SPECIAL SERIES ON
THE FEDERAL DIMENSIONS OF
REFORMING THE SUPREME
COURT OF CANADA

Should Supreme Court Judges be Required to be Bilingual?

Sébastien Grammond* and Mark Power**
The Supreme Court of Canada hears and decides cases in both of Canada’s official languages, English and French. Its Francophone judges have always spoken English. But as Peter Russell, who studied bilingualism at the Supreme Court more than 40 years ago, observed: “while fluency in English appears to have been a necessary qualification for membership on the Court’s bench, fluency in French has not.”1 Even though the situation has improved since the time of Russell’s writing, there are still some Supreme Court judges who cannot understand written or oral submissions in French without the assistance of an interpreter or translator, and there is no guarantee that the situation will not persist. Francophone litigants before the Supreme Court face a challenge that is not shared by their Anglophone counterparts: to attempt to persuade judges who do not understand the language in which arguments are presented.

Several attempts have been made to correct this disequilibrium. Some judges have suggested that a party’s constitutional right to use English or French before the federal courts and the courts of certain provinces entails the right to be understood by the judge in that language without interpretation;2 yet, this remains a minority view. When a new Official Languages Act was introduced in the House of Commons in 1988 by the Conservative government of the day, it contained a provision explicitly recognizing such a right in the federal courts. However, in the course of the debates an exception was made for the Supreme Court.3 More recently, at least two private member’s bills requiring future appointees to the Supreme Court to possess some proficiency in both official languages, have sparked a country-wide debate4. One such bill was passed in the House of Commons but died on the order paper in the Senate at the end of the 40th Parliament. At present, the prospects of such a principle becoming law in the near future appear bleak.

---
1 P.H. Russell, The Supreme Court of Canada as a Bilingual and Bicultural Institution, Documents of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen’s Printer, 1969) at 61.
3 This exception is found in the Official Languages Act, R.S.C. 1985, c. 31 (4th supp.), s. 16.
4 Being C-232, An Act to amend the Supreme Court Act (understanding the official languages), 40th Parliament, 3rd Session (Y. Godin); and C-548, An Act to amend the Official Languages Act (understanding the official languages — judges of the Supreme Court of Canada), 39th Parliament, 2nd Session (D. Coderre).
This paper surveys the arguments in favour and against a statutory requirement to the effect that Supreme Court judges be bilingual. We adopt a public policy perspective rather than a purely legal one. We do not analyze arguments aimed at showing that such a requirement is mandated by existing constitutional provisions (for example, as a consequence of one’s right to speak the language of one’s choice before the courts) or prohibited by such provisions (for example, if it somehow led to the impairment of a judge’s right to speak in the language of choice). Rather, we explore whether, given Canada’s political and demographic conditions, there are any substantive reasons for requiring Supreme Court judges to be bilingual. We disclose at the outset our sympathy for a requirement of bilingualism.

We begin by showing that the ability to understand French has increasingly become critical to the performance of the tasks assigned to Supreme Court judges, especially to hear oral argument in French, to read written submissions in French and to interpret bilingual statutes and sections of the Constitution. We then underline how bilingual judges would improve the Court’s status and fulfillment of its role as a national institution and ensure the equal status and use of Canada’s two official languages. We consider the objection to the effect that a requirement of bilingualism would unduly narrow the pool of candidates from which judges are selected. We present empirical data in order to measure the extent to which this argument is valid. Finally, we assess other proposals that would aim at achieving the same goals.

We decided to write this paper in English because the points we make are usually considered to be obvious by a Francophone audience. We thus speak to those who need to be convinced of our point of view.

**Hearing and Deciding Cases in both Languages**

When an employer lays down minimal requirements for a job, it should normally do so after considering the tasks that an employee must perform and identifying the skills necessary for the fulfillment of those tasks. Thus, the most convincing arguments for a requirement of bilingualism are based on a consideration of the process by which the Supreme Court actually decides cases.
The Supreme Court hears cases in English and French, as it is the constitutional[^5] and statutory[^6] right of the parties before it to speak the official language of their choice. For example, of the 62 cases in which it rendered judgment in 2009, 22 were entirely or partly in French, including many cases originating from outside Quebec. Moreover, many of the cases heard by the Court involve the interpretation of bilingual legislation, including the *Canadian Charter of Rights and Freedoms*.

A case before the Supreme Court comprises many types of documents: the record, which contains the judgments of the courts below, the exhibits and the transcripts of the evidence at first instance or before an administrative tribunal, the factums, which are detailed analysis of the legal arguments put forward by each party and are up to 40 pages long; and the authorities, which are the statutes, cases, law journal articles and textbooks cited by the parties. None of that is translated.[^7] Hence, a unilingual anglophone judge does not have direct access to a case presented in French by a francophone litigant. That judge will have to rely on the “bench memo” written by a clerk. A bench memo is a report by a law clerk that summarizes the facts of the case, the judgments below and the results of the law clerk’s analysis and research on the legal questions at issue.[^8] The bench memo is not communicated to the parties. Thus, the unilingual judge will have access to the arguments of the parties through the eyes of an inexperienced recent law school graduate, rather than directly. While we do not want to trivialize the law clerks’ abilities (we were both law clerks at the beginning of our careers), we think that law clerks are likely to focus more on particular categories of argument (e.g., discussions of precedents or academic literature) that their studies have trained them to recognize, while giving less weight to arguments based on a lawyer’s practical experience. Even though the phenomenon

[^5]: *Constitution Act, 1867*, s. 133; *Canadian Charter of Rights and Freedoms*, s. 19(1).
[^7]: Some courts or administrative tribunals will issue their reasons in both official languages. This is a rare occurrence. When reasons are prepared in both languages, it is not uncommon for the translation not to be simultaneously released with the original version. See generally *Official Languages Act*, R.S.C.1985, c. 31 (4th Supp.), s. 20. Some parties go so far as to file with the Supreme Court, at great personal cost, unofficial English translations of decisions of Quebec courts or tribunals issued in French only. This was the case, for instance, in *Enerchem Transport Inc. v. Gravino*, [2008] S.C.C.R. No. 479. Regarding the language of factums, to the best of our knowledge only the Commissioner of Official Languages regularly serves and files French and English versions of his written submissions.
[^8]: For a description of the work of the law clerks, see M. McInnes, J. Bolton and N. Derzko, “Clerking at the Supreme Court of Canada” (1994) 33 Alta. L. Rev. 58.
is difficult to measure, it may be that law clerks act as a sort of filter when they summarize the arguments made by the parties.

The situation at the hearing is somewhat different. When the case is entirely or partly in French, the court provides simultaneous interpretation during the course of the hearing, which normally last no more than two hours. Unilingual anglophone participants in the hearing, be they judges, lawyers, parties or members of the public, may thus have access to a means of understanding what is said in French. Serious doubts have recently been expressed, however, about the accuracy of the translation. Lawyer Michel Doucet, Q.C., publicly expressed his grave concerns when, by chance, he listened to the English version of his oral argument in *Charlebois v. St John (City)*, a case his client lost by a margin of 5 to 4, broadcast on the Cable Public Affairs Channel. His reaction was as follows:

I listened to the English interpretation of my argument, and I understood none of it. I have a lot of respect for the interpreters and the work they have to do. It must be quite complicated to do it in a political context; I can imagine what it must be in a judicial context, where every word counts, where the interaction between bench and counsel plays a very important role, and where the questions put to counsel and the answers given can have an influence. In those circumstances, if I had to plead another case before a bench on which three judges did not directly understand the language in which I wanted to plead, I might suggest to my client that we proceed in the other language to ensure the nine judges were able to understand the argument.9

In fact, the ambivalence of French-speaking lawyers such as Doucet regarding the language they should use before the Supreme Court is reminiscent of the practice of many Quebec lawyers, documented by Peter Russell in the late 1960s, to argue in English to ensure that they would be understood.10

More recently, one of us argued a case before the Supreme Court.11 The overall quality of the simultaneous interpretation was very good. Yet, by comparing the webcasts of the original...

---

10 P. Russell, *op. cit.*
11 de Montigny v. Brossard (Succession), [2010] 3 S.C.R. 64. Luckily, the case was argued before a panel of seven judges who all listened to the argument without the assistance of an interpreter. The discrepancies noted here did not result in any injustice to the parties.
French argument and its English translation, both available on the Supreme Court’s website, the following discrepancies may be noted. The French sentence, “The Gosset case affirmed the principle of full compensation of the injury,” was translated as “Gosset says that there has to be comprehensive damage.” In addition to the cumbersome style of the translation, the words “comprehensive damage” are imprecise and do not convey clearly the idea of full compensation of the injury. But there is more. In order to contrast the civil law and the common law, which adopt different positions on the compensation of grief, it was said, in French, that “at common law grief is not compensable.” The interpreter omitted to translate “at common law,” making it sound as if the statement related to the civil law, thus inserting a contradiction in the English version of the argument. Other examples of errors are the translation of “droit commun” (which means general law) by “common law” (a totally different concept); saying that one’s rights were not breached without specifying that the argument was related to “Charter rights” only, which makes the argument incomprehensible; or saying that the second paragraph of article 1610 of the Civil Code of Quebec was not applicable when the original French argument made exactly the opposite point, that the article was indeed applicable.

An interesting comparison may be drawn with the practice of international arbitration, where language issues are pervasive. In his book-length study of the question, law professor and arbitrator Tibor Várady asserts that most authors on the subject agree that “arbitrators must have an adequate command of the language chosen as the language of arbitration.” In this regard, the International Bar Association has adopted a Code of Ethics for international arbitrators that states that a “prospective arbitrator shall accept an appointment only if he is fully satisfied that he is competent to determine the issues in dispute, and has an adequate knowledge of the language of arbitration.” As to the possibility of simultaneous interpretation as a second-best solution, Várady notes that “experience has shown that interpretation is usually the less effective choice. Translation simply cannot fully mirror both the arguments and the art of advocacy. It cannot

---

reflect every emphasis, gambit of persuasion, or undertone. Often, the arguments are not reflected clearly either.”\footnote{15}{T. Várady, \textit{op. cit.}, at 53.}

It has sometimes been suggested that the Supreme Court of Canada’s internal decision-making process would somehow “self-correct” any translation errors that occur during oral argument. For example, a unilingual judge could ask clarification from his or her fellow judges or from law clerks. By its own nature, the accuracy of such a claim is difficult to verify. Moreover, it would require in the first place an awareness of the shortcomings of translation and a willingness to actively seek clarification. A unilingual judge may not feel at ease to seek clarification from law clerks, and may even assume that translation errors will be caught by bilingual colleagues.\footnote{16}{During a speech at the University of Ottawa’s Faculty of Law on February 4th, 2010, the Honourable Louis LeBel, a judge of the Supreme Court of Canada, recounted the many hours he devotes in order to ensure that the French and English language versions of the Court’s reasons convey the same meaning.} In any event, a unilingual judge may simply not appreciate the gap between the original arguments presented in French and their translation. Retired Justice John Major, for one, stated: “I was unilingual for all intents and purposes, and I was on the court for 14 years and made use of the translation, which I found to be very good. There was no case from Quebec or elsewhere argued in French in which I did not feel I had a complete grasp of the facts and the positions of the parties.”\footnote{17}{House of Commons, Standing Committee on Justice and Human Rights, 17 June 2009, on line: \url{http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004136&Language=E&Mode=1&Parl=40&Ses=2} (accessed 16 June 2011).} This position is hard to reconcile with the evidence of discrepancies outlined above and does not bode well for the self-correction theory.

More importantly, however, this claim is reducible to the idea that English-speaking lawyers have a right to an oral hearing without their arguments being filtered by translators, while French-speaking lawyers do not. Yet, despite the fact that applications for leave to appeal have been dealt with in writing for over 30 years, there is very little support for the abolition of oral argument at the appeal stage. The possibility to speak directly to the decision-makers and to attempt to influence them has been a vital part of the Anglo-American judicial tradition. Lawyers will sometimes make concessions or reframe their arguments when they feel that the position articulated in their written factums does not find favour with the court. In our experience, lawyers always refine their arguments between the moment they file their factums and the oral...
hearing. At the hearing, judges ask questions about points that may not have been addressed in the factums. Oral argument can be the turning point of a case.

This is also what distinguishes oral argument before a court and making a speech before Parliament, for instance. Legislative processes are largely institutionalized and involve a large number of actors. Effective advocacy does not require personal access to each person involved in the process. The process is highly public and ideas may be pursued at various stages and with a variety of individuals, such as civil servants, members of Parliament, ministers’ staff, as well as through the media. This is in contrast with the judicial process. A court’s decision-making process is secret. The oral hearing is the only occasion when litigants may engage in direct, real time communication with the decision-makers. It would be highly improper for a litigant to attempt to speak to a judge (or the court’s personnel) in private. This sets oral hearings apart from other political fora where persons do not have a right to be heard in their own language.

Another important aspect of a Supreme Court judge’s duties is to interpret bilingual legislation. Federal legislation, as well as the legislation of Quebec, New Brunswick, Manitoba, Nunavut, the Northwest Territories and the Yukon is bilingual, and both versions have equal status and authority. The situation is the same for all public general statutes of Ontario since 1992, as well as many other statutes and many regulations in that province. Some legislation in other provinces is bilingual. The same is also true of the Constitution Act, 1982, which includes the Canadian Charter of Rights and Freedoms. It should be noted that the French version of federal legislation is not a mere translation of the English. Rather, the federal drafting process involves the concurrent drafting of the two versions by two teams of drafters who strive to produce English and French versions that respect each language’s drafting tradition. As a result, the French version is often more concise and more precise than the English version.

---


Giving equal status to both versions surely means that the ultimate interpreter of legislation must be able to understand them both.\(^{21}\) In truth, a bilingual judge will be in a position to benefit from the additional information contained in the French version. In some cases, even a quick look at the French version might very well resolve an ambiguity that arises from the English version.\(^{22}\) Moreover, the well established rule of interpretation that requires judges to give bilingual provisions their shared meaning, that is, a meaning that can be supported by both versions, obviously requires the judge to be able to understand both. This rule may in fact lead the court to prefer the French version over the English one.\(^{23}\) To implement these principles, the court mandates a process the first step of which is the comparison between the English and French versions of the legislation. The Supreme Court even requires litigants to reprint in their factums both versions of the bilingual statutory provisions that are relevant to the cases to facilitate its interpretation of those provisions.\(^{24}\) It should be obvious that a unilingual judge is not well-equipped to perform that task.

**A Truly National Institution**

Standing at the apex of Canada’s judicial system, the Supreme Court should reflect the country’s fundamental values and principles, in particular with respect to language. In this connection, subsection 16(1) of the *Canadian Charter of Rights and Freedoms* states that “English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.” Subsection 16(3) of the same instrument encourages Parliament “to advance the equality of status or use of English and French.” In doing so, our constitution clearly excludes regimes, which have been adopted in other countries, where one language has more privileges than the other, where a non-dominant language is official only in certain parts of the country or for regional governments only, or where speakers of a non-dominant language simply have rights

\(^{21}\) The role of *ultimate* interpreter distinguishes the Supreme Court from other courts: while it might be desirable that judges of the Alberta Court of Appeal, for example, understand French, their failure to take into account the French version of a federal statute could be corrected by the Supreme Court.


\(^{24}\) *Rules of the Supreme Court of Canada*, s. 41(2)(g). This rule was made in order to avoid, going forward, what occurred in *R. v. Mac*, [2002] 1 S.C.R. 856.
of accommodation rather than equality of status and use. Yet, the presence of unilingual anglophone judges at the Supreme Court has the effect of marginalizing French in a number of ways that are incompatible with the principle of equality of status and use.

One obvious limitation of unilingual judges is that they are unable to draw upon the rich body of Canadian legal literature written in French. There have been a few quantitative studies of academic citations by the Supreme Court over the recent decades. The general picture that emerges from those studies is one where English-language books and articles overwhelmingly dominate, and French-language texts are mostly cited in judgments dealing with civil law or other issues peculiar to Quebec. Thus, the information compiled by McCormick suggests that the Supreme Court cites English and French law journal articles in a ratio of about 7:1. The only francophone author to appear on the list of the most often-cited authors is Albert Mayrand, who ranks 13th. The only French-language article that was cited four times or more was written by Louis Perret and was cited four times, whereas there are more than ten English-language articles in that category. The only book originally written in French that ranks among the ten most-often cited works is Pierre-André Côté’s treatise on statutory interpretation, most certainly owing to the fact that it was translated in English. Apart from Côté, the most often-cited French-language textbook author is Jean-Louis Baudouin, ranking 13th. Black and Richter’s study of citations in the period 1985-1990 shows that books written in French about fields of the law that are uniform throughout Canada, such as criminal law and evidence, constitutional law and statutory interpretation, are sometimes cited by francophone judges but almost never by anglophone ones. They concluded: “our study provides support for the claim that while québécois judges are quite

---


26 Surprisingly, McCormick did not publish statistics concerning the language of the articles cited. However, he provides detailed information about the number of times every major law journal was cited. Assuming that all the articles cited were in each journal’s main language of publication, and making adjustment for the number of French and English articles cited from the Canadian Bar Review, which he provides, we can infer that the Supreme Court, over the 1985-2004 period, cited English-language articles 1380 times and French-language ones 203 times, a ratio of approximately 7:1.
prepared to utilize scholarship available only in English, non-Québec judges, as a group, are slow to make use of works available only in French.”

The unilingualism of some judges also severely limits their ability to understand the civil law. Although there are notable exceptions, most civil law literature is written in French. While it is certainly possible to acquire a general idea of the system from materials written in English, the literature that supports specialized arguments of the kind that is likely to reach the Supreme Court are overwhelmingly written in French.

Most importantly, unilingual anglophone judges can only have an indirect access to francophone and, in particular, Quebec society. It is often said that the Supreme Court should render decisions that are adapted to contemporary society. That can only take place if judges keep themselves abreast of social and political developments, through the media or other means. Yet, one gets only a partial and largely inaccurate perspective if one learns about Quebec by reading the *Globe and Mail*, or if one learns about the Francophone community in Ontario by reading the *Ottawa Citizen* or the Acadian community in New Brunswick by reading the *Moncton Times & Transcript*. And, of course, there is the reality and the perception. For many Quebecers, the Supreme Court’s legitimacy to decide questions about Quebec has always been suspicious. Unilingual anglophone judges certainly reinforce that perception, and make the counter-argument that English and French “have equality of status and equal rights and privileges” sound hollow.

“Narrowing the Pool”?

We thus have strong reasons, related to the nature of the work performed by Supreme Court judges and to the status of the Court as a national institution, to require its judges to be bilingual. We now assess whether the implementation of such a requirement would have severe drawbacks that would counterbalance its advantages. In this connection, opponents of mandatory bilingualism often argue that this would sacrifice “competence” in the name of bilingualism.

---


28 See, e.g., Eugénie Brouillet’s chapter in this volume.

29 This is in substance the argument made by retired Justice John Major in his testimony before the Justice Committee of the House of Commons, 17 June 2009, on line:
Presumably, this is not meant to say that francophones or bilingual anglophones are per se less competent, nor that learning French diverts a person from the acquisition of more directly relevant skills. Rather, we understand the argument to mean that a requirement of bilingualism would drastically reduce the pool of candidates from which Supreme Court judges are selected, presumably leading to the appointment of less competent judges, or preventing the appointment of “deserving” unilingual jurists.

To assess this argument, we must highlight the fact that when an employer draws the list of requirements for a job, essential requirements – that cannot be dispensed with because their absence compromises a candidate’s ability to do the job – are usually distinguished from desirable qualities – that are not essential, but that would facilitate performance of the job’s tasks. We would argue that bilingualism falls into the first category, notably for the reasons outlined above. It is an essential requirement for the job. Hence, requiring bilingualism does not compromise “competence.” Competence, in fact, includes bilingualism.\(^30\) One would not seriously argue that we should appoint a non-lawyer to the Supreme Court on the basis that that person is extremely wise; one would never say competence or wisdom is sacrificed in selecting judges among those who obtained a law degree.

The competence argument may also be assessed from an empirical standpoint. The question then becomes whether there is a sufficient number of available competent bilingual candidates. Supreme Court judges are usually chosen from among the judges of the courts of appeal. Thus, we conducted a survey of appellate judges (outside Quebec) to measure their rate of bilingualism. We sought information from the court registries concerning the number of judges who could hear a case in French without the help of an interpreter (the criterion employed by Bill C-232) and the number of judges who had some proficiency in French without being able to hear a case in that language. We did not independently verify the information provided. While we suspect some cases of overreporting or underreporting, we make the assumption that those would cancel each other out. The results are as follows:

\(\text{http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004136&Language=E&Mode=1&Parl=40&Ses}\)

\(^\text{30}\) The fact that bilingualism is an aspect of competence was recognized by the Canadian Bar Association’s resolution concerning Bill C-232: Resolution 10-03-A, Institutional Bilingualism at the Supreme Court of Canada, adopted at the CBA’s annual meeting in Niagara, Ontario, 14-15 August 2010, on line: \(\text{http://www.cba.org/CBA/resolutions/pdf/10-03-A.pdf}\) (accessed 16 June 2011).
These figures show that there is a sizeable pool of bilingual appellate judges from which Supreme Court judges can be appointed. They also show that these bilingual judges are not concentrated in Central Canada (i.e., Ontario and New Brunswick), but that bilingual judges are present in provinces that are often thought to be almost exclusively English-speaking, such as Alberta and Nova Scotia.

On the other hand, one could argue that a rate of bilingualism of about 25% excludes three quarters of the appeal court judges from consideration. At first sight, this might be cause for concern, but a more in-depth analysis alleviates the fears. Over the last two decades, there has been only one of the nine members of the Supreme Court who was unilingual. Thus, it has been possible to find a good number of bilingual judges. Moreover, several of the persons who were rumored to be on the “short list” for the recent appointments were bilingual. Even with respect to a more distant past, Russell noted that anglophone judges such as Justices Strong, Anglin, Abbott, Judson, Cartwright, Kerwin and Kellock understood French, and the same was true of Chief Justice Duff. This suggests, first, that bilingualism is not a major impediment to finding competent candidates and, second, that there is a correlation between the ability to understand

---

31 It may be that this is partly attributable to the status of French in criminal proceedings throughout Canada; Criminal Code, R.S.C. 1985, c. C-46, Part XVII; see generally R. v. Beaulac, [1999] 1 S.C.R. 768.
32 P.H. Russell, op. cit., at 62. In a 1952 speech, Justice Cartwright asserted that all Supreme Court Justices could at least read French and were generally able to understand oral argument in French: Remarks to the 45th Annual Banquet of the American Association of Law Libraries, (1952) 45 Law Library Journal 437 at 446-7.
French and other qualities that are deemed essential for a Supreme Court judge. Although there are debates regarding who should be appointed, one rarely hears that someone was appointed because he or she spoke French, or that someone was not appointed for the opposite reason, nor arguments that the past appointments have sacrificed competence for bilingualism. Thus, recent history shows that is a correlation between knowledge of French and being regarded as fit for an appointment to the Supreme Court.

It might be risky to infer causality, but three explanations may be attempted. First, it may be that the Prime Minister is already considering bilingualism as a very important asset, if not a prerequisite for appointment. If that is true, the pool of candidates would already have been “narrowed” and the adoption of a statutory requirement would simply officialize long standing practice and prevent future exceptions. Second, knowledge of a second language may be a sign of an openness of mind or intellectual curiosity that would be correlated with the qualities expected of a Supreme Court judge. Third, the incentives in Canada’s judicial system are such that judges who consider themselves as potential candidates for the top court make an effort to learn French, as it has been known for at least 30 years that speaking French is an asset, if not an informal requirement for a Supreme Court appointment. Indeed, superior and appeal court judges in Canada have the opportunity of taking free French lessons, and close to 200 judges take advantage of that opportunity every year.34 (This large number suggests that judges do so not only by hope of promotion, but simply because they regard knowledge of French as a useful asset for the discharge of their duties.) Some judges have also used their study leave to spend a few months in a Quebec university, thus improving their knowledge of the civil law, as well as their French. Moreover, there is every reason to believe that the rate of bilingualism among appellate judges will continue to increase, as a result of the availability of very popular French immersion programs, of the greater emphasis on bilingualism and bijuralism in certain law schools (e.g., McGill and Ottawa) and of the increased popularity of exchange programs.

A variant of the “narrowing the pool” objection is that it might hamper the appointment of judges from more diverse backgrounds, in particular, an aboriginal Supreme Court judge. We do not take issue with the idea that the court should be as representative as possible of Canadian

---

34 Personal communication with the Commissioner for Federal Judicial Affairs, 20 May 2010.
society, and we hope that an aboriginal person will one day be appointed to the Court. However, the pursuit of diversity is not a reason to ignore an essential requirement for the job. A non-lawyer could never be appointed to achieve representation of ethnic minorities; neither should a person who does not speak French be appointed either. Moreover, the objection is based on the premise that most aboriginals or members of ethnic minorities do not understand French. This is an unverified assumption. According to media reports, one of the persons currently considered for filling a vacancy at the Court comes from a minority ethnic group and speaks French. We have not conducted a survey of Canada’s leading aboriginal judges, but we know anecdotally that at least one of them has a fair level of understanding of French. There are a number of young aboriginal lawyers who speak English and French and who, one day, could serve on the Court.

**Second-Best Solutions?**

Are there any other ways of achieving the goals identified above without requiring each judge of the Supreme Court to be bilingual? At its 2010 summer annual general meeting, the Canadian Bar Association adopted a resolution calling on the Court to become “institutionally bilingual” but explicitly rejecting a requirement of bilingualism for individual judges. According to the resolution, subsection 16(1) of the *Official Languages Act* should be amended to provide the right of members of the public to be heard by the Supreme Court without the help of an interpreter. While the details are not spelled out in the resolution, this apparently means that the Supreme Court would hear cases involving a French-speaking litigant in a panel of five or seven judges, all of whom would be bilingual. Thus, in making appointments, the Prime Minister should ensure that there are no more than two unilingual judges on the Court at any given time. This raises obvious practical problems. A party, even an intervener, could decide to use French in order to disqualify a unilingual judge for reasons entirely unrelated to language. Most constitutional cases, in which the Attorney-General of Quebec routinely intervenes, would be decided by a panel of seven judges in which the Western provinces would be under-represented (if the pattern of the last 20 years continues). Aside from its impact on the development of the law (in division of powers jurisprudence, for example), such a measure would not address the other problems caused by unilingual judges. Even in cases involving English-speaking litigants only, the Supreme Court is often called upon to interpret bilingual legislation, and the problem of unilingual judges not being able to understand the French version of the statute would remain.
Neither would such a proposal remedy the under-representation of French-language literature in the authorities referred to by the Court.

It has also be suggested that the coming into force of a measure like Bill C-232 should be delayed by a number of years that would allow candidates to learn French or upgrade their knowledge of that language.35 The objective would be one of fairness towards persons who did not have sufficient notice of this new requirement for the job they relish. This suggestion is problematic in two ways. First, it sees an appointment to the Supreme Court as a sort of entitlement of the individual. We think this is misguided: those appointments are made in the interests of the country and its judicial system, not in the interest of the individuals who are appointed. Requiring bilingualism is in no way unfair to unilinguals. Second, we would argue that there has already been sufficient lead time for the enactment of a requirement of bilingualism. An exception for unilingual judges to be appointed to the Supreme Court was carved out nearly 25 years ago, in subsection 16(1) of the Official Languages Act. It has been known for decades that knowledge of French is at least a highly valued skill. Any jurist embarking on a long-term plan to position him- or herself as a candidate for the Court would already have taken measures to learn French. How many more years could reasonably be required?, we ask.

Another alternative would be to give new appointees with a partial understanding of French a “period of grace” within which they would be required to improve their French abilities to level required for them to hear a case without the aid of translation services. The data shown above suggests that this would enlarge somewhat the pool of eligible candidates. Indeed, it is often pointed out that some current members of the Supreme Court did not, on their appointment, possess the requisite level of French, but that they acquired it later and are now able to hear cases in French. However, it should be noted that such a policy has produced uneven results in the higher echelons of the federal public service. It would also be difficult to enforce such a rule: would we require a judge who has not achieved the requisite fluency within the prescribed delay to step down? It may be that in practical terms, a “period of grace” rule would not be very different from what was proposed in Bill C-232. It did not mandate any form of testing, so that

35 It should be noted that the requirements of subsection 16(1) of the Official Languages Act, RSC 1985, c 31 (4th Suppl.) only entered into force five years after their enactment.
whether a judge meets the required standard would have fallen upon the judge’s individual conscience. Thus, a judge who reads and understands French but who has some doubts as to his or her capacity to hear a case in French could accept an appointment, take measures to upgrade his or her level of French within a couple of years and take measures in the interim to ensure the proper understanding of oral argument.

The polarization of the debate concerning the status and use of French in the Supreme Court of Canada and the fierce opposition of many to the very idea of a formal requirement of bilingualism has made it very difficult to seriously discuss how such a measure could be implemented. While we firmly believe that the time has come to require Supreme Court judges to be bilingual, we acknowledge that a serious discussion about the modalities of application could make the principle more acceptable. For example, political expediency may call for a two-year “period of grace” applicable to persons appointed in the next ten years who have partial knowledge of French but not to the level required to hear a case. That could alleviate fears about “narrowing the pool,” especially with respect to Aboriginal judges. It could also be made clear that there would be no testing regime, especially not at the public interview that the current government has indicated it would hold with nominees. Such a regime might deter potential candidates who understand French but whose speech does not match the understanding.

* * *

The Constitution requires the Supreme Court of Canada to be a bilingual institution fully able to hear cases in French. Simultaneous translation at the hearing is not an adequate substitute to judges being able to listen to argument in French. It undermines the equality of status and use of French and English. As the ultimate interpreters of bilingual legislation, Supreme Court judges have a mandate that goes beyond that of trial and appellate judges in certain parts of the country. To discharge these duties, the Court needs a full complement of judges who understand Canada’s official languages. The experience of the past decades and the results of our survey show that there is a good number of bilingual jurists who have all the qualities to be appointed to the Supreme Court. Requiring bilingualism does not compromise competence. Rather, it should

---

at last be recognized that understanding English and French is a required skill for being appointed to the Court.