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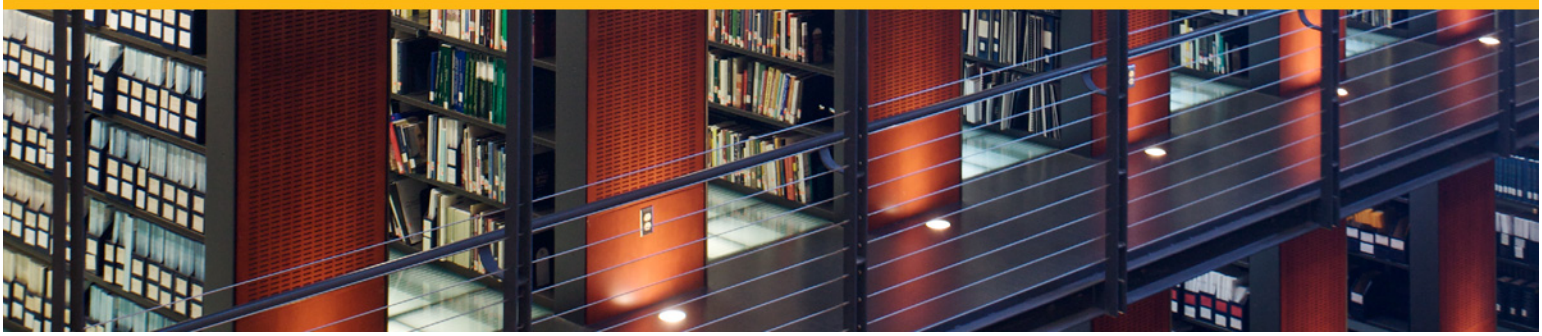

Bilingualism in the Federal Courts

Publication No. 2011-40-E
30 November 2011
Revised 2 March 2016

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Legal and Social Affairs Division
Parliamentary Information and Research Service

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Bilingualism in the Federal Courts
(Background Paper)

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Ce document est également publié en français.

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BILINGUALISM IN THE FEDERAL COURTS

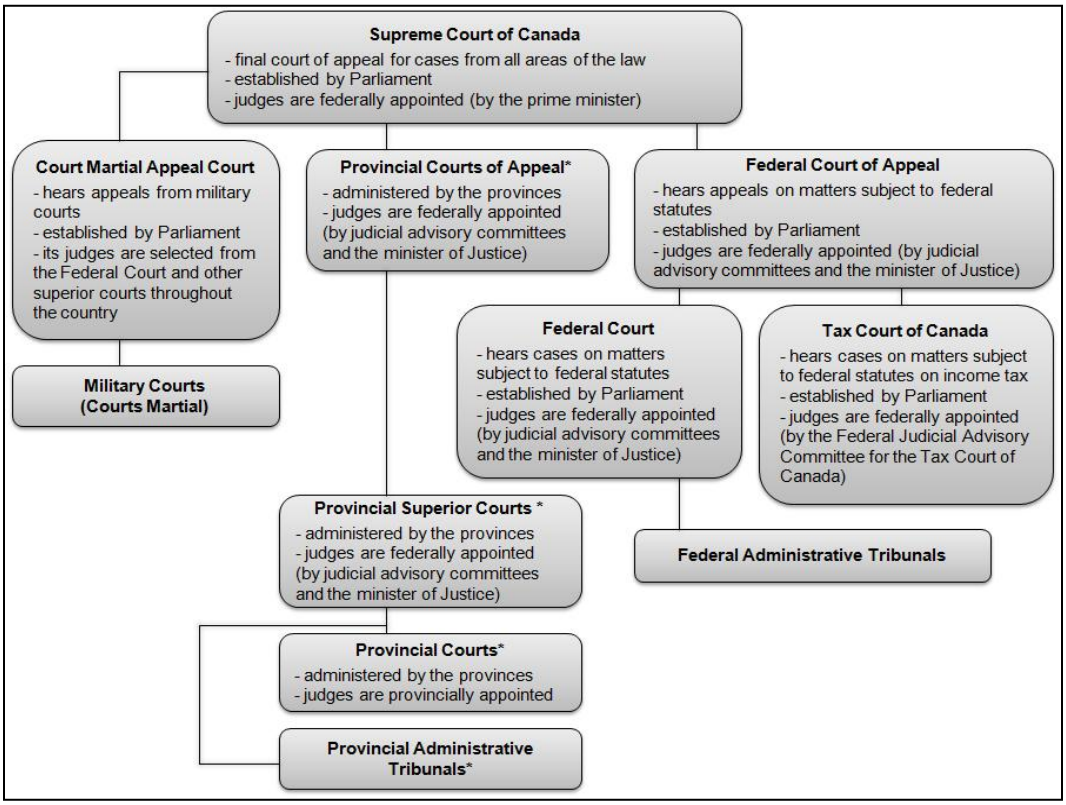
1 INTRODUCTION

This document analyzes the rules that govern the use of both official languages in federal courts, that is, the courts established by Parliament. It gives a brief overview of Canada's court system before examining the legislative, constitutional and judicial framework of bilingualism in the federal courts. Lastly, it reviews the unique case of the Supreme Court of Canada and summarizes the recent debate on adding language requirements for the judges who sit on the Supreme Court bench.

2 BRIEF OVERVIEW OF CANADA'S COURT SYSTEM

This section gives a brief overview of Canada's court system. Some courts are administered by the federal government, while others are administered by the provincial or territorial governments. The general structure of the court system can be illustrated as follows:

Figure 1 – Canada's Court System



Note: * These characteristics apply to the corresponding courts in the territories, with the exception of Nunavut.

Sources: Figure prepared by the author using information obtained from the Department of Justice Canada, *Canada's Court System*; the Canadian Superior Courts Judges Association, *Structure of the Courts*; and the Office of the Commissioner for Federal Judicial Affairs Canada, *Process for an Application for Appointment*.

2.1 Administrative Tribunals

Administrative tribunals[1] – at both the federal and the provincial/territorial levels – are not in fact part of the court system. However, they play an essential role in examining matters that are subject to a wide variety of administrative rules and regulations, and they can be called on to make rulings on language rights issues. They can also refer cases to superior courts, if necessary.

2.2 Provincial and Territorial Courts

In each province and territory (with the exception of Nunavut), the lower courts hear cases on a variety of subjects involving either federal or provincial/territorial laws.[2] The superior courts also hear a wide variety of cases, including but not limited to criminal and family law cases. Courts of appeal hear appeals of rulings made in the lower courts as well as cases that address constitutional issues. The lower, superior and appeal courts are each administered by the province or territory in question.

2.3 Federal Courts

Parliament created specialized courts to handle cases in more specialized areas of law. The Tax Court of Canada, the military courts and the Court Martial Appeal Court are examples of specialized federal courts. Parliament also established the Federal Court and the Federal Court of Appeal. Both of these courts have civil jurisdiction, but deal only with cases that are subject to federal statutes. Since 2003, the Courts Administration Service has provided support services to all these courts.

The highest court in the country is the Supreme Court of Canada. It is the final court of appeal, and its jurisdiction covers all areas of the law. The Supreme Court also hears cases that involve a question of public importance or raise an important issue of law. The Supreme Court can also be called upon to advise the federal government regarding the interpretation of the Constitution and federal or provincial legislation. The unique role of the Supreme Court is explored in greater detail in section 3 of this paper.

3 THE LEGISLATIVE, CONSTITUTIONAL AND JUDICIAL FRAMEWORK OF BILINGUALISM IN FEDERAL COURTS

This section examines the language requirements that must be met by the federal courts, focusing on several key principles. It also explores issues relating to judicial bilingualism, such as the appointment process for judges, the distinction between the right to be heard and the right to be understood, access to justice, language training, and the equality of the two official languages.

3.1 Administering Justice in Both Official Languages

Various pieces of legislation provide for the administration of justice in both official languages. Table 1 summarizes the main legislative and constitutional requirements that apply to the federal courts with regard to language.

Table 1 – Language Requirements for Federal Courts

Constitution Act, 1867	*Canadian Charter of Rights and Freedoms*	*Criminal Code*	Other Legislation
Section 133 guarantees that both English and French can be used "in any Pleading or Process" before the courts of Canada (and Quebec). Furthermore, section 133 stipulates that the Acts of the Parliament of Canada and the legislature of Quebec must be printed and published in both languages.	Section 14 grants the right to the assistance of an interpreter during proceedings. Section 16 states that English and French are the official languages of Canada and includes the principle, "to advance the equality of status or use of English and French." Section 19 establishes that either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament (and any court of New Brunswick).	Section 530 guarantees that the accused has the right to be tried by a judge in the official language of his or her choice. The accused must be advised of this right. Certain circumstances may warrant a trial in both languages. Section 530.01 gives the accused the right to obtain from the prosecutor a translation of the portions of an information or indictment against the accused that are written in the official language that is not that of the accused. Section 530.1 outlines the circumstances under which a bilingual trial is permitted. Section 849(3) states that any pre-printed portions of a form set out in the Criminal Code must be printed in both official languages.	In addition to these general provisions, a number of Acts and regulations establish specific criteria with respect to official languages: *Supreme Court Act* *Rules of the Supreme Court of Canada* *Federal Courts Act* *Federal Courts Rules* *Tax Court of Canada Act* *Tax Court of Canada Rules (General Procedure)* *Court Martial Appeal Court Rules*
Official Languages Act (1988)			
Part II of the Act defines language requirements for legislative instruments. Acts of Parliament must be enacted, printed and published in both English and French (s. 6). The same conditions apply to legislative instruments made by the Governor in Council and ministers of the Crown, as well as all instruments made in the exercise of a prerogative or other executive power that are of a public and general nature, except for the ordinances and laws of the territories and instruments of a group of Aboriginal people (s. 7). All rules, orders and regulations governing the proceedings of a federal court must also be made, printed and published in both official languages (s. 9). All the texts addressed in Part II must be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative (s. 13). Part III of the Act defines the language requirements for the administration of justice. English and French are the official languages of the federal courts, and they may be used in any pleading in or process issuing from any federal court (s. 14). Witnesses have the right to be heard in the official language of their choice, and interpretation services are provided under certain conditions (s. 15). There is a duty to ensure that judges of federal courts other than the Supreme Court understand the official languages (s. 16). The Governor in Council may make rules governing legal procedure, other than for certain specific courts, one of which is the Supreme Court (s. 17). In cases where Her Majesty is a party to civil proceedings, the language can be chosen by the other parties or be the most reasonable in the circumstances (s. 18). Pre-printed portions of forms must be written in both languages, but can be filled out in one language only, provided that a translation may be made available upon request (s. 19). Federal court decisions are published in both languages (s. 20).			

Source: Table prepared by the author using data obtained from information on the consolidated Acts and regulations of Canada taken from the Department of Justice Canada, *Justice Laws Website*.

The coming into force in 2008 of section 533.1 of the *Criminal Code* made it mandatory for a parliamentary committee, either from the Senate, the House of Commons or both Houses of Parliament, to undertake a comprehensive review of the provisions and operation of Part XVII on Language of Accused. This review was undertaken by the House of Commons Standing Committee on Justice and Human Rights in May 2013, which tabled its conclusions in April 2014.[3] The Committee recommended that a new review of these provisions be undertaken by a parliamentary committee within the following five years.

3.1.1 A Bijural and Bilingual Justice System

The Canadian legal system is based on two legal traditions: the civil law tradition, which applies in Quebec, and the common law tradition, which applies in the rest of Canada. While the Federal Court and the Federal Court of Appeal hear only cases that are subject to federal legislation, the Supreme Court can be called on to interpret legislation from either of these two legal traditions. Furthermore, federal legislation is drafted in both English and French and both versions are equally authoritative. The requirements set out in the *Canadian Charter of Rights and Freedoms* and the *Official Languages Act* (OLA) mean that most federal legislation is drafted in parallel, not written in one language and then translated into the other.

The Nature of Federal Legislation

Federal courts interpret laws that are conceived, drafted and adopted in both official languages. Both language versions are equally authoritative.

3.1.2 The Use of Official Languages

The use of official languages in the justice system depends on the type of court and the nature of the case. As Vanessa Gruben of the University of Ottawa says:

> The federal government has the authority to regulate the language used before "federal courts" and in relation to "criminal procedure" … Parliament also has the authority to legislate language usage in certain administrative tribunals.[4]

In federal courts, the right to use English or French is decided based on various factors and extends to all the participants in the justice system, depending on the circumstances.

The Right to Use English or French

The right for everyone to use his or her language of choice before federal courts extends to litigants, lawyers, witnesses, judges and other officers of the court.

3.1.3 Verbal and Written Communication

Verbal and written communication in federal courts can be in English or French. Section 133 of the *Constitution Act, 1867* enshrines the right to use either language in any pleading or process. This requirement is repeated in the Charter, which alludes to the right to use English and French in cases and proceedings, as well as in the OLA of 1988.

Cases and Proceedings

Language requirements apply to all written submissions (e.g., summons) as well as submissions of the parties, oral submissions, statements and briefs. They do not apply to evidence.

Translation and simultaneous interpretation services are offered under certain conditions to ensure that language rights are respected. The right to the assistance of an interpreter during proceedings is guaranteed by the Charter. However, a distinction must be made between the language rights of the accused (i.e., the right to express oneself in one's own language) and the right to a fair trial (i.e., the right to understand and be understood). In 1999, the Supreme Court of Canada summarized this distinction in the *Beaulac* case:

> The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.[5]

The OLA and the *Criminal Code* provide for translation services on request for court documents, indictments and criminal information. The provisions regarding simultaneous interpretation are mainly to allow witnesses to express themselves and to be heard without prejudice in the language of their choice.

3.1.4 The Right to a Trial in the Language of One's Choice

According to the *Criminal Code*, an accused has the right to be tried in his or her official language of choice, regardless of where in Canada the trial may take place. The accused must be informed of this right.

Institutional Bilingualism

Federal courts, as institutions, must meet the obligations set out in the *Official Languages Act*. Their administration must ensure that a case can be heard in either of the official languages. It is not necessary for every person sitting on the bench to be bilingual.

If the request is filed within the proper timeline, it is automatically granted. If the time limit is exceeded, the court can still grant the request, in the interest of justice. All the criminal courts of Canada are subject to the language requirements outlined in the *Criminal Code*. The Supreme Court of Canada ruled on the application of these provisions in the *Beaulac* case:

> Section 530(1) … creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.[6]

A criminal trial can therefore be conducted entirely in one language, which requires federal courts to be institutionally bilingual.

In 2015, the Court of Appeal for Ontario, in *R. v. Munkonda*, handed down a decision identifying two principles governing the conduct of a bilingual trial or preliminary inquiry:

- first, that accused persons retain their right to equal access to proceedings in their language, notwithstanding the imposition of a bilingual proceeding; and
- second, that the court and the prosecution must be bilingual and must not favour either of the official languages.[7]

For civil cases, the OLA requires federal institutions to use the official language chosen by the other parties, or the one that makes the most sense in the circumstances.

3.1.5 Decisions, Judgments and Orders

In general, the judgment in a trial is delivered and issued in the language in which the trial was conducted. A translation of the judgment must be made available to the public as soon as possible. A decision delivered in one language alone is not considered invalid as long as it respects the provisions of the OLA.

Federal judgments are published simultaneously in both official languages if they determine a question of law of general public interest or importance, if the proceedings were conducted in both official languages, or if the proceedings were written in both languages. The same standards apply to decisions published in the official reporters or online.

3.1.6 The Authority to Make Implementing Rules

The Supreme Court, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada establish their own rules regarding the use of either of the official languages. These rules of procedure must be bilingual. Section 17 of the OLA grants the Governor in Council the authority to establish such rules for the other courts, but this authority has never been exercised.

3.2 Appointing Bilingual Judges

The federal government is responsible for appointing judges to the bench in federal courts as well as in the superior courts and courts of appeal in the provinces and territories.

Acts Governing the Appointment of Judges

The *Judges Act*, the *Federal Courts Act* and the *Tax Court of Canada Act* outline the appointment process for federal judges. The Office of the Commissioner for Federal Judicial Affairs Canada is responsible for the administration of the appointments process.

Judicial advisory committees are tasked with assessing the qualifications of the lawyers who apply for federal judicial appointments. There are a total of 17 judicial advisory committees: three for Ontario, two for Quebec, one for each of the other provinces and territories, and one for the Tax Court of Canada.

Once the list of candidates has been established, the minister of Justice presents it to the federal Cabinet and the appointments are made by letters patent by the Governor in Council. The prime minister appoints chief justices and associate chief justices.

Assessments are valid for two years. "Professional competence and overall merit are the primary qualifications."[8] Understanding official languages is one of many factors that are taken into account when assessing candidates.

As Table 2 shows, a total of 1,171 judges can sit on federally appointed courts. As of 1 March 2016, there were 1,136 sitting judges.

Table 2 – Federally Appointed Judges as of 1 March 2015

Court	Number of Judges in Office	Number of Supernumeraries	Total Number of Judges Currently Sitting	Current Vacancies	Total Number of Positions
Supreme Court of Canada	9	0	9	0	9
Federal Court of Appeal	12	3	15	1	16
Federal Court	35	7	42	2	44
Tax Court of Canada	21	5	26	1	27
Provincial superior courts and courts of appeal	790	254	1,044	31	1,075
Total	*867*	*269*	*1,136*	*35*	*1,171*

Source: Table prepared by the author using data obtained from the Office of the Commissioner for Federal Judicial Affairs Canada, *Number of Federally Appointed Judges as of March 1, 2016*.

Because the judges who are appointed to federal courts do not undergo oral or written language testing, it is difficult to determine how many of them are bilingual. Year after year, stakeholders have called for the federal government to appoint a sufficient number of bilingual judges, especially to courts administered by the provinces.[9]

3.3 THE RIGHT TO BE HEARD OR UNDERSTOOD IN THE LANGUAGE OF ONE'S CHOICE

Does the right to use the official language of one's choice mean that one has the right to be understood in that language without the use of an interpreter?

In 1986, the Supreme Court of Canada ruled in the *MacDonald* case that parties have a right to use either language, but that this does not guarantee that they will be heard or understood by the court in that language.[10] However, according to the Supreme Court, judges do not enjoy unconstrained language liberties, as "they are invested with certain duties and responsibilities in their service to the community. This extends to the duty to give a meaningful language choice to litigants appearing before them."[11] In short, it is difficult to draw an unequivocal conclusion regarding the rights of litigants and judges to use the language of their choice.

When the OLA was enacted in 1988, the government imposed on federal courts (with the exception of the Supreme Court) a requirement for judges to understand the official languages without the assistance of an interpreter. A unilingual judge can hear a case if he or she understands the language chosen by the parties. When the case is heard in both languages, the designated judge must be bilingual. A five-year

grace period was given before this requirement came into force. Federal courts have had to meet this requirement since 1993 and ensure that there are enough judges qualified to hear cases in either of the official languages.

In March 2011, the Provincial Court of Alberta made a ruling in the *Pooran* case that stated the following:

> If litigants are entitled to use either English or French in oral representations before the courts yet are not entitled to be understood except through an interpreter, their language rights are hollow indeed. Such a narrow interpretation of the right to use either English or French is illogical, akin to the sound of one hand clapping, and has been emphatically overruled by *Beaulac*.[12]

In 2012, an impact study that received financial support from the Language Rights Support Program[13] was released. This study examined whether there exists a right to be understood directly, orally and in writing, without the assistance of an interpreter or translator, in the particular context of the Supreme Court of Canada.[14] The study recognized that there can be grounds allowing courts to conclude that a right to be understood directly by the judges of the highest court exists.

3.4 Access to Justice in the Language of One's Choice

Despite the legislative and constitutional requirements in place, there are still limitations to accessing the courts in one's language of choice. While many of the provinces and territories have legislative provisions that promote access to justice in both official languages,[15] work remains to be done to ensure that everyone has equal access to justice in both languages across the country.

Obstacles to Accessing Justice

The lack of lawyers and judges who have a sufficient understanding of French and English is one of the primary obstacles to accessing justice in one's own language. Other difficulties include institutional obstacles such as a lack of bilingual legal staff, a lack of bilingual legal or administrative resources, and the delays associated with choosing to proceed in one language rather than another.

A study carried out on behalf of the Department of Justice Canada in 2002 showed that the judicial and legal services offered in both official languages vary greatly across the country. Outside Quebec, the proportion of lawyers who expressed dissatisfaction with judicial and legal services in French was as follows: 50% for criminal law, 58% for bankruptcy law and 45% for divorce and support law.[16] The report made the following statement:

> [T]he lower the minority community's demographic weight in a jurisdiction, the more difficult it is for the members of that community to exercise their language rights in the courts.[17]

Since 2003, the federal government has offered additional funding to increase access to justice in both official languages through three horizontal initiatives. The *2003–2008 Action Plan for Official Languages* provided $18.5 million in funding over five years that targeted the following areas:

- providing project funding (through the Access to Justice in Both Official Languages Support Fund);

- creating a consultation process for official language minority communities; and
- developing training tools on language rights for Department of Justice Canada legal counsel.

Another initiative was the *Roadmap for Canada's Linguistic Duality 2008–2013: Acting for the Future*,[18] which earmarked $41 million over five years to pursue these initiatives and to encourage young people who are fully bilingual to pursue a career in the field of justice. It intensified linguistic training efforts for all officers of the court (e.g., court clerks, stenographers, justices of the peace and mediators).

Finally, the *Roadmap for Canada's Official Languages 2013–2018: Education, Immigration, Communities*[19] earmarks $40.2 million over five years for networks, training and access to justice services.

In 2012, the French Language Services Bench and Bar Advisory Committee submitted a report to the Attorney General of Ontario on access to justice in French in that province.[20] This report, which contains 17 recommendations, caught the attention of the French Language Services Commissioner of Ontario, who committed to closely monitoring its implementation.[21] In the fall of 2015, the provincial attorney general released her response to the Advisory Committee's recommendations, which "outlines solutions that have actually been or are being implemented to further enhance the French language rights of Ontarians and access to the justice system in French."[22] Ontario's French Language Services Commissioner reacted publicly to the release of the response by calling for the implementation of a specific compulsory directive on the active offer of French-language services in the provincial courts.[23]

The Commissioner of Official Languages at the federal level, in partnership with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario, released a study in August 2013 providing 10 recommendations to improve the bilingual capacity of the superior court judiciary.[24] The study found that the existing process of appointment of judges does not ensure sufficient bilingual capacity at all times in the judiciary. Coordinated action by the federal minister of Justice and the minister's provincial and territorial counterparts is required to prevent future breaches.

3.5 LANGUAGE TRAINING

Since 1978, the government has offered language training to federally and provincially appointed judges through the Office of the Commissioner for Federal Judicial Affairs Canada so that they can improve their second language skills. Through the Judges' Language Training Program,

> numerous judges have gained sufficient knowledge to master a second language. Thus many of them are able to preside in court, understand testimony, read legal texts, write judgments and participate in legal conferences in their second language.[25]

The purpose of the Department of Justice Canada's training component of the Access to Justice in Both Official Languages Support Fund is to promote activities that provide advance training focusing on legal terminology for bilingual justice professionals, contribute to the development of a curriculum for bilingual students interested in pursuing a career in the field of justice, elaborate a recruitment strategy and promote justice-related careers, and develop linguistic training tools.

The University of Moncton, the University of Ottawa and McGill University are the only post-secondary institutions that offer law programs in both official languages. Other organizations, such as the Centre canadien de français juridique or the various associations of French-speaking jurists, offer targeted training to various justice professionals.

A report submitted to the Department of Justice Canada in 2009 analyzed official language training needs in the area of justice. It put forward several strategies and concluded that being proficient in the legal vocabulary of each language is essential to ensure institutional bilingualism in the field of justice.[26] An evaluation released in May 2012 indicated that additional efforts will be needed to meet the challenges identified in this study.[27] Distance training could become a priority.[28]

The study released in August 2013 by the Office of the Commissioner of Official Languages presented the following vision of language training for judges:

> Language training should serve to maintain and enhance the court's bilingual capacity, while allowing interested judges to take advantage of the learning activities and to use their language skills within the context of their work. The current FJA [Federal Judicial Affairs] language training program seems to meet judges' needs in terms of second language learning as well as maintaining and strengthening their bilingual capacity. However, the language training tools offered to provincial court judges could be useful models if FJA would like to provide a complementary language training program for superior court judges wishing to evaluate their language skills in work-related situations.
>
> Finally, superior court judges must be better aware of the language rights of those who appear before the courts in order to ensure substantive equality in access to justice in both official languages.[29]

3.6 THE EQUALITY OF THE TWO OFFICIAL LANGUAGES

In the *Beaulac* case, the Supreme Court of Canada stated that the purpose of sections 530 and 530.1 of the *Criminal Code* is to:

> provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity.[30]

Furthermore, the Court recognized that language rights are based on the principle of true equality between the two official languages:

> [T]he existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis … [A]n application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.[31]

Substantive Equality in the Legal System

"Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada" (*R. v. Beaulac*, [1999], para. 22).

The study carried out on behalf of the Department of Justice Canada in 2002 confirmed that "equal access to high quality judicial and legal services in both official languages is a contributing factor in completing the plan for a society that, in this respect, remains unfinished."[32] Some have asserted that true equality means an active offer of services. In the *DesRochers* case, the Supreme Court stated, "Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation."[33]

The principle of the equality of the two official languages that is recognized in Canadian case law provides for the equal treatment of the two language communities in Canada. According to Vanessa Gruben, everything suggests that a broad interpretation of the principle of the equality of the two official languages could lead the courts to amend their vision of language rights in the judicial realm.[34] An impact study funded by the Language Rights Support Program highlighted three principles applicable to language equality that flow from the jurisprudence:

- The applicable norm is that of substantive equality, and not formal equality.
- Substantive equality imposes positive obligations on government.
- The exercise of language rights must not be considered as a request for an accommodation.[35]

4 THE SUPREME COURT OF CANADA: A UNIQUE CASE

This section looks at the unique case of the Supreme Court of Canada. It examines the exceptions that apply to this court with regard to language and summarizes recent debates about changing the language requirements for judges appointed to the Supreme Court.

4.1 EXCEPTIONS THAT APPLY TO THE SUPREME COURT

The Supreme Court of Canada was created in 1875. It is governed by the *Supreme Court Act* (SCA), which does not have any provisions on official languages. While the OLA applies to all federal courts, the Supreme Court is not subject to sections 16 and 17 of the Act. These sections outline the duty federal courts have to

ensure that judges understand the proceedings without an interpreter and the authority to make implementing rules.

The Supreme Court is exempt from these requirements for various geographic and administrative reasons. Section 6 of the SCA outlines certain conditions regarding Quebec representation: at least three judges must be from Quebec. Convention has it that, of the remaining six judges, three come from Ontario, one from the Atlantic provinces and two from the Western provinces. The nine Supreme Court judges hold office until they reach the age of 75, but are removable by the Governor General. They sit three times a year.

The judges of the Supreme Court are called on to interpret both civil and common law, as well as to make rulings on cases that were argued in the lower courts in either of the official languages. The *Rules of the Supreme Court of Canada* state that a party may use either English or French in any oral or written communication with the Court, and that simultaneous interpretation services must be provided during the hearing of every proceeding.[36]

4.2 Recent Debates in the Public and Political Spheres[37]

4.2.1 Amendment Bills

Since May 2008, bills have been tabled seven times in the House of Commons aiming to require Supreme Court justices to understand both official languages.

- In May 2008, Bill C-548[38] proposed amending section 16 of the OLA so that the Supreme Court would be subject to the same requirement as the other federal courts, that is, that its judges be capable of hearing cases in the official language chosen by the parties without the assistance of an interpreter. The bill died on the *Order Paper*.

Proposals to Make Legislative Amendments

Eliminating the exception provided for in the *Official Languages Act* with regard to the Supreme Court would force the Supreme Court to be institutionally bilingual. Including in the *Supreme Court Act* that judges must understand both official languages without the aid of an interpreter supposes that each judge on the Supreme Court bench must be bilingual upon appointment.

- In June 2008, Bill C-559[39] proposed to amend section 5 of the SCA by including a similar requirement to understand the official languages. The bill died on the *Order Paper*.
- A similar bill, C-232,[40] was introduced in November 2008 and reinstated in two parliamentary sessions after that, in January 2009 and March 2010; it died on the *Order Paper* in each case. The bill was tabled again in June 2011 under new number C-208.[41] It died on the *Order Paper* when Parliament was prorogued and was reinstated in October 2013,[42] after which it was defeated at second reading.

- Bill C-203,[43] currently before the House of Commons, pursues the same objective as its predecessors: to require appointees to the Supreme Court to be able to understand English and French without the aid of an interpreter. The bill was introduced on 9 December 2015.

It should be noted that the Minister of Justice and Attorney General of Canada mandate letter, released in the fall of 2015, includes instructions regarding the process of appointing individuals to the Supreme Court, requiring them to be "functionally bilingual."[44]

4.2.2 Summary of the Debates

A number of questions have been raised during recent debate on the bilingualism of Supreme Court judges. Table 3 summarizes the positions of those who support and those who oppose mandatory bilingualism.

Table 3 – Summary of Positions on Mandatory Bilingualism for Judges of the Supreme Court of Canada

Supporters of Mandatory Bilingualism	Opponents of Mandatory Bilingualism
Is language a basic skill required for judges to carry out their judicial duties?	
Yes. Understanding both official languages must be a prerequisite when appointing judges. It is an essential qualification, similar to professional qualifications and merit. Bilingualism is mandatory for others who hold senior positions, such as those in the public service.	No. It would be unacceptable to compromise the quality of decisions in favour of a language skills requirement. Judges are legal specialists, not language specialists. However, if two candidates have equivalent legal qualifications, then the bilingual candidate is preferred.
Are there enough bilingual candidates in the country to fill judges' positions?	
Yes. Language training courses are already offered across the country. If language is seen as an essential skill to become a judge, and if we take into account the fact that lawyers must practise for 10 years before they may be appointed to the bench, lawyers have plenty of time to complete the necessary training. There are many bilingual candidates on the lists established by the judicial advisory committees for appointments to federal courts. In fact, seven of the nine judges currently sitting on the Supreme Court bench are bilingual, but all it takes is one unilingual judge for all the discussions, especially where judgments are reserved, to take place in one language.	No. Candidates from certain regions are at a disadvantage because they have less contact with their second official language. Before making bilingualism a mandatory requirement, we must develop second language learning opportunities throughout the country. The federal government has been offering funding for language and bijural training in the field of justice since 2003. This support has been reinforced by the *Roadmap for Canada's Linguistic Duality*. We must address the issue of the lack of bilingual judges in the lower courts before targeting the judges of the Supreme Court.
Does the right to be heard in the language of choice assume the right to be understood in this language?	
Yes. The constitutional right for Canadians to be heard in the language of their choice must be respected. The right of litigants to receive justice takes precedence over the right of someone to be appointed as a judge. The *Pooran* decision suggests that resorting to an interpreter does not fully respect the language rights that are enshrined in the Constitution, and the decision does not agree with the liberal interpretation given in *Beaulac*. Simultaneous interpretation is a filter. Precise word choice is of particular importance, as Supreme Court decisions cannot be appealed. An impact study released in 2012 recognized that there can be grounds allowing courts to conclude that a right to be understood directly by the judges of the highest court exists.	No. The right for judges to use the language of their choice must also be considered. The accused and the witnesses have access to translation and simultaneous interpretation services, if needed. The judges have access to the written documentation and make themselves acquainted with the files before the hearing. During the hearing, they have access to interpreters, who are language specialists. If bilingualism is mandatory for the appointment process, then judges lose their freedom to choose and are forced to become bilingual. Everyone's language rights must be respected.

Supporters of Mandatory Bilingualism	Opponents of Mandatory Bilingualism
What level of command of both languages should be required of judges?	
Federal legislation is drafted in parallel in English and French, and both versions are authoritative, which must be taken into account. Supreme Court judges must therefore understand the bilingual and bijural nature of Canada's judicial system, as they are called on to make rulings in all areas of the law. Supporters of mandatory bilingualism have suggested setting a period before the requirement would take effect, as was done for the other federal courts when the OLA came into force in 1988. This would give current and future judges the time to acquire the necessary skills.	It is difficult to determine the exact level of command of the language that is necessary, whether that be for reading, writing, speaking or understanding. Tests would need to be implemented to evaluate judges' language skills, and tests would need to be administered to determine if passive bilingualism is enough to meet the bilingual standard. People who oppose mandatory bilingualism are in favour of a delayed coming-into-force date so that there would be time to build this bilingual capacity at the lower levels.
Is bilingualism in the Supreme Court something that we should work toward?	
Yes. It is a matter of principle. Linguistic duality is one of Canada's recognized values, and our country's highest court should reflect this. It is also a matter of fairness. The principle of the equality of the two languages that is upheld in case law provides for the equal treatment of francophones and anglophones. This principle has been reflected in a number of recent decisions.	Yes. But making it mandatory right now is utopian. Before making bilingualism a requirement for judges, we must increase the opportunities for Canadians to become bilingual. It is also possible that mandatory bilingualism would prevent the appointment of a unilingual francophone judge to the Supreme Court, which would be unfair for one of Canada's two language communities.(In 2008 and in 2011, the government appointed two unilingual anglophone judges to the Supreme Court.)

Sources: Table prepared by the author based on information taken from the *Debates* of the House of Commons, the *Debates* of the Senate and various news articles on the issue.

5 CONCLUSION

The interpretation of language rights is constantly evolving. Recent debate on bilingualism for judges of the Supreme Court of Canada is one example. In 1999, the Supreme Court adopted a wide and liberal view of these rights in the legal system:

> Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.[45] [Emphasis in the original]

This interpretation has been taken up many times in judgments in the years since. The rules that govern bilingualism in the federal courts could evolve in the coming years due to case law, legislative amendments or changing attitudes within Canadian society.

NOTES

1. At the federal level, the Canadian Human Rights Commission, the Immigration and Refugee Board of Canada, the Canadian Radio-television and Telecommunications Commission and the Competition Tribunal are examples of administrative tribunals.
2. In many of the provinces and territories, there are separate courts for certain areas of law, such as family court, youth court and small claims court.
3. House of Commons, Standing Committee on Justice and Human Rights, *Statutory Review of Part XVII of the Criminal Code*, 2nd Session, 41st Parliament, April 2014.

4. Vanessa Gruben, “Le bilinguisme judiciaire,” in *Les droits linguistiques au Canada*, Michel Bastarache, ed., 3rd ed., Éditions Yvon Blais, Cowansville, 2013, p. 311 [Translation].
5. *R. v. Beaulac*, [1999] 1 S.C.R. 768, para. 41.
6. Ibid., para. 28.
7. *R. v. Munkonda*, 2015 ONCA 309, para. 46.
8. Office of the Commissioner for Federal Judicial Affairs Canada, *Process for an Application for Appointment*.
9. Over the years, federal official languages commissioners have spoken out many times about this issue, the most recent being Graham Fraser. In August 2013, his office released a study of the issue of the shortage of federally appointed judges capable of hearing cases in both official languages. The Fédération des associations de juristes d’expression française de common law has decried the situation for a number of years. The Canadian Bar Association has called for a sufficient number of bilingual judges to be appointed to ensure equal access to justice and recognize bilingualism as an important criterion for being appointed to the federal court. Parliamentary committees have studied the issue: in 2003, the Standing Senate Committee on Official Languages presented a report on this matter with recommendations.
10. *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, para. 103. The Supreme Court reached the same conclusion in *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, para. 53.
11. *Société des Acadiens v. Association of Parents*, para. 23.
12. *R. v. Pooran*, 2011 ABPC 77, para. 21.
13. The Language Rights Support Program is managed by the University of Ottawa through a joint partnership between the university’s Official Language and Bilingualism Institute and its Faculty of Law. It is financed by the Department of Canadian Heritage. (See Language Rights Support Program, *LRSP at a glance*.)
14. Mark C. Power, *Étude d’impact de la possibilité d’être compris directement, à l’oral comme à l’écrit, sans l’entremise de services d’interprétation ou de traduction, par les juges de la Cour suprême du Canada*, Language Rights Support Program, 21 August 2012 [Available in French only].
15. For an overview of language requirements in the provinces and territories, see Marie-Ève Hudon, *Language Regimes in the Provinces and Territories*, Publication No. 2011-66-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 8 January 2016. See also Gruben (2013), pp. 301–449.
16. GTA Research, *Environmental Scan: Access to Justice in Both Official Languages*, Final report submitted to the Department of Justice Canada on 10 May 2002 (see, in particular, the section, “Overall Level of Satisfaction with Judicial and Legal Services in the Minority Language” in Chapter 2, “Access to Justice in Francophone Minority Communities”).
17. Ibid. (See, in particular, the chapter, “General Conclusion.”)
18. Canadian Heritage, *Roadmap for Canada’s Linguistic Duality 2008–2013: Acting for the Future*, Ottawa, 2008.
19. Canadian Heritage, *Roadmap for Canada’s Official Languages 2013–2018: Education, Immigration, Communities*, Ottawa, 2013.
20. French Language Services Bench and Bar Advisory Committee, *Access to Justice in French*, Report submitted to the Attorney General of Ontario, 25 June 2012.

21. Ontario, French Language Services Commissioner, "What Price Justice for Francophone Litigants?," *Commissioner's Blog*, 19 December 2012.

22. Ontario, Ministry of the Attorney General, *Enhancing Access to Justice in French: A Response to the* Access to Justice in French *Report*, September 2015.

23. Ontario, Office of the French Language Services Commissioner, "'Bonjour, vous avez joint la boîte vocale de …' [Hello, you've reached the voice mail of …]," *Commissioner's Blog*, 18 November 2015.

24. Office of the Commissioner of Official Languages, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013.

25. Office of the Commissioner for Federal Judicial Affairs Canada, *Judges' Language Training*.

26. PRA Inc., *Canada-Wide Analysis of Official Language Training Needs in the Area of Justice*, Report submitted to the Department of Justice Canada, 31 March 2009.

27. Justice Canada, *Initiative in Support of Access to Justice in Both Official Languages – Evaluation – Final Report*, Evaluation Division, Office of Strategic Planning and Performance Management, May 2012, p. 27.

28. Ibid., p. 42.

29. Office of the Commissioner of Official Languages (2013), p. 36.

30. *R. v. Beaulac*, para. 34.

31. Ibid., para. 39.

32. GTA Research (2002). (See, in particular, the chapter, "General Conclusion.")

33. *DesRochers v. Canada (Industry)*, [2009] 1 S.C.R. 194, para. 31.

34. Gruben (2013), p. 349.

35. Ingride Roy, *Legal Impact Study on Desrochers v. Canada (Industry), [2009] 1 S.C.R. 194*, submitted to the Language Rights Support Program, 8 June 2010, pp. 16–17.

36. Interpretation services are not provided when a judge's decision is reserved.

37. For a brief overview of past debates, see Cynthia Kirkby, *Notes on a Bilingualism Requirement for Supreme Court Justices*, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 July 2009 [Available from the author on request].

38. Bill C-548: An Act to amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada), 2nd Session, 39th Parliament.

39. Bill C-559: An Act to amend the Supreme Court Act (understanding the official languages), 2nd Session, 39th Parliament.

40. Bill C-232: An Act to amend the Supreme Court Act (understanding the official languages), 3rd Session, 40th Parliament. This bill was also introduced under the same number during the previous two sessions of the 40th Parliament.

41. Bill C-208: An Act to amend the Supreme Court Act (understanding the official languages), 1st Session, 41st Parliament.

42. Bill C-208: An Act to amend the Supreme Court Act (understanding the official languages), 2nd Session, 41st Parliament.

43. Bill C-203, An Act to amend the Supreme Court Act (understanding the official languages), 1st Session, 42nd Parliament.

44. Prime Minister of Canada, *Minister of Justice and Attorney General of Canada Mandate Letter*.

45. *R. v. Beaulac*, para. 25.