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Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

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● (1100)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): I call this meeting to order. I want to thank everyone for coming. This is meeting number 17 of the Standing Committee on Justice and Human Rights.

Pursuant to the order of reference on Monday, October 21, 2013, we are doing the statutory review of part XVII of the Criminal Code this morning.

We are joined by our commissioner, Mr. Graham Fraser, from the Office of the Commissioner of Official Languages; and he is joined by Madame Tremblay, the director and general counsel for the legal affairs branch of the same organization.

The floor is yours, Mr. Fraser. You have 10 minutes or so.

Mr. Graham Fraser (Commissioner of Official Languages, Office of the Commissioner of Official Languages): Thank you very much, Mr. Chair, and honourable committee members.

Good morning. *Bonjour.*

Thank you for offering me this opportunity to present my views on the study currently being undertaken by the Standing Committee on Justice and Human Rights on part XVII of the Criminal Code—language of the accused—and the implementation of the amendments to sections 530 and 530.1 of the Criminal Code in 2008.

The Office of the Commissioner of Official Languages has been following the evolution of these measures since 1995.

[*Translation*]

As members of this committee know, in August 2013, I published a joint study with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario titled *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary.* This study led us to conclude that the process for appointing judges does not guarantee the appointment of an appropriate number of bilingual judges to the country's superior courts and courts of appeal.

Consequently, despite the provisions in the Criminal Code granting Canadians the right to be heard in the language of their choice in criminal cases, the ability to exercise this right remains uncertain.

[*English*]

Our finding is based on three key observations.

First, there is no objective analysis of needs in terms of bilingual judges in the country's different districts and regions.

Second, there is no coordinated approach on the part of the federal Minister of Justice, his provincial and territorial counterparts, and the chief justices of the superior courts to establish a process that would ensure that an appropriate number of bilingual judges are appointed.

Finally, the evaluation of superior court judicial candidates does not allow for an objective verification of the language skills of candidates. In fact, candidates for the federal judiciary can declare on their application form that they are capable of conducting trials in both official languages, but this statement is not objectively verified. At most, the committee analyzing the candidatures will consult those named as references. However, candidates are never interviewed in person, nor are they evaluated through an objective testing of their language skills, as is the case for public service employees, for example.

It is therefore not surprising that, as a number of our study respondents reported, litigants speaking the minority official language are all too often forced to be heard in the majority language or otherwise incur additional costs and delays if they persist in exercising their rights.

[*Translation*]

In light of these findings, I have made several recommendations, directed primarily to the federal Minister of Justice. In particular, I recommended that the minister establish, together with the attorneys general and the chief justices of superior courts of each province and territory, a memorandum of understanding to adopt a common definition of the level of language skills required of bilingual judges and identify the appropriate number of bilingual judges and designated bilingual positions.

I have also recommended the implementation of a process to objectively evaluate the language skills of all candidates who identified the level of their language skills on their application form.

● (1105)

[*English*]

On February 22, 2014, the Canadian Bar Association adopted unanimously a resolution that supported our study and urged the federal Minister of Justice to implement our recommendations. It is important to clarify that the goal of our study was not to determine whether there is a lack of bilingual judges. Rather, it was intended to determine to what extent the judicial appointment process guarantees sufficient bilingual capacity in superior courts.

However, I believe that the implementation of our recommendations is the best way to develop a pool of bilingual judges in the country's superior courts. Also, our study applies to superior courts only, which deal with the most serious criminal cases and are also used in trials with jury. The study does not apply to provincial courts.

[*Translation*]

Regarding the number of bilingual judges in the country, I would like to make a few additional comments. During their appearance before you, certain witnesses stated that there were sufficient bilingual judges in the country's courts. I cannot speak to the number of bilingual judges in provincial courts. As for superior court judges, it is currently impossible to determine whether the number of bilingual judges is sufficient or not, and that is for two reasons.

In order to be able to say that there are sufficient bilingual judges, there must be an assurance that the number of bilingual judges can respond to the needs of minority language communities in terms of access to justice in both official languages. Yet, as I mentioned earlier, no objective analysis of these needs is performed at any point of the superior court judiciary appointment process. The federal Minister of Justice consults chief justices before appointing a judge in superior courts, and the needs in terms of bilingual judges may sometimes be discussed in the context of those consultations.

Given that the consultation process is entirely informal, we do not know what information chief justices consider when they communicate their needs in terms of bilingual judges. We can speculate that chief justices base their decisions in part on the demand for trials in the minority official language in previous years. However, as many stories reveal in our study, this number is inevitably inferior to the real needs, given the various obstacles litigants face when they do ask to be heard in the minority language.

Among these obstacles, we can mention the delays and additional costs often caused by the requests for trials in the minority official language, as well as the lack of language rights knowledge by court users and many key actors of the judicial system. These obstacles often limit Canadians to proceeding in the majority official language, despite their rights to the contrary.

[*English*]

Appointing bilingual judges according to demand only contributes to the state of affairs and creates a vicious circle that is detrimental to the preservation and development of official language communities. This is why I recommend an objective evaluation of the needs in terms of access to justice in both official languages which takes into account the opinion of French-speaking common-law jurists' associations or the minority language legal community.

Second, in order to maintain that there are sufficient bilingual judges, there must be an assurance that the language skills of candidates to the superior court judiciary are evaluated objectively. This is presently not the case. As I said earlier, candidates to the judiciary do not undertake an exam or an interview regarding their language skills. It is therefore impossible to know which judges possess a sufficient level of bilingualism. As a matter of fact, there are currently no definitions or objective criteria allowing us to determine what a bilingual judge is.

For all these reasons, my counterparts and I have urged the Minister of Justice of Canada to ensure a quick and collaborative implementation of these recommendations. The consequences of inaction are real for the citizens who must contend with the judicial system and who are not guaranteed to be heard in their official language of choice. The full implementation of these recommendations is crucial in ensuring that the rights guaranteed under part XVII of the Criminal Code are respected.

● (1110)

[*Translation*]

I trust these comments will be useful as you carry out your study.

Mr. Chair, I thank you and the honourable members of this committee for your consideration.

[*English*]

The Chair: Thank you, Commissioner, for those opening remarks.

We will go to questions now. Our first questioner is from the New Democratic Party, Madame Boivin.

[*Translation*]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair.

Mr. Fraser, Ms. Tremblay, thank you for being with us this morning.

The parameters of your study, I believe, were a bit broader than ours. Our mandate was limited to a review of part XVII of the Criminal Code.

With that in mind, then, if the language rights in part XVII were not mentioned, if no bilingual judges were available or if the accused was not duly advised of their rights, the accused could end up being acquitted because they did not receive a fair trial. Is that correct?

Mr. Graham Fraser: As I see it, the most important thing is that the accused be duly informed of their rights at the first opportunity in the process.

But even when that does happen, the interviews we conducted as part of our study revealed that counsel sometimes make recommendations to their clients that go against their professional code of ethics. They advise clients to make decisions based on efficiency and effectiveness or counsel's assessment. I believe Mr. Doyle spoke to that when he appeared. The accused wants a quick trial and a favourable outcome, so that can influence the accused's decision.

Ms. Françoise Boivin: There'd be no problem with that if it were an informed and fact-based decision. If someone makes a certain choice for informed reasons, I see no problem with that.

You said “at the first opportunity”. Part XVII talks only about the trial and the preliminary hearing. We've asked this question a lot, but I'd like to hear what you, the Commissioner of Official Languages, has to say about it. Should part XVII extend to the first appearance as well, because that is often the time when pleas are made, evidence is revealed and the accused's release is discussed, among other things? Should part XVII go further?

Mr. Graham Fraser: Personally, I think so. It would also be helpful if that obligation fell to the judge because it would carry more weight coming from the judge. I will ask Ms. Tremblay to elaborate on that.

Ms. Johane Tremblay (Director and General Counsel, Legal Affairs Branch, Office of the Commissioner of Official Languages): I'll come back to what happens when the accused's rights are not respected. Can it lead to an acquittal? More often than not, there's an appeal and the judge orders a new trial. The process takes longer, and that carries costs for the justice system.

Ms. Françoise Boivin: As lawmakers, we want to adopt the best possible policies. I am not one of those who believes that if people aren't satisfied, all they have to do is appeal. I believe the process should be fair from the outset. Fair play from beginning to end. That would seem to go without saying.

Mr. Fraser, I was flabbergasted when the committee heard from Mr. Lévesque on Tuesday. He talked to us about the translation of documents in Alberta. Sometimes, it would appear that French is viewed as a foreign language in Canada. Is that true?

Mr. Graham Fraser: I can't speak to that in detail, but I can say that, in one of its rulings, the Supreme Court agreed with the decision of courts in British Columbia to refuse documents submitted in French, such as affidavits that formed part of the evidence provided by the parties. Clearly, then, in some court systems in the country, such as British Columbia's, it is acceptable to refuse French-language documents, and the Supreme Court even recognized that.

● (1115)

Ms. Françoise Boivin: But that doesn't apply to criminal trials under part XVII, does it?

Mr. Graham Fraser: I won't go into detail, but the anecdotal evidence shows there have been problems with interpretation in some cases where defence counsel had to listen to the simultaneous interpretation of what was said in order to then correct it. So, yes, that can be a problem.

Ms. Françoise Boivin: I can already hear some people in the country say that extending the scope of part XVII to include bail hearings could complicate matters. Those who practise criminal law know that the language selection has to be made fairly quickly because the person is in custody and has the right to be released. So it satisfies certain requirements.

Let's say a defendant asks to be tried in English if he is in Quebec, or in French if he is elsewhere in the country. How would you respond to those who would argue that doing so would probably make things more complicated? Some people argue that having to find a judge who speaks the accused's language and constitute a court in the language of the defendant's choice could complicate things.

What would you say to those people?

Mr. Graham Fraser: I would say that justice, in and of itself, is complicated.

Back to your scenario, the choice would have to be an informed one. Take, for example, an accused who is in a vulnerable situation. It's a bit like a sick person in a hospital. I am not a lawyer and I can tell you that going to court is pretty intimidating for those of us who aren't lawyers. Someone might feel at ease expressing themselves in their second language, but not necessarily using the right terminology. It is possible to make an informed choice at the beginning of the process, but that choice might also be a difficult one for an accused who is in a vulnerable situation.

Ms. Françoise Boivin: It would probably be best to let the judge —and not the lawyers—lay the issue out very clearly.

[*English*]

The Chair: Merci. Thank you for those answers and that question.

Our next questioner is Mr. Goguen from the Conservative Party.

[*Translation*]

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you, Mr. Fraser, for appearing before the committee today and sharing your extensive expertise with us.

I'd like to discuss the challenge of finding French-speaking or bilingual candidates for trials by judge and jury. We talked about that with another witness, Rénald Rémillard, the executive director of Fédération des associations de juristes d'expression française de common law inc. When he appeared, he said to the committee, and I quote:

> That question has already been raised in some provinces. I know that Manitoba and British Columbia have looked into making up these juries. Each province uses different means. Manitoba, for example, uses health insurance card numbers to make up a list.
>
> The issue is to ensure that the list is representative of the general population. I know that poses a problem in some provinces. We have, for example, approached francophone school boards or spokespersons from member associations to make lists. The issue of the make-up of juries has been a problem, but it is different from one province to the next. It is another example of Canadian diversity.

Does one particular province have a better model as far as making up bilingual juries is concerned? Is there a model that we could support?

Mr. Graham Fraser: I know a study was done in British Columbia. There, I think they use the list of parents whose children attend French schools. I agree with Mr. Rémillard that a single approach can't be imposed country-wide. I think the language situation varies from province to province. Some communities are very unique. To some extent, it's up to each province to know the needs of their respective communities best. That's in fact the reason why we included a recommendation to initiate a consultation process with the Fédération des associations de juristes d'expression française, or FAJEF, and maybe with community institutions as well.

● (1120)

Mr. Robert Goguen: I'm not sure whether every province has an association of French-speaking jurists, but their mandate could include making up lists of people who were willing to volunteer. I know being on a jury isn't necessarily pleasant because it comes with many obligations, especially in terms of time, and it could even cause a loss of income.

Mr. Graham Fraser: I think it would be better to ask members of the FAJEF whether that would be too demanding. The association certainly represents individuals who practise the profession in the minority language. I should actually be referring to French since Quebec doesn't have an equivalent association. And precisely because Quebec doesn't have an association of English-speaking jurists, we had trouble finding English-speaking lawyers for our study. In short, the FAJEF represents lawyers who practise in French in the provinces.

It may not have a presence in Prince Edward Island, but—

Ms. Johane Tremblay: Or in Newfoundland, for that matter.

Mr. Graham Fraser: I believe it has member associations in every province except for Prince Edward Island and Newfoundland and Labrador.

Mr. Robert Goguen: I know that many lawyers from New Brunswick argues cases in Prince Edward Island since it is so close.

Mr. Graham Fraser: Yes, that's true, and some judges will go there to hear cases as well. There is a close level of cooperation between the two court systems.

Mr. Robert Goguen: That's definitely a step in the right direction.

Did you have anything to add, Ms. Tremblay?

Ms. Johane Tremblay: We could send you the study that was done in 2007. It looks at the various practices.

It might be a good idea to find out where things stand in New Brunswick now, but back then, the province had just put in place a system where anyone wanting access to health care services had to register. They had to fill out a form indicating which language they wanted to be served in. And that information was used to establish a list.

Mr. Robert Goguen: Yes, it would involve extensive monitoring and control.

Ms. Johane Tremblay: The issue of confidentiality and personal information is also taken into account.

Mr. Robert Goguen: That's very true.

[*English*]

The Chair: Thank you very much.

Our next questioner is from the Liberal Party.

Mr. Casey.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

In your opening remarks, you referenced your report of August 2013 and highlighted two specific recommendations that you've made to the federal Minister of Justice. That was seven months ago. First, what response have you received from the minister, and second, what steps, if any, have been taken towards implementing or not implementing, I suppose, or rejecting, your recommendations? What has happened in the last seven months?

Mr. Graham Fraser: At the Canadian Bar Association meeting in Saskatoon, I had a brief conversation with the minister, who responded very favourably to the approach. I had previously debriefed the deputy minister on our study and our recommendations. Similarly, when the minister was questioned in his bear-pit session, I guess you'd call it, with the Canadian Bar Association, he responded in a favourable fashion.

Since then, other than a formal acknowledgement of the receipt of the report, I haven't had any indication of specific implementation of the recommendations, but neither have I had any indication that they've been rejected.

● (1125)

Mr. Sean Casey: So the initial response was favourable, but you're not aware of anything beyond that.

Mr. Graham Fraser: Yes, that's correct. I mean when I say “favourable” that it was a non-committal favourable response, but my sense was that he welcomed the contribution to the discussion on access to justice.

It was a report that was tabled at the same time as the Canadian Bar Association's more general report on access to justice. He appeared to welcome the contribution to the discussion.

Mr. Sean Casey: Okay.

The first of those recommendations is to adopt a memorandum of understanding for “a common definition of the level of language skills”. I take it from your previous comment that you're not aware that there has been any meeting convened where that's on the agenda.

Mr. Graham Fraser: Not to my knowledge.

Mr. Sean Casey: Okay. I want to relay to you a practical circumstance that I'm aware of and just get your reaction to it.

The defence attorneys who I speak with and who practice in areas where there is a significant minority community—in that, I'm not talking about my home province—tell me that when a defence attorney meets his client for the first time, when that person is in the lock-up and possibly awaiting a bail hearing, and when that attorney advises him that he has the right to a trial in either official language, the most common response is that the client wants whatever it takes to get him out of there quick. They say, “I don't care whether it's English, French, or Greek, you're the person who goes to court every day, so you tell me.”

I expect that doesn't come as a surprise to you. But from where you sit, if you accept what I say as an accurate statement of the lay of the land and what's on the front lines, how do you react to that being the reality in Canada today?

Mr. Graham Fraser: I'm not surprised. In fact I think Mr. Doyle made similar points when he appeared in testimony before the committee.

I think it is incumbent upon the legal system to ensure that people have confidence that they will get equal treatment before the courts in their preferred language. Inevitably it's the responsibility of the lawyer in that circumstance to do a strategic evaluation of who the judge is that they likely will appear before. Does that judge have a track record of being able to effectively hold a trial in French? Is it worth, in the interest of the client, actually insisting upon a trial in French? It becomes a strategic decision.

We quote some lawyers in our study who make that point and say that for those strategic reasons, in the interest of their client, they recommend that they in effect sacrifice their language rights, which, as I said to Maître Boivin, is putting themselves off in an even more vulnerable situation.

Mr. Sean Casey: Thank you.

Now I want to come to a specific example in my own province. In your remarks, you talked about the need for objective testing and the lack of objective measures in a couple of respects, and one of them is with respect to language proficiency. There is one Supreme Court Justice in Prince Edward Island who, when appointed to the bench, had no French, went at it like a dog with a bone, and at the end of his training actually passed the civil service exam for his level C. His name is Justice Gordon Campbell.

I use Justice Campbell as an example because when you talk about the need for objective measures, isn't it really that simple, to follow the training program and to follow the evaluation measures that you have in the civil service, which are tried, proven, and work?

● (1130)

Mr. Graham Fraser: One of the things I've learned about in the course of my work is the language training program that exists for provincial judges in New Brunswick. Judge Finn has developed a series of criteria for evaluating the ability of a judge, or a potential candidate to be a judge, in their second language in very specific terms that would be applicable to their ability to preside over a case.

I don't say this at all to undermine the substantial achievement of Judge Campbell in doing that, but the public service exam is more general and doesn't necessarily apply. I've been very impressed by the quite focused set of criteria developed by the training program that's been introduced by Judge Finn. It includes, as part of its training, mock trials where RCMP officers appear, and people in the village in New Brunswick where this training session takes place will appear as the accused and the court officials. It is much more practical training based on the experience that people will actually have if they are presiding over a case.

The Chair: Thank you very much.

Thank you for those questions, and thank you for that answer.

Our next questioner is from the Conservative Party.

Mr. Seeback.

Mr. Kyle Seeback (Brampton West, CPC): Thank you, Mr. Chair.

Thank you, Mr. Fraser. I had the pleasure of sitting in on the official languages committee a few times, so I've heard you come to the committee. You always present well and have lots of information.

I was looking through and listening to your opening statement. There's one thing I want to ask a couple of questions on before I move on. You talked about how there's nothing “objectively verified” with respect to language capability for judges when they're vetted.

Are you suggesting that this leads to judges who claim to be bilingual but actually aren't? I'm not sure if that's what you're hinting at. You didn't come right out and say that, but....

Mr. Graham Fraser: The way the application process works is that there is a self-evaluation process. People tick off “yes” or “no” as to whether they are. According to some of the interviews we did with lawyers who are practising, they recounted to us experiences of judges who in good faith had ticked off the box, thinking that their French was adequate to preside over a case. They then presided over a case and discovered that it actually wasn't quite as good as they thought it was and basically said to themselves that they were never going to do that again. So whereas the chief justice of the province had them psychologically on the list of bilingual judges, in fact those cases were not being held.

This was a survey and interviews were done. I can't name you any examples in which this was the case, but our interviews indicated that there are cases in which that has happened.

Mr. Kyle Seeback: That's interesting.

I just want to quickly talk about subsection 530(3), which was amended in 2008. At the time, it was just for people who were not represented by counsel. That was amended so that the judge would give the instruction on the first appearance for anybody, whether they were represented by counsel or not. What do you say about that section? Do you think that's been an improvement with respect to the ability for an individual to exercise their right? Do you agree that the judge should be doing that at the first instance? Or should it be done...? I don't know when else it could be done. What are your comments on that?

Mr. Graham Fraser: First of all, I'd like to say that I did appear before, I think, this committee in support of the amendments that were brought forward in 2008. There were some other recommendations we made that were not taken into account, and there were some amendments made by the Senate that did not survive the process, but I'm going to ask Maître Tremblay to talk a bit about some of the other aspects of section 530.

● (1135)

Ms. Johane Tremblay: Well, this amendment of course allows the clerk, or it could be another person, to inform the accused of their rights. If the judge doesn't have the bilingual capacity to do it, at least the outcome is that the accused will be informed. But as the commissioner says, if it's the judge who informs the accused, it has another perspective to it. The accused will feel more comfortable in exercising their rights knowing that the judge is offering the informing of their rights.

At the end of the day, I think that maybe, technically, it's easier now because the obligation doesn't lie only on the judges to inform the accused, but it's the impact of that active offer being made by anyone.... It could be the crown. It could be the defence lawyer. It could be anyone who informs the accused of their rights. It's a question of whether or not, at the end of the day, more accused will exercise their rights with that amendment or not. It is difficult to say.

Mr. Kyle Seeback: When you talk about the chief justice trying to determine whether or not there are enough judges to deal with minority language rights across the country, you talk about a memorandum of understanding. What do you think it would take to get that information and data? It seems like a fairly large project to me to try to determine this. How would you see that taking shape? If someone is asking at the trial, and it doesn't happen....

Do you understand? Or if the lawyer says to the person to not ask for it in their minority language because it'll be slower, how would you ever trace or track that in any kind of study?

Mr. Graham Fraser: I'm sorry. I thought you were asking about how you would introduce the process and the memorandum of understanding for the evaluation of judges.

Mr. Kyle Seeback: No, not that. I understand how that would work. What I'm saying is, how would you see this study actually working? Like we've heard at the committee so far, sometimes a lawyer will just say, "Look, if you want this done quickly, you had better do it in this language." So you might never get the data that there was someone who wanted it.

Mr. Graham Fraser: It would be extremely difficult to get that data, because you're talking about lawyer-client privilege. This fits into the same category as the decision involving whether the accused will go on the stand. This becomes part of the advice that the lawyer will give his client. No lawyer would feel comfortable putting in jeopardy the confidential advice that he's given to his client or the confidential request that his client has given him. As you say, if this is happening in a cell and the client's primary concern is "get me out of here", then....

These changes are not things that can occur overnight. For those changes to take place, the lawyer has to be confident that the process works. There has to be prior experience on the part of people who know other people who've been accused who have gone through the process. At the risk of being cliché-ridden, every journey begins with a single step, and we've suggested a couple of steps that we think would produce a better system.

The measurement, I think, that would take place would be this. Do we see an increase in trials that are taking place in the minority language? When former attorney general Roy McMurtry introduced a bilingual judicial system in Ontario, he observed at one of the anniversaries that the usage of the system does not correspond with the proportion of francophones in Ontario.

● (1140)

Mr. Kyle Seeback: It's kind of like the movie *Field of Dreams*, "If you build it, they will come." Is that...?

Voices: Oh, oh!

The Chair: Thank you—

Mr. Graham Fraser: But there has to be some conviction that it actually has been built.

The Chair: Commissioner, in either official language, I'm going on to the next questioner.

Thank you for those questions and answers.

Our next questioner is Madame Péclet from the New Democrat Party.

[*Translation*]

Ms. Ève Péclet (La Pointe-de-l'Île, NDP): Thank you kindly, Mr. Chair.

Thank you, as well, commissioner.

I am going to get right to the crux of the matter. As you know, we are studying the execution of part XVII of the Criminal Code. A number of witnesses have told us that the judge has an obligation to advise the accused of their rights. But because the obligation isn't of an official or personal nature, it gives rise to certain problems. In fact, in 2002, the Department of Justice conducted a study that revealed a problem in that respect.

I am going to ask you something I have asked many of our witnesses. In order to improve the way that part XVII of the Criminal Code is administered, should the judge have a personal obligation to advise the accused of their language rights at the time of their appearance?

Mr. Graham Fraser: Yes. At the very least, the judge should make sure that the accused has indeed been advised. It isn't mandatory that the accused be advised of their rights at the time of their first appearance before the judge. The possibility of advising the accused at other stages of the proceedings does exist. To my mind, the judge should have an obligation to ensure that the accused has a clear understanding of their rights.

Ms. Ève Péclet: Very good.

In your research, did you detect a problem in that regard?

Mr. Graham Fraser: We didn't look at that element because it didn't enter into the scope of our study, as Ms. Boivin mentioned.

Ms. Ève Péclet: I see.

I want to pick up on what my colleague said.

Part XVII of the Criminal Code does not apply to sentencing hearings or parole hearings. I'd like you to tell us more about where you stand on that. You said that part XVII should apply to those cases and that its reach should ultimately be extended.

Mr. Graham Fraser: Personally, I believe it should. If the point is to ensure equal access to a court process in the language of the accused's choice, that right shouldn't be limited to the trial, but should apply to the entire process.

Ms. Ève Péclet: In your report, you recommend that the Attorney General of Canada establish an appropriate number of designated bilingual judge positions. That would make language skills one of the criteria to be considered. It would still allow people who were not bilingual to become judges and prevent them from being discriminated against based on their official language skills.

A designated number of positions would be established. I know that's how Ontario's justice system works. It has a designated number of positions for bilingual judges. Do you think that would solve the problem related to bilingual judges?

Mr. Graham Fraser: We identified two approaches. They are to establish either an appropriate number of designated bilingual positions or an appropriate number of judges with the language skills to preside over a proceeding in the minority language.

We didn't make any determination as to the better option. However, a system with designated bilingual positions would have the benefit of ensuring certain things. For example, it would ensure that Sudbury had enough judges in designated bilingual positions and that the required number of bilingual judges weren't all in Toronto.

We recommended that it be agreed that the province's chief justice would obviously be the one who determined the more effective method.

● (1145)

The Chair: Two minutes left.

Ms. Ève Péclet: Just two minutes.

In that case, I'm going to give my time to my colleague.

[*English*]

The Chair: No, he has time. We'll have time for a whole turn for him.

Ms. Ève Péclet: Oh, okay, perfect, good; I didn't think so.

[*Translation*]

I'd like to discuss section 531 in part XVII. I know you didn't cover that in your study. The section allows a trial to be held in another territorial division that has the necessary resources when the original territorial division does not. My question will most likely be for Ms. Tremblay, since she seems to know what I'm talking about.

Is this section applied often enough in territorial divisions where bilingual judges are lacking and the courts are therefore supposed to order that the trial be held in a territorial division with the necessary resources?

Mr. Graham Fraser: Yes, I am going to ask Ms. Tremblay to answer your question. I'm no expert on court logistics in the various provinces.

Ms. Johane Tremblay: I'm familiar with the section, but I can't tell you much about it. I don't know how it is applied. I couldn't say whether it was used regularly or even whether ordering that a trial be held in a different district or province is a pragmatic approach judges use to ensure the accused is tried in their language.

The Chair: Thank you very much.

[*English*]

Thank you for those questions and answers.

Our next questioner is Mr. Wilks from the Conservative Party.

Mr. David Wilks (Kootenay—Columbia, CPC): Thank you very much, Mr. Chair.

I thank the witnesses for being here today.

I'm going to focus my stuff in on what I'm comfortable with, and that's the police side of it. Certainly from the perspective of the judges and lawyers that preside over the cases in the courts, that in itself is a significant issue, I think. I'm wondering if you can tell me what you see as the role for the police, interpreters, translators, and typographers with regard to the legal system specific to sections 530 and 530.1. Where do you see that role? Then I'm going to continue on with another question.

Mr. Graham Fraser: I think it depends on the province in which the case occurs. There are some provinces where the police force has language obligations. For example, in New Brunswick where the RCMP acts as a provincial police force, the courts held that the RCMP needs to meet the criteria of New Brunswick rather than the federal linguistic criteria. So they have language obligations from the point at which they pull a car over to the side of the road. There are other provinces where that obligation does not exist.

I have sometimes wondered whether in fact some language activists in different provinces engage in their activism by speeding, when you consider the number of speeding tickets that have led to Supreme Court decisions on language rights. We have such an asymmetrical language system that the obligations involving police forces in western Canada, for example, are very different from what they are in New Brunswick.

● (1150)

Mr. David Wilks: That was leading into my next question.

My entire career was in western Canada, where we were not very often exposed to the official language of French. It's just not there, right? But the odd time it happens, and it's the odd time that is really problematic, because as I mentioned in previous testimony, the problem is that we receive the 10(a) and 10(b) card for the charter, and it's in both official languages.

Only once did I have significant difficulty on the side of the road. It's not as though you can call someone. You're there, so you just give them the card and say to read it. Then you have to assume that he—in this case it was a he—understood. He acknowledged that, yes, he got it. I would suggest that would not hold up in the court too quickly.

I guess that leads to my second question, which is with regard to official languages in a broader context. I understand New Brunswick, but how should that apply to all stages of the judicial process, right from time of arrest to disclosure to bail hearings for that matter? It's a significant challenge when you have to bring it in as a total judicial process.

Mr. Graham Fraser: You're absolutely right, and the nature of the real world is that if there is a violent incident on a Saturday night in Red Deer, the arresting officer is not necessarily—in fact not likely—to have language skills. I recognize that it would be a very ideal world in which those language rights would be available from the moment of arrest.

Mr. David Wilks: You bring up another point, because in the heat of the moment, sometimes especially in violent altercations, the police are making decisions in seconds. The last thing you're worried about is the official language of the accused. But the problem is that when it gets to court, those few seconds of your decision as a police officer can be examined for hours on end by the court system. They can determine that you made a decision within seconds that now could potentially jeopardize the case, when in fact that wasn't the intent of the police officer. I guess I liken it to what I said back on Tuesday, which was, regardless of your language, you're going in the back of that car. You decide how you're getting there.

The Chair: Did you want the commissioner to answer that question about how you're getting there?

Voices: Oh, oh!

The Chair: Any answer to that, Commissioner?

Mr. David Wilks: We have to bring some humour to this place sometimes.

Mr. Graham Fraser: We're wandering a fair way from section 530 of the Criminal Code. The one thing I would suggest is that we have seen examples of deeply unfortunate incidents that arose because of great frustration on the part of an individual and a lack of comprehension of that frustration on the part of police officers who intervened.

Without wishing to cast aspersions on any of the people involved in that process, I think that as.... It should be extremely important for all police officers to have some understanding of the nature of people under stress who don't speak the officers' language. My job involves the two official languages, but there have been incidents involving people who were, not in one of the official languages, venting—smashing chairs—and bad things happened. Had there been better training on how to deal with somebody who does not have either of the official languages, a tragedy could have been avoided.

Again, we're wandering a long way from section 530, but one of the things I've always thought about the nature of official languages in Canada is that when I learned French, I felt I was a prisoner of my accent. I didn't understand the jokes. I didn't understand the cultural context. I realized that's the immigrant experience, so the process of learning French made me more sensitive to the challenges of people coming to this country with other languages and other accents. It is not a question of pitting multiculturalism against linguistic duality—those who speak other languages against those who speak French or English—but of recognizing that there's a certain sensitivity required when two languages encounter each other in a situation of tension.

● (1155)

The Chair: Thank you very much.

Thank you for those questions and answers.

Our final set of questions is being led by Madam Boivin, who is sharing her time with Mr. Jacob.

[*Translation*]

Ms. Françoise Boivin: My question is a complex one, but I would appreciate it if you could keep your answer brief.

When it comes to preparing our reports, I always try to be very practical. Although principles are extremely important, it's necessary to take a logical and practical view and ask how long all this will take.

If the committee decides it should recommend to Parliament that part XVII be reviewed to broaden its scope, it would certainly have implications resource-wise. Those involved in the administration of justice would need to be able to speak the accused's language, be they judges, interpreters, transcribers, jury members and so forth.

Some things can be accomplished quicker than others. As someone in the official languages business, you know that very often things move at a snail's pace. In this matter, what do you think would be a reasonable timetable?

Once we get to the end of our study, people may get the impression that it was a fruitless debate. I have no doubt that everyone will come to the same conclusion, but some provincial justice ministers seem to be denying the existence of a problem. And the lawyers on the ground don't necessarily agree. Even though everyone comes at the issue through their own lens, it's important to make sure that all the players are involved, because this isn't something the federal government can do on its own.

What would be a reasonable timeframe to recommend as far as putting everything in place goes?

Mr. Graham Fraser: A series of agreements need to be reached with the provinces. And it has to be addressed in federal-provincial discussions or discussions involving the Minister of Justice and the attorneys general.

When it comes to the judicial appointment process, meeting the language requirement is thought of as checking a box and that's the end of it. In fact, that's why we recommended, as a first step, assessing the needs and evaluating candidates' language skills. Our report outlines a series of timetables. What's important is establishing a timetable, even if it isn't necessarily followed. A clear message has to be sent.

● (1200)

Ms. Françoise Boivin: You have to start somewhere.

Mr. Graham Fraser: What matters is that you decide on a reasonable timetable for each area, be it a year or 18 months. As a former reporter, timetables and deadlines are particularly important to me. Even if some provinces and courts aren't able to meet the deadlines, just having established a timetable sets a certain pace, if you will. It creates a sense of urgency when you have to respond to a letter from the Minister of Justice requiring you to move forward.

Ms. Françoise Boivin: Definitely. Thank you.

Forgive me, Pierre.

[*English*]

The Chair: Do you have a quick question?

[*Translation*]

Mr. Pierre Jacob (Brome—Missisquoi, NDP): Mr. Fraser, I'd like you to elaborate on something you said in your brief: "Appointing bilingual judges according to demand only contributes to this situation and creates a vicious circle that is detrimental to the implementation of part XVII of the Criminal Code."

Could you kindly elaborate on that?

Mr. Graham Fraser: We've talked at length about the matter of accused not availing themselves of their right to be tried in the language of their choice. A chief justice might think another bilingual judge isn't needed because only a half-dozen or twenty trials, out of a great many, have been conducted in French only. But that isn't a true assessment of the needs. Instead, the proper way to assess the needs is to consult with the province's association of French-speaking jurists. Such an association would be in a position to estimate how many of its clients would exercise their language rights if they had assurance that the system would work as effectively in French as it did in the majority language. That would be a better way of assessing the needs, as opposed to basing the decision on the fact that a small number of cases have been tried in French. That isn't an acceptable approach, in my view.

[*English*]

The Chair: Thank you very much.

Thank you, Commissioner and Director, for joining us this morning and having a chat about the bigger issue, I think, of official languages in the justice system, and not just about part XVII.

But we are dealing with part XVII, and we will be dealing with that from here on. What we will do now is suspend for a few minutes and go in camera to talk about drafting a report and about directions.

I want to thank you for that.

We'll suspend for five minutes and then go in camera.

[*Proceedings continue in camera*]

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