps he wouldn't say everything the first judge would need to hear.

In that way, the accused isn't appearing before a court that is fair to him.

Mr. Graham Fraser: I would like to add another point to the issue. We live in this bijural system in which the Supreme Court is called upon to make decisions, to decide arguments, some of which are conducted in French. The entire concept is debated in French in a legal system that is not necessarily a common law system, in a country where there has been a language debate for 40 years that has profound legal implications. So it's not through interpretation that we're necessarily going to understand all the aspects of the debate prior to a case being brought before the Supreme Court.

Mr. Yvon Godin: Mr. Chairman, there is an important question that we put to the deputy ministers last week or early this week.

You say that the language debate has been going on for 40 years, but I believe instead that it's been going on for 400 years. So as regards the current debate, how many Supreme Court judges are there who are, for example, French-speaking and who don't speak English? Has a completely francophone judge ever been appointed to the Supreme Court? From your knowledge, do you know of a unilingual francophone who's previously been appointed to the Supreme Court?

● (0955)

Mr. Graham Fraser: As far as I know, no.

Mr. Yvon Godin: Mr. Doucet.

Mr. Michel Doucet: I've already asked myself the question, and the answer is no.

Mr. Yvon Godin: Ms. Aucoin.

Mrs. Louise Aucoin: It's the same thing.

Mr. Yvon Godin: Mr. Tremblay.

Mr. Marc Tremblay (General Counsel and Director, Official Languages Law Group, Department of Justice): We keep no data on the subject, on either anglophones or francophones.

Mr. Yvon Godin: Mr. Tremblay, you work at the Department of Justice. Can you find that information and send it to the committee?

Mr. Marc Tremblay: We aren't able to do those kinds of searches. You have to talk to the Commissioner for Federal Judicial Affairs.

Mr. Yvon Godin: We should ask other witnesses from the Department of Justice to provide those figures to us.

Mr. Marc Tremblay: They aren't at the Department of Justice, but at the Office of the Commissioner for Federal Judicial Affairs.

Mr. Yvon Godin: All right.

Mr. Fraser, would it be possible to conduct a study to determine how many individuals in Canada could be appointed? In Saskatchewan, are there any lawyers who speak both languages? They say there's only one in that province.

Mrs. Louise Aucoin: I know a number. We have an association of French-speaking lawyers in Saskatchewan.

Mr. Yvon Godin: In all the provinces, the government, if it wanted—it seems we'll have to pass an act to give it a little kick in the pants—could find qualified people or send out a signal that, if an individual isn't bilingual, he or she isn't qualified. We could say the reverse. But now it's being said that, if a person is bilingual, he or she isn't qualified, since they say you have to recruit the most qualified person.

The Chair: Thank you, Mr. Godin.

Now we'll move to the government side.

Mr. Petit.

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good morning, Mr. Fraser. Good morning to the other guests as well. Welcome to the committee.

My question is for Mr. Fraser, Mr. Doucet and Ms. Duchesne. I've been a lawyer for 35 years and, unlike Mr. Doucet, I haven't had the opportunity to go to the Supreme Court. I worked with ordinary people in the lower courts. What do those people want? First, they want access to justice in their language. The information must be laid in their language. In other words, if they are accused of something, they want to be able to read the indictment.

If I don't have any money, I want federally-funded legal aid to enable me to get a lawyer who speaks my language. When I appear before the court, I want the evidence provided to me by Crown counsel, since we are at the federal level, to be in my language. That's access to justice. When I appear before the judge, I'll see whether I'll plead guilty. But that's another matter.

I also want to the clerk of the court to be able to speak my language, because he holds certain things. For example, he can compile evidence that will be used in a subsequent appeal, if necessary. That's what I mean by access to justice.

The judge is an extremely important instrument, but I have all this way to go before appearing before him.

Mr. Fraser, are we currently going all that way? Then I'm going to ask Ms. Duchesne, Ms. Aucoin and everyone to answer the question.

Mr. Graham Fraser: Correct me if I'm wrong, but I get the impression that Bill C-13 was developed precisely to make it possible to do what you just mentioned. I've already appeared before the House Justice Committee and that of the Senate to express my support for that bill because it is an attempt to correct the deficiencies you've identified.

Mr. Marc Tremblay: I note some confusion in all the remarks expressed before the committee this morning. I believe it's important to clarify matters. When it comes to federal jurisdiction, the Official Languages Act and the Criminal Code, you, as parliamentarians, and we, as the government, have a certain control and can pass laws, policies and so on. In those conditions, the Criminal Code provisions referred to and Part III of the Official Languages Act make it so that, apart from the minor exemption for the Supreme Court previously discussed, not only is everyone free to use English or French before the courts, but under correlative obligations, the judge and Crown counsel must actively use the language chosen by the other party. That's already the case in the sphere that we control and over which we have an influence.

However, the other spheres are areas of provincial jurisdiction. In a case concerning access to justice in Manitoba, the Constitution does not guarantee the right to be understood directly. No provincial legislation confers that right. Provincial law is a provincial jurisdiction. I think that issue is important. If you ask me in what language the introductory pleadings will be drafted in a civil case in Manitoba, I can only answer you that that isn't our responsibility.

There are rules at the federal level. Mr. Fraser referred to those of the Criminal Code which are in the process of being developed and which are designed to provide for translation of the information. At the federal level, the Attorney General has an obligation to use the language of the other party from the moment it is known. These matters must be clarified, or else our discussions will head in the wrong direction in a number of respects.

● (1000)

Mr. Michel Doucet: With your permission, I'm going to issue a minor warning.

I agree with Mr. Tremblay when he says that civil procedure is a provincial jurisdiction and that criminal procedure is a federal jurisdiction. Judicial appointments are a federal jurisdiction. For example, the appointment of Supreme Court justices is the responsibility of the federal government.

Where there are not enough bilingual judges, I won't exercise my right to request a trial in French because my client will want to have access to justice as soon as possible. If it appears that we'll have to wait a few months, we'll opt for the other language. Whatever the case may be, the appointment of superior court judges is a federal responsibility.

Mr. Daniel Petit: My last question is for Ms. Duchesne.

I also sit on the Standing Committee on Justice, and I would like to know what the Access to Justice in Both Official Languages Support Fund consists of. What is its purpose? We're talking about something that might be useful to us today.

Ms. Andrée Duchesne (Senior Counsel and Manager, Francophonie, Justice in Official Languages and Legal Dualism, Department of Justice): The Access to Justice in Both Official Languages Support Fund is a federal program administered by the Department of Justice Canada. One of its objectives is to help improve access to justice in both official languages across the country. As regards the subject of particular concern to us this morning, I would say that we are working on this matter in close cooperation with the provinces and territories in the context of a federal-provincial/territorial working group. We've supported initiatives advanced by a number of provinces. The purpose is to help them ensure that judicial personnel, the clerks and staff providing front-line service, are assisted and encouraged, at their request, to train people in the other official language.

For example, a particularly interesting initiative concerning provincial prosecutors is designed to improve the ability of those individuals to provide services in the other official language. In all these cases, the individuals must first be bilingual in order to undergo this development training. We hope to step up our efforts with our provincial colleagues in this area. At the request of provincial courts, we have supported the training of provincial court judges in certain provinces. That was the case in Quebec, that was recently the case in Alberta, and it's currently the case in New Brunswick.

The Chair: Thank you for that clarification, Ms. Duchesne.

We'll now begin our second round with Mr. Rodriguez.

Mr. Pablo Rodriguez (Honoré-Mercier, Lib.): Thank you, Mr. Chairman.

Welcome, everyone.

Mr. Doucet, you said at the outset that the judicial system had to reflect our values and who we are. Briefly put, our judicial system does not reflect who we are: Canada, an officially bilingual country. There is still a lot of work to be done in that regard.

What strikes me is the present situation with regard to the Supreme Court, which is the supreme body, the court of last resort, and for which there is an exemption. May I know where it is stated?

● (1005)

Mr. Graham Fraser: It's in the 1988 version of the Official Languages Act, section 16, which reads as follows:

> 16.(1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that
>
> (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
>
> (b) if French is the language chosen by the parties for proceedings conducted before it...

So it's up to the courts, except for the Supreme Court, in accordance with the version of the act amended in 1988.

Mr. Pablo Rodriguez: So it's an act of Parliament that can be amended by Parliament.

Would that be your recommendation, Mr. Fraser?

Mr. Graham Fraser: I've always thought that it was very important to appoint bilingual judges to the Supreme Court. Amending the act is one way of doing it, but there is another, simpler way of proceeding. And that's to ensure that that happens in the appointment process.

Mr. Pablo Rodriguez: Indeed. However, we can't guarantee the government's wishes and will. To force the government to act accordingly, we should therefore amend the Official Languages Act. I assume that's the wish of virtually everyone here. Obviously, you're staying neutral on the question, but that at least is the wish of those working in this field.

What is the current situation of judges? Did I correctly understand that eight are bilingual and that only one, the last to be appointed, is unilingual?

Mr. Graham Fraser: That's correct.

Mr. Pablo Rodriguez: That creates an odd dynamic, for example, in unofficial discussions outside a room where a translation service is offered. I assume everyone must necessarily speak English.

Mr. Graham Fraser: I think that dynamic is inevitable in discussions on a case that has been pleaded partially in French, on a case concerning elements of the Civil Code or on language cases. Either the ninth judge won't be in on the discussions among the bilingual judges, or the francophones judges will conduct the conversation in English.

Mr. Pablo Rodriguez: So we can say that it's legal, in accordance with the act, but in a way unacceptable, in accordance with the values of bilingualism that we're trying to defend.

Mr. Graham Fraser: Let's say that—

Mr. Pablo Rodriguez: Can Mr. Doucet answer the question? We're going to let him speak a little.

Mr. Michel Doucet: I've always found it somewhat odd that these obligations are imposed on all the federal courts and that this exception is made for the Supreme Court of Canada, the highest court in the land.

That's why I too am in favour of an amendment to this provision to ensure the appointment of bilingual judges to the Supreme Court.

Mr. Pablo Rodriguez: I'm really interested in this subject.

In my opinion, there are two occasions where an individual in a vulnerable position really requires services in his language. First of all, this is the case in the health field. When you're sick, you are vulnerable and need to be reassured. So you need to be able to communicate with your doctor in your language. It's also the case in the area of justice. For example, if a problem arises, you may be intimidated or nervous. You are in a field that you don't know and you want to be able to speak your language, but it seems complicated.

Mr. Doucet, you mentioned a recent case in which you had to plead in English. Does that happen often?

Mr. Michel Doucet: I wasn't talking about a recent case. I cited an example that occurred at the start of my career. I would like to say that the beginnings of my career are quite recent, but that goes back a number of years now.

So it was a case that occurred at the start of my legal career. We had started a trial in French, but in the middle of the first hearing day, the judge himself admitted that he understood, but perhaps not enough.

Mr. Pablo Rodriguez: Does it often occur that you have to plead in English?

Mr. Michel Doucet: It happens often when I have to plead language cases in other provinces. We have to plead them in English, even though the witnesses are francophone.

That can happen in New Brunswick. I personally try to do it as little as possible because I represent francophone litigants.

Mr. Pablo Rodriguez: Thank you, everyone.

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

It's now the turn of a government member. Mr. Lemieux, go ahead, please.

Mr. Pierre Lemieux (Glengarry—Prescott—Russell, CPC): Thank you very much and thanks to our witnesses.

I'd like to begin by asking Mr. Fraser a question.

Your predecessor, Commissioner Adam, mentioned in 2003 that the Office of the Commissioner of Official Languages had received very few complaints about the exercise of language rights before the courts. If my memory serves me, she had received approximately 24 complaints in 10 years. She explained that situation as being the result of a number of factors, including perhaps a lack of awareness on the part of Canadian litigants of their language rights.

I would like to know whether you can bring us up to date on the number of complaints received in recent years. Has the number increased or decreased, or has it remained virtually the same?

● (1010)

Mr. Graham Fraser: As regards the specific area of access to justice, I'm going to ask Ms. Tremblay to answer you.

Ms. Johanne Tremblay (Director, Legal Affairs Branch, Office of Commissioner of Official Languages): I believe Commissioner Adam was talking about complaints filed under Part III, which concerns federal quasi-judicial or administrative tribunals. A small number of complaints have indeed been filed in the past 10 years.

In a number of cases, litigants are not informed of their rights, including the right to be heard in the official language of their choice. And often those who are informed prefer to proceed in English, as a result of the inability of those tribunals to plead in French.

We currently have two complaints concerning the ability of superior courts to hear cases in both official languages. I'm not able at this time to tell you the number of complaints concerning federal quasi-judicial tribunals, but we could provide you with those figures if the committee wishes.

Mr. Marc Tremblay: I'd like to add a brief comment.

The conclusion seems to be that this lack of complaints stems from poor knowledge of rights. However, that's an opinion. I'm not sure the Office of the Commissioner has specific figures that could support that fact.

I can say that, in my 10 years dealing with language rights at the Department of Justice, to my knowledge, we only had to handle a single complaint concerning the question of access, and it involved the Attorney General of Canada, whether it was before criminal courts or civil courts.

We're making efforts to increase litigants' awareness back home. The Office of the Commissioner of Official Languages has a mandate to make the public aware of their language rights. We must definitely continue making efforts in that area.

However, before drawing any negative conclusions about the lack of complaints, perhaps we should rethink this process somewhat.

Mr. Pierre Lemieux: I'm not advancing any hypotheses. I would simply like to know how many complaints have been received.

Some initiatives have been taken by the Department of Justice, but also by groups like the Association des juristes d'expression française, to make Canadians aware of their language rights.

What is your opinion of those initiatives? Do you have a positive or a negative impression? Does that contribute to the cause?

Mr. Graham Fraser: I'm referring to the support fund that Ms. Duchesne mentioned. I'm going to take this opportunity to say that it's very important that the support fund be renewed in the context of the action plan. It was a program of $18.5 million over five years, which is now awaiting the action plan's renewal.

I indeed view that in a positive light, but I nevertheless have some concerns about the fact that we're still waiting for a renewal of the action plan.

The Chair: Ms. Aucoin, go ahead very briefly.

Mrs. Louise Aucoin: I'd simply like to add that the plan as such has been evaluated and that the evaluation is very positive. That was done as part of an external evaluation, and the evaluation is excellent.

● (1015)

The Chair: Thank you, Ms. Aucoin and Mr. Lemieux.

We'll now go to Ms. Freeman.

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): Thank you for being here today.

I'd like to ask other questions on the appointment of judges to the Supreme Court.

I had the privilege of being a member of the committee when Mr. Justice Rothstein appeared. We took great note of his knowledge of the French language. I must say that, at every point, he declared his commitment to take courses that would enable him, in the space of two years, to master the language well enough to be able to comply.

Later, Mr. Nicholson appeared in the Standing Committee on Justice and Human Rights, of which I am also a member. The minister had assured us that this was not a major handicap, since one could very well learn the language quite quickly. What took precedence in the appointment of a Supreme Court justice, apparently, was legal ability more than language ability.

I also heard Mr. Doucet say that a distinct improvement has been noted with regard to Supreme Court justices. Could you provide some clarification on that point? I don't see a major improvement.

Mr. Michel Doucet: What I simply meant was that there was a time when there were many more unilingual judges on the Supreme Court of Canada, a time when virtually the majority of justices in the court could be unilingual. Not so long ago as well, barely four or five years ago, there were three or four judges who could not function in French.

Earlier I was listening to my colleagues say that there is currently only one. As long as there is one, I won't say that the situation is perfect. In my opinion, it is essential that all the justices of the Supreme Court of Canada be able to hear cases directly in both official languages. Until that is the case, I can't say that it's perfect.

Mrs. Carole Freeman: I think you're absolutely right to say that it's elementary, in a country that defends both official languages, for the highest court to be able to operate in both languages. It seems to me that's elementary. If we look at the problem at its source, judicial appointments are said to be a federal jurisdiction. Everyone knows that the government proceeded unilaterally to amend judicial appointments last November by changing the composition of the evaluation committee. On the evaluation committee, of course, they forgot to take the language provision into account.

You know that, previously, to appoint a judge—and that's a federal jurisdiction—the evaluation committee had to have a member from the Canadian Bar Association, a member from the provincial bar association, the Attorney General, a member of the judiciary and three individuals appointed by the government. They changed that way of appointing judges by designating a member of the Canadian Bar Association, a member of the provincial bar, a member of the police department, or who represents it unilaterally, and three individuals from the government. The committee was completely changed.

Do you think we could change it more in order to take language into account? Currently the Conservative government's claims are very much taken into account, but could we introduce this provision in the way judges are appointed, in the evaluation committee?

Mr. Graham Fraser: Absolutely.

Ms. Carole Freeman: And what do you propose?

Mr. Graham Fraser: I'd like to go back to a point that you raised, that what is important is legal competency. A distinction is made, and I don't think it should be. I think that linguistic ability is an integral part of legal competency. Our acts aren't translated; they're drafted in both languages. So if you can't read the other version of the act, you understand half the act, since there isn't one official version that takes precedence over the other. In my opinion, it's essential that, at the Supreme Court, we be able at least to require... As regards the matter of the acts drafted in both languages, a translation is not enough, because you have to understand both versions.

Mrs. Carole Freeman: Thank you.

Ms. Aucoin?

Mrs. Louise Aucoin: I'd just like to add that the objective way that has been established to ensure legal competency is that you have to have been a member of the bar for 10 years in order to be eligible to become a judge. So it seems to me that perhaps we could also have an objective criterion to ensure candidates' language ability.

● (1020)

Mrs. Carole Freeman: I didn't understand what you just said.

Mrs. Louise Aucoin: We have an objective criterion for evaluating a candidate's legal ability, that is to say that the candidate must have been a member of the bar for 10 years in order to be appointed judge. So it seems to me that it would also be a good idea to have an objective criterion for evaluating language ability. I quite agree that that's part of the ability—

Mrs. Carole Freeman: That's my question.

The Chair: Thank you, Ms. Freeman. We've already used more time than was allotted to you.

Mr. Godin.

Mr. Yvon Godin: Thank you, Mr. Chairman.

Mr. Tremblay, earlier you said that the debate was a false debate and that it was as though we didn't know what we were talking about. However, it's very clear to me that you were talking about Supreme Court justices from the provinces whose appointments are under federal jurisdiction. That's the debate today. In Nova Scotia, for example—you should be aware of that—how many judges are there in the Supreme Court?

Mr. Marc Tremblay: I don't work at the Office of the Commissioner for Federal Judicial Affairs, Mr. Godin. I don't have a handle on the questions you're asking me.

Mr. Yvon Godin: You say you don't work there, but you like to answer certain questions. We see that Nova Scotia has just appointed two unilingual judges to positions previously occupied by two bilingual judges. As Mr. Doucet said, we're losing two-thirds of the opportunities to be served in French in court. We're losing the chance to be judged in our language. That makes me think of when you try to reach the government by telephone, and you're told to press 1 for English and 2 for French. Pressing 1 for English gives you access to immediate service, whereas, if you press 2 for service in French, you wait for half an hour or two hours. Isn't this the same thing? We're no longer talking about an hour or two, but we can wait six months for justice to be done in our language. Justice should be accessible immediately, not in six months.

Mr. Marc Tremblay: Indeed, the question you're raising directly can't be put to me. However, I'm going to take the opportunity to tell you about things I can talk to you about, as I did to clarify the comments of today's guests, who in some respects didn't draw the necessary distinctions between levels of courts.

You say you want to talk about superior courts, and that's entirely all right. However, regardless of the court concerned, what hasn't been said today is that, if there is a delay, under the Criminal Code, in the case of a hearing that must be conducted in the language of the accused—because it's the language of the accused, pursuant to sections 530 and 530.1—or if the judge does not have competence or is absent, or if no one can give effect to the right, recourse is provided for in the Criminal Code. The Supreme Court was very clear on this point in Beaulac: there would be a stay of proceedings, release of the accused—

Mr. Yvon Godin: Quite often in that case, people give up and decide to proceed in English. At that point, you don't receive any complaints. You were quick to say that you had only received one complaint in 10 years. How many complaints have you received from anglophones in 10 years?

Mr. Marc Tremblay: Pardon me?

Mr. Yvon Godin: How many complaints?

Mr. Marc Tremblay: I've received one in 10 years.

Mr. Yvon Godin: All right.

Was it an anglophone who said he couldn't be served in his language?

Mr. Marc Tremblay: He was a francophone in that case.

Mr. Yvon Godin: All right.

[*English*]

As we say in English, I rest my case on that one.

[*Translation*]

Mr. Marc Tremblay: With respect, Mr. Godin, I believe that it's a bit premature to draw grand conclusions on the basis of one complaint.

Mr. Yvon Godin: It isn't premature. What happens is that judicial positions should be granted to individuals who know both languages, and I see that Stephen Harper's Conservative government doesn't have the will to say it will respect the country's two languages, English and French, and to make an appointment to the Supreme Court that respects the two official languages. That's where we're headed. At least that's my opinion. Perhaps I'm wrong. I think that, if we talk to people and conduct a survey to determine how they would like to be served, they'll definitely say, with regard to justice, that they would like to be served in the language of their choice.

Mr. Marc Tremblay: With your permission, I'll provide some additional information on one final point. It's the government's purpose in Bill C-13 to ensure that rights are publicized as widely as possible, by making sure that it informs all accuseds, whether they are represented or not, of their rights under the Criminal Code. We hear these remarks. We're not saying that there isn't any room for certain improvements in the justice system in Canada. What I'm saying is that we have to ensure that we clearly understand the necessary nuances based on the court levels, the type of proceeding and the constitutional responsibilities that apply to each. I can't talk to you about judicial appointments; that's not my responsibility, but, in the areas of federal jurisdiction, the measures that can be taken have largely been taken. We're still working actively to lower any remaining barriers, even beyond our areas of jurisdiction.

● (1025)

The Chair: Thank you very much, Mr. Godin. You'll have the opportunity to come back to this.

However, I would like to recall that the judiciary is an independent branch and, as such, is independent of the Department of Justice. All committee members are aware of that.

We'll now begin the third round. We'll start with Mr. Coderre.

Hon. Denis Coderre (Bourassa, Lib.): Thank you, Mr. Chairman. I don't want to talk about courses given by the Department of Justice, but about courses. I especially want to announce to you, Mr. Chairman, that I will be tabling a motion to request that the Standing Committee on Official Languages recommend that justices appointed to the Supreme Court be bilingual. I will eventually table a private bill to make the necessary changes to ensure that we have bilingualism. When a court is the court of last resort, that's where it happens. It's like in hockey. When the puck goes by the goaltender, you can no longer stop it: it's gone in; it's over. So you have to be subtle. These are important technical and legal concepts. If people aren't able to make themselves understood in their language, I'm sorry, but they get the feeling they are second-class citizens. There has to be justice—isn't that true, Mr. Tremblay?—there has to be the appearance of justice. So it's necessary that that appearance of justice also take on its full force.

What also concerns me is that we unfortunately always get the feeling that bilingualism is a francophone who speaks English. When there are eight bilingual individuals and one anglophone and everybody is speaking English, that's nice, that's fine, but personally that's a problem for me. Everyone agrees that there is a problem of perception, that there is a double standard when you find yourself in superior courts where the judge has trouble communicating, or you're unable to get judges who allow you to be heard.

I'd simply like to ask you whether you get the feeling that, even though there are stays of proceedings in the Criminal Code and elements that make it possible to postpone a case, very often people need to be heard, and if you aren't on the same footing as people who can make themselves understood immediately in English, there's somehow a certain injustice. Even if you sweep the dust under the carpet by saying that that will come one day, ultimately, it's as though we were saying to ourselves that we'll stop at the street corner and wait for an RCMP officer for two more hours because we want to be served in French.

What do you think of what I've just told you, Commissioner, and then Mr. Doucet?

Mr. Graham Fraser: Very briefly, there is an old saying in English that goes:

[*English*]

justice delayed is justice denied.

[*Translation*]

This is a principle that has been endorsed a number of times by Canadian courts. The right to have a case heard was recently reinforced in Ontario by the decision in the Belende case. I think the argument you raise is very legitimate.

Mr. Michel Doucet: I would simply like to add that there is always the psychological aspect for the litigant in that kind of situation. Mr. Tremblay said that there weren't any complaints. I know very well that, last week, I could have filed a complaint concerning a federal court. However, the client too stands before an imposing, large structure, and he doesn't want to file a complaint. He wants to proceed in court by saying that he doesn't want to make any waves.

As regards the other aspect, I understand it very well, and I have an enormous amount of respect for the amendments made to the Criminal Code to make access to justice in French easier. However, when someone is in criminal court, very often, with regard to the language issue, unless someone explains it to us very well and it's immediately accessible, we don't dare exercise that right for fear of offending the court.

● (1030)

Hon. Denis Coderre: That's a good argument.

Mrs. Louise Aucoin: There's the psychological aspect, but there's also the financial aspect. We know that, if ever the order is to start over, that costs quite a lot more. All that reduces access to justice.

Hon. Denis Coderre: I'm speaking on behalf of my party. I'm the official languages critic, and I can assure you of our full support in this regard.

I'm pleased to see that we had an action plan that worked, particularly for the Access to Justice Support Fund. Unfortunately, it's not in the budget, so we don't know whether there are any envelopes for the future.

However, I agree; I like the idea of a support fund. However, don't you think it would also be necessary for access to justice to have a court challenges program that would enable us to ensure, for the same psychological reasons, that people are able to know that justice will be done? They don't always have the financial capability to carry it through to the end. A right shouldn't be based on the thickness of one's wallet.

Mr. Graham Fraser: I'm going to answer very briefly. I intervened before the courts in the case brought by the Fédération des communautés francophones et acadienne on the matter of the cancellation of the Court Challenges Program. That was a debate with the government before the courts. I'm not going to repeat all the arguments that we raised in court, but I'm going to hand over to Mr. Doucet.

The Chair: Please be very brief.

Mr. Michel Doucet: I'm the lawyer for the Fédération des communautés francophones et acadienne.

The Chair: All right. Thank you.

Mrs. Louise Aucoin: It's thanks to the Court Challenges Program that we have more services in French. We need only think of our schools in Nova Scotia, Manitoba and elsewhere.

The Chair: Thank you, Ms. Aucoin.

We'll now continue with Mr. Nadeau, from the Bloc Québécois.

Mr. Richard Nadeau: Mr. Chairman, we've talked a lot about the situation of the minority francophone community in Canada.

Can English-speaking Quebec citizens be served in English in the law courts? I'd like to know whether something is being done in that area.

Mr. Graham Fraser: I'll ask Ms. Tremblay to give you some details on that. For our part, based on the information we've gathered, the federal courts in Quebec pose no problem in that regard. However, there has been a certain amount of discomfort with the provincial courts.

Do you want to provide more details?

Ms. Johanne Tremblay: In the superior courts in Quebec, the level of bilingualism appears to be adequate. Based on the information we've been able to gather, the same isn't true of provincial court judges.

Mr. Richard Nadeau: Mr. Chairman, I'm going to share my time with Ms. Freeman.

Mrs. Carole Freeman: I'd like Ms. Aucoin, whom I interrupted earlier, to complete her answer on the evaluation of legal or linguistic competency. Had you finished your remarks?

Mrs. Louise Aucoin: The appointment of judges poses a systemic problem. The system should be changed and objective criteria established to ensure that the superior courts are sufficiently bilingual. To ensure legal competency, the bar imposes a 10-year criterion in order to be eligible. As for language competency in the superior courts, objective criteria must become systemic. They could appear on a form or something like that.

Mrs. Carole Freeman: What could be done about the structure of judicial appointment committees? We're trying to find a solution. Sixteen committees have been established to appoint judges across Canada. Surely there's a way to improve the ability of members who evaluate candidates. Do you have anything to suggest?

When people appear in court, are they systematically told that they have the right to a trial in either language? Is that stated clearly? In the rest of the country, are all citizens who appear really informed that it's possible for them to undergo their trial in their language?

● (1035)

Mrs. Louise Aucoin: Members of lawyers associations could sit on the appointment committees. For example, it was considered important that a police officer sit on those committees. If we had members of lawyers associations, that would ensure a presence in that regard.

As to whether information is given to litigants, section 530 provides that they have that right solely if they are not represented by counsel. However, the act is being amended so that judges can inform litigants.

Mrs. Carole Freeman: I think that Mr. Fraser, who appeared on the subject of Bill C-23, could add to that.

Do you have anything to add?

Mr. Graham Fraser: The purpose of amending the act is to remedy that problem. If I understand correctly, that's Bill C-13. I don't know if it changed between Bill C-23 and the last version of Bill C-13, but it requires that informations be—

Mrs. Carole Freeman: [*Inaudible - Editor*] isn't represented by counsel. But we want an amendment to be made so that it's done.

Mr. Graham Fraser: It would be amended so that everyone is informed of that right.

Mrs. Carole Freeman: So that everyone is warned with the... But it died on the *Order Paper*, because there was a—

Ms. Johanne Tremblay: No, it's before the Senate now.

Mrs. Carole Freeman: It's before the Senate?

Ms. Johanne Tremblay: Yes, but it's a criminal matter. We shouldn't forget civil trials either. The discourse contines. There is this obligation to inform, but there's the entire component of civil trials. In Ontario, Franco-Ontarians have the right to be heard in the courts in the designated regions—we mentioned this—which concerns 90% of the population. In this civil context, there isn't this obligation of active offer. Litigants thus aren't necessarily informed of their rights. Under their code of ethics, lawyers now have this obligation to inform their clients, but it isn't—

The Chair: Thank you very much, Ms. Freeman.

[*English*]

We now turn to Monsieur Michael Chong.

Hon. Michael Chong (Wellington—Halton Hills, CPC): *Merci.*

I note that all of the witnesses, I believe, with the exception, of course, of the public servants from the Department of Justice, were of the view that the next candidate or next appointment to the Supreme Court should be bilingual. I just want to put it on the record that John Major, one of the past justices of the Supreme Court, who retired in 2005, indicated in reports today that he felt it was not a requirement. I find it interesting that there are differing points of view on this.

I just wanted to put that on the record.

One of the things I wanted to ask—

Mr. Graham Fraser: Can I respond to that?

I'm not sure that the opinion of a unilingual anglophone judge should necessarily be the determining opinion as to the importance of knowledge of both languages. What former Justice Major said was that he found the interpretation system perfectly adequate, and he praised it. I'm not sure if the evaluation of a unilingual anglophone is what you should rely on as to whether interpretation is the appropriate mechanism for a judge to understand the case being presented before him. We've had quite eloquent testimony here as to some of the problems that can arise despite the talent of the interpreters, who I see working behind the glass here.

Hon. Michael Chong: I don't disagree with you, Commissioner, but I just wanted to put that on the record, because I did notice it in newspaper reports today.

Mr. Graham Fraser: Well, it leapt out at my breakfast table too.

Mr. Michel Doucet: Can I respond to that also?

I suggest that it might be interesting for you to try to listen to a translation in English when somebody is pleading in French to see what you would get out of it. Or, if someone is pleading in English, listen to the French version if you're bilingual, and you'll see what you can get out of it.

Basically, I agree with the commissioner, in that I don't believe a unilingual judge is able to appreciate—

● (1040)

Hon. Michael Chong: I just wanted to get it on the record.

I wanted a ask a question of you, Michel, in your role as a professor in the faculty of law at the University of Moncton. In the entrance requirements for the law school, do you require students to have knowledge of both official languages? The second part of my question is, do you require that students have knowledge of both official languages to graduate with a law degree?

Mr. Michel Doucet: First of all, it's a French law school; but second, it's impossible to study the common law if you're not bilingual. So all of our students at the law faculty, once they graduate, francophones and anglophones—because we don't only accept francophones, as there are also a lot of anglophones from every province in Canada, who are perfectly bilingual. As for the francophones, they have to read the decisions of the court and the case books in English; so for them, it's an impossibility to study the common law by being unilingual French. Maybe one or two can do it, but the majority—I'd say about 98% to 99%—of our students who graduate are bilingual.

Hon. Michael Chong: So it is an entrance requirement to know both official languages?

Mr. Michel Doucet: It's not an entrance requirement, but—

Hon. Michael Chong: Is it a graduation requirement?

Mr. Michel Doucet: It's not a graduation requirement; it's a practical requirement.

Hon. Michael Chong: The only reason I bring it up—

Mr. Michel Doucet: It's not the same at UNB, for example.

Hon. Michael Chong: I understand, and I'm not pointing out in particular the University of Moncton, because it is a francophone school, and obviously the number of bilingual graduates you have would naturally be much higher, for the reasons you pointed out.

The only reason I bring that up is that in committee hearing after committee hearing, we often hear about the challenges in ensuring the French fact in Canada in its national institutions, yet we often, in my view, seem to be focusing on the symptoms rather than the fundamental causes. One of the questions I've always wondered about is why universities and law schools across the country, particularly anglophone ones, are not indicating to their students that if they see a career on the bench at some point in the future, they need to know both official languages.

I note that not even your law school has the requirement to have both official languages to graduate, yet we have these issues around ensuring that our national institutions can work in both languages.

[*Translation*]

The Chair: Very quickly.

[*English*]

Mr. Michel Doucet: Very briefly, Justice Bastarache, before he became a judge, presided over a committee in New Brunswick—the Barry-Bastarache committee—in 1980, and they suggested then that the provincial government make sure that any lawyer who graduates in New Brunswick from the two law schools be bilingual. Unfortunately, the bar association said no. If they had accepted that back then, maybe we would have more bilingual lawyers and judges, at least in New Brunswick.

[*Translation*]

The Chair: Thank you.

[*English*]

Thank you, Mr. Chong.

[*Translation*]

I want to inform committee members that, on our schedule, according to our study plan, once we finish discussing the collaboration agreements, the committee plans to examine post-secondary instruction in second languages and languages in general in the education sector.

Mr. Godin, go ahead, please.

Mr. Yvon Godin: I don't know whether I've already covered this ground, but I think as you do, Commissioner, when you say, and I quote:

> I recognize that Minister Nicholson's practice of consulting with the chief justices on their specific needs in terms of bilingual capacity is a step in the right direction.

Are you satisfied with the results?

Mr. Graham Fraser: In my view, in a situation where bilingual capacity is a matter of self-assessment by candidates, we can't say that the results are as we would have desired. What is important, I believe—Mr. Chong moreover raised the question—is that, if law schools don't take the importance of the situation into account, we won't have a sufficient pool of lawyers. If we don't take into account the importance of linguistic ability in judicial appointments to the lower courts, there won't be a sufficient pool for the superior courts. This is an ecological system where you have to start at the beginning and explain to students that this is a very important requirement in order to aim for the top of the legal system.

● (1045)

Mr. Yvon Godin: When Mr. Justice Bastarache made his recommendation, the bar didn't do any favours for the people it represented. If we're talking about ability, having the ability to interpret the law is one thing, but if law and argument don't meet, it's no longer a matter of ability. We've just lost that ability, not just as regards what's written on paper and interpretation. We have to understand that. We don't want to get it from a third party. That's not fair. And yet that's precisely what's happening now.

Personally, when I make a speech in the House of Commons, when I go back to my riding, people tell me that it's too bad I can't take 10 minutes to make a speech in one language and 10 minutes to make a speech in the other language, because they miss half of what I said. I'm not saying that to be nasty to the translators: it's that I speak too quickly. They can't follow me. The poor judge... I wouldn't want to be a lawyer and present an argument, because I wouldn't do a good job. In Acadian, we say: “I wouldn't do a good job, I guarantee you that.” That's the problem.

Mr. Coderre stole my idea earlier. I had the idea of introducing a private bill. I believe you'll have the support—

Hon. Denis Coderre: I have a point of order. Mr. Chairman, it's not acceptable to say that, because the member, who had three chances to speak before me, wasn't quick enough... He's starting to say that we're stealing his ideas. He should focus on Manitoba's New Democratic government, which hasn't done its job with regard to rights.

The Chair: Mr. Coderre, that's more a point of debate.

Mr. Yvon Godin: Mr. Coderre, with regard to your point of order —

The Chair: It's not a point of order, but a point of debate.

Continue, Mr. Godin.

Mr. Yvon Godin: When we talk about the Federal Court, it's the Liberal government that didn't act during the 13 years it was in power. We're talking about federal appointments; it's not the NDP government in Manitoba—

Hon. Denis Coderre: We say “nomination”, Mr. Godin. The word “appointment” isn't from where we come from.

Mr. Yvon Godin: Despite Mr. Coderre's sudden annoyance, he'll have support. He should at least be proud that I support a bill. I don't think he liked the word “steal”, and that's normal; that's all right. Let's say he borrowed my idea. They say pickpocket in English.

We're looking for solutions. This is 2008 and we've been fighting for this for 40 years. It's been more like 400 or 402 years. The Acadians arrived before the Quebeckers. They celebrated their 400th anniversary two years ago. We could say that within a short period of time, that's what the act will provide and that we must prepare accordingly. In future, lawyers who want to become judges will have to do their homework.

Is that a good idea?

Mr. Graham Fraser: I've often told people who complain about linguistic obligations in the public service that, if a young person wants to be a judge, he has to start by going to law school. I don't complain about the fact that I wasn't appointed judge, since I didn't go to law school. Similarly, if you want to become a Supreme Court justice, you should prepare for it. There are specialized training courses for judges. I know judges who are taking those courses to maintain their level of French and to develop. They are very satisfied with them.

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

And that brings our meeting to an end. We have to vacate the room by 11 o'clock. I want to thank our witnesses for their invaluable comments, as well as parliamentarians. We'll see each other next week to continue the business on the Canada-community agreements. Thank you.

The meeting is adjourned.

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

Also available on the Parliament of Canada Web Site at the following address:
Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca
