Modernizing the *Official Languages Act*:
A Matter of Access to Justice

Association des juristes d'expression française de l'Ontario

Brief Submitted to the Standing Senate Committee on Official Languages
Terms of Reference: Study on Canadians' views about modernizing the *Official Languages Act*,
Fourth Part: Perspective of the Justice Sector

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Executive summary

1. The Association des juristes d’expression française de l’Ontario (AJEFO) is a not-for-profit organization dedicated to facilitating equal access to justice in French for everyone across Ontario.

2. The Official Languages Act (OLA) of 1969 recognized the equality of status of English and French in all federal institutions. Since then, the OLA has gone through a number of changes to broaden its scope in Canadian society in general.

3. The AJEFO appeared before the Standing Senate Committee on Official Languages on October 22, 2018. The AJEFO is submitting this brief as an additional tool for the Committee; in it the AJEFO presents the following observations with a view to modernizing the OLA:

   a. That a process for appointing bilingual judges to the federal judiciary and the Supreme Court of Canada is essential;

   b. That the Court Challenges Program must be enshrined in the OLA, and that establishing an administrative tribunal would provide a concrete and timely remedy for complaints from individuals under the OLA;

   c. That the legal principles of the OLA must be defined, and that creating a central agency responsible for its implementation is necessary; and

   d. That there is a need to develop and promote legal French resources that will further enable professionals to work in French.
Introduction

1. The AJEFO is both a community and a centre of legal expertise in French with more than 1,000 members, including lawyers, students, judges and other legal professionals (translators). This makes the AJEFO the largest group of francophone justice professionals in Ontario.

2. The AJEFO has been active since 1980 in promoting access to justice in French in Ontario by educating the general public about their rights and by supporting francophone jurists so that they can serve individuals in the minority language.

3. Over the years, the AJEFO has supported various projects related to its primary mandate, which is to facilitate equal access to justice in French for everyone across Ontario. The AJEFO is proud to say that thanks to its extensive network of partners across the country, several projects have reached individuals and justice professionals in other common law provinces and territories, broadening the scope of its work nationally.

4. Three major projects have helped the AJEFO develop expertise in the use of both official languages and the provision of service in French, which we believe, as discussed below, could contribute to the development of a modernized OLA.

5. The **Ontario Legal Information Centre** will provide anyone in Ontario facing a legal problem with a 30-minute meeting with a lawyer at no cost in both official languages. Opened in 2015, the Centre has responded to more than 8,000 requests for service in person and by telephone, particularly to unrepresented litigants. Although the services provided by the Centre are bilingual, the working language is French, thereby encouraging active offer of service in French to the francophone community.¹

    **CliquezJustice.ca** is a nationwide legal information portal for Canada’s minority francophone community. Its mandate is to provide the general public with clear and easy-to-understand information about their rights and obligations in daily life and in society. The portal covers a wide range of everyday legal topics by providing general legal information, explanations of developments in the law, special topics, videos, games, and so forth, all of it presented in a clear and simple way. For example, it presents legal information on employment law, wills and estates, family law, and the *Criminal Code*. This information is presented in a way that is easy for people to understand. The site also presents useful resources, such as for connecting individuals with a lawyer, and educational resources for teachers across Canada.

6. **Jurisource.ca** is a Canada-wide portal of legal and terminological resources to support the daily work of justice professionals, including jurists, judges, paralegals, court officers, support staff, language professionals and law students.

7. Jurisource.ca is a free virtual library that provides professionals practising in French in the common law provinces with thousands of legal and terminological resources (approximately

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¹ See the AJEFO’s 2017–2018 annual report for statistics on the use of its three programs, online: [http://www.ajefo.ca/qui-sommes-nous/rapports-annuels](http://www.ajefo.ca/qui-sommes-nous/rapports-annuels) [in French only].
such as precedents and procedures, bilingual legal glossaries, checklists, professional training tools, issue files, terminology resources and online training.

8. Basically, this major project was made possible thanks to the financial contribution of the Department of Justice Canada through the Access to Justice in Both Official Languages Support Fund. Its objective was to address the shortage of legal French resources, thereby increasing access to justice, reducing costs and promoting substantive equality between anglophone and francophone litigants.

9. In addition to its projects and programs aimed at both individuals and legal professionals, the AJEFO also plays an “applicant” role, intervening in several key language rights cases. Recently, the AJEFO intervened before the Supreme Court of Canada in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50. The Court’s decision highlights the obligation of judges to contribute to and protect language rights, and it stresses the ethical obligations of lawyers, arguments put forward by the AJEFO in its intervention.

10. The AJEFO also appeared before the House of Commons Standing Committee on Justice and Human Rights on May 2, 2017, as part of its study on access to justice with respect to legal aid and made two recommendations:

1) that the House of Commons Standing Committee on Justice and Human Rights recommend that the federal government make sustainable investments in legal projects aimed at helping Canadians understand their rights in the official language of their choice; and

2) that the House of Commons Standing Committee on Justice and Human Rights recommend that the federal government invest in the creation of legal tools for legal professionals to help them offer services in the official language of their client’s choosing, specifically in official language minority communities.

11. The AJEFO works closely with other national organizations to promote access to justice in French. The AJEFO is a member of the Fédération des associations de juristes d’expression française (FAJEF), which is itself a member of the Fédération des communautés francophones et acadiennes (FCFA). The AJEFO is also a member of the Réseau national de formation en justice (RNFJ), which the AJEFO is actively involved with.

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Modernizing the *Official Languages Act*: Issues to consider

12. First of all, the AJEFO generally shares the concerns raised by the FCFA, the FAJEF and the RNFJ and, in this regard, the AJEFO generally supports the recommendations put forward by these three organizations.³

13. The AJEFO’s recommendations for modernizing the OLA are based on its experience with its projects, particularly Jurisource.ca, which are vital to the administration of justice. These are recommendations on aspects that have a direct impact on access to justice and that currently create an unfair situation among Canadian litigants. We discuss four specific recommendations below:

   a) introduce a process for appointing bilingual judges to the Supreme Court of Canada;

   b) entrench the Court Challenges Program in the OLA and establish an administrative tribunal to protect the language rights of Canadians;

   c) clarify legal principles and establish a central agency to implement the OLA; and

   d) expand and promote legal French resources for justice professionals.

1. Individuals need to be understood in the language of their choice before the highest court in the land

14. A modernized OLA must set out a federal judicial and Supreme Court appointments process that is concerned about the bilingual capacity of judges.

15. The appointment of bilingual judges to the Supreme Court of Canada is a necessity for the AJEFO and for many justice stakeholders, such as the FAJEF, for whom this has been a longstanding demand. The AJEFO endorses the FAJEF’s recommendation.

16. Consequently, section 16 of the OLA, which states that Supreme Court judges are not required to understand French in order to hear a case in French without the assistance of an interpreter, must be amended. The AJEFO has argued in the past⁴ and continues to call for the removal of this exception for Supreme Court judges, the highest court in the land, for the following reasons.

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³ Brief submitted by the FCFA to the Standing Senate Committee on Official Languages following their appearance on March 26, 2018, online: [https://sencanada.ca/content/sen/committee/421/OLLO/Briefs/2018-03-26_Brief_FCFA_Final_rev_e.pdf](https://sencanada.ca/content/sen/committee/421/OLLO/Briefs/2018-03-26_Brief_FCFA_Final_rev_e.pdf); the FAJEF’s appearance before the Standing Senate Committee on Official Languages on October 15, 2018, online: [https://sencanada.ca/fr/Content/Sen/Committee/421/OLLO/54275-f](https://sencanada.ca/fr/Content/Sen/Committee/421/OLLO/54275-f); Brief submitted by the RNFJ to the Standing Senate Committee on Official Languages following their appearance on October 22, 2018, online: [https://sencanada.ca/content/sen/committee/421/OLLO/Briefs/2018-10-22_RNFJ_BISSON_e.pdf](https://sencanada.ca/content/sen/committee/421/OLLO/Briefs/2018-10-22_RNFJ_BISSON_e.pdf).

17. First, these days, with all the progress made on bilingualism in the country, it is unacceptable that a litigant or lawyer pleading in French before the Supreme Court of Canada cannot be heard, understood and questioned by all the judges on that court without the assistance of an interpreter. It is incongruous that litigants and lawyers can appear before courts at all levels in the language of their choice, namely French, except for the highest court in the land. At the Supreme Court of Canada, a unilingual francophone litigant runs into a wall.

18. Second, litigants who go before the highest court should be assured that all the judges will understand them and be able to grasp the intricacies of the legal debate. Despite the commendable work of interpreters, the law remains, and is becoming increasingly technical and complicated (and errors have been documented). However, it is only after the hearing that the interpretation can be checked by rereading the transcript. In addition, it is important to note that although there are interpreters to render oral argument, written documents (dockets, briefs) are submitted to judges in the language in which they are presented, and not all of them are translated for judges, as confirmed to the Committee by the Registrar of the Supreme Court of Canada on October 22, 2018. Judges must therefore assimilate and understand documents in the language they are submitted in, or rely on their bilingual law clerks.

19. Third, with respect to the obstacles raised in the past with respect to this legislative change, it is the AJEFO’s opinion that they are unfounded.

20. Indeed, there are prominent bilingual jurists across the country. These bilingual jurists are qualified to sit on the Supreme Court of Canada. To say otherwise is to ignore the significant developments in the linguistic capacity of jurists in common law jurisdictions.

21. Moreover, requiring Supreme Court judges to be bilingual would promote access to justice because it would encourage jurists to become bilingual and take the necessary measures during their careers, if they had these ambitions, to meet this requirement. This would be very useful for motivating the legal profession to develop, as well as for serving Canadians, in particular by delivering services to minority language communities.

22. Fourth, some have argued that there may be a constitutional issue preventing the amendment of the OLA or the Supreme Court Act. We support the FCFA’s position in this regard, which is based on the opinion of constitutional expert Sébastien Grammond, now a Federal Court judge, that a constitutional amendment would not be necessary to make changes to the legislative system. This would be changing one aspect of the qualification of appointed judges, not the composition of the Supreme Court of Canada.


5 Appearance by the Registrar of the Supreme Court of Canada before the Standing Senate Committee on Official Languages on October 22, 2018, online: https://sencanada.ca/en/Content/Sen/Committee/421/OLLO/54306-e.
Lastly, the AJEFO supports the FAJEF’s recommendations on the linguistic capacity of judges and the designation of bilingual positions in the federal judiciary. Through defined objective tools, the judicial appointment process should assess the language skills of candidates in order to ensure equal access to justice in French.6

2. Enshrining the Court Challenges Program in the OLA and establishing an administrative tribunal would protect Canadians’ language rights

The government pledged to restore and modernize the Court Challenges Program (CCP). The objective of the CCP is to provide financial support to Canadians to access the courts for the litigation of test cases of national significance, to help clarify and assert certain constitutional and quasi-constitutional official language rights and human rights in Canada.

The restoration process is underway. The CCP has had a difficult history, having been abolished a few times, including by the previous government in 2006. In order to enshrine the CCP’s existence and protect it from any possible political change, we believe that the new OLA should entrench the CCP’s existence and endorse the Program’s objectives:

1) allow individuals and groups to access funding to initiate or participate in test cases based on the rights and freedoms covered by the Program;

2) ensure that the perspectives of these individuals or groups who receive funding are presented before the courts in test cases; and

3) ensure that the rights and freedoms covered by the Program are clarified and strengthened.

The AJEFO also supports the idea of having an effective remedy in the legislation, one that would establish an administrative tribunal to hear and adjudicate complaints from individuals. The OLA can contain the best obligations in the world, but without a mechanism to provide for concrete and prompt remedy, it is doomed to failure. Without any incentive, there would be nothing to encourage compliance.

3. Clarifying the principles of rights in the OLA would promote the understanding and implementation of language rights

Several important principles underlie and “shape” the obligations under the OLA. For example, there are fundamental principles such as “active offer,” “substantive equality” and the principle of “by and for.” It would be not only useful, but essential for the government to enshrine these principles in the OLA while giving them content and a scope commensurate with the expectations they create.

28. It is also essential to empower the official language minority communities to participate in implementing the OLA. The OLA should recognize their role and give them a voice in the Act. Community organizations have developed significant knowledge of their community’s real linguistic needs and the problems individuals face when they wish to access the justice system in French. These organizations have also gained expertise and acquired resources to promote access to justice in both official languages. It is not unusual to include a duty to consult in legislation. For example, in the Canada Transportation Act there is a duty to consult people affected by the legislation (s. 53), and the same is true in environmental assessment legislation.

29. We therefore support the FCFA’s recommendation to create a system for consulting these communities.

30. In addition, in order to clarify who is responsible for implementing the OLA, there should be a central agency responsible for its full implementation. The OLA must have an accountable entity with the necessary enforcement powers. Unfortunately, the Department of Canadian Heritage does not currently have the necessary powers to persuade the other government departments to comply with the law—all it has are the powers to encourage and promote.

4. The administration of justice requires promoting access to high-quality resources and continuous online training

31. Although the AJEFO catalogues and develops resources for the various justice stakeholders, there are gaps in legal French resources and in easily accessible continuing education in French. There is still work to be done, and adequate funding is needed to address these gaps. It is not enough to impose an obligation to provide services in both official languages; the various stakeholders must have the tools and precedents that enable them to do this work. At present, too few resources are available to justice professionals in the minority language. It is not enough for a resource to exist; it must be easily accessible and not impose additional costs. Otherwise, it is the litigant who ends up paying the costs of the translation work carried out by their legal representative, and this creates an injustice for the individual who chooses to receive services in French in a predominantly English-speaking region. It should not be more expensive for a member of a minority language community to go to court than for a member of the majority. This need for access to high-quality material affects much more than the language rights of the individual—access to high-quality material has a direct impact on access to justice and on public confidence in our administration of justice.

32. Jurisource is an example of an existing technological tool that meets this urgent need for high-quality resources in French. Jurisource is a virtual library that provides the necessary resources in French, such as terminology glossaries and precedents.

33. Jurisource.ca statistics show that the most used resources are precedents and glossaries. Professionals have difficulty obtaining legal documents in French. The legal field requires precision; the choice of words is of paramount importance. This makes it essential to create tools for jurists in French and to maintain funding for organizations that create high-quality materials in legal French.
34. The modernized OLA should impose obligations on the judicial system. It is essential that the OLA also take into consideration the importance for justice professionals to keep their French knowledge up to date, hence the importance of having training in legal French easily accessible online.
Conclusion

35. The modernization of the *Official Languages Act* is an ideal opportunity to make the necessary corrections and improvements to ensure that the language rights of Canadians across the country are respected. A modernized OLA should include clauses regarding the bilingualism of judges at each level of court and the right of individuals to be understood in the official language of their choice. These clauses should refer to collaboration between the federal and provincial governments to ensure their implementation. The OLA should also entrench the Court Challenges Program to protect it from political decisions, and it should incorporate and clarify key principles of acquired language rights in case law. Finally, a modernized OLA should promote access to high-quality resources and continuing education for justice professionals, otherwise the active offer of services cannot be of equal quality.