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Abstract

This paper is a first empirical foray in the debate concerning mandatory bilingualism for Supreme Court judges in Canada. The paper summarizes the main arguments, discusses the framing of bilingualism as a "legal" or an "identity" requirement, and uses empirical data to assess whether unilingualism has had an impact on four dimensions of the decision-making process at the Supreme Court of Canada: panel composition, assertiveness, individual caseloads and deference towards lower courts by unilingual and bilingual judges. Our results suggest that there is a correlation between the fluency in French and the first three elements but that there is no difference in the level of deference across linguistic groups towards francophone lower courts. Even if the paper is exploratory in nature and warrants further research, the general picture that emerges is that language proficiency superimposes itself as another kind of legal specialization in the inner-working of the Court.

Assessing the Impact of Unilingualism at the Supreme Court of Canada: Panel Composition, Assertiveness, Caseload, and Deference

JEAN-CHRISTOPHE BÉDARD-RUBIN & TIAGO RUBIN*

This paper is a first empirical foray in the debate concerning mandatory bilingualism for Supreme Court judges in Canada. The paper summarizes the main arguments, discusses the framing of bilingualism as a "legal" or an "identity" requirement, and uses empirical data to assess whether unilingualism has had an impact on four dimensions of the decision-making process at the Supreme Court of Canada: panel composition, assertiveness, individual caseloads and deference towards lower courts by unilingual and bilingual judges. Our results suggest that there is a correlation between the fluency in French and the first three elements but that there is no difference in the level of deference across linguistic groups towards francophone lower courts. Even if the paper is exploratory in nature and warrants further research, the general picture that emerges is that language proficiency superimposes itself as another kind of legal specialization in the inner-working of the Court.

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> [An] objection to this scheme is that two languages are to be used. One-half of the members will get up and jabber in French, and not one of our members will understand what they are saying. The courts of law are conducted in French too. In Lower Canada one lawyer talks to the jury in French and another in English. This is a system with which we want nothing to do.
>
> William Needham, 3 April 1866, House of Assembly of New Brunswick, St John.[1]

MULTILINGUALISM POSES MANY CHALLENGES to national and supra-national political and legal institutions, whether it comes from possible misunderstandings, settling on the authoritative version of a text or the organization of work. Even in the face of the emergence of English as a *lingua franca*, national and sub-national languages will continue, in all likelihood, to play an important role in the functioning of political and legal institutions. The situation in Canada provides a rich fodder to start thinking about the specific challenges of institutional multilingualism because, as the opening quotation reminds us, the country has dealt with the question of institutional bilingualism since its very beginnings. The respective place of French and English in public institutions—from parliamentary debates to legal texts, from public education to judicial proceedings—has been a periodic matter of contention.[2] Notwithstanding this situation, Canadian scholarship has surprisingly little to offer in terms of positive

1. Janet Ajzenstat et al, eds, *Canada's Founding Debates* (Toronto: Stoddart Publishing, 1999) at 329.
2. For a brief history, see André Braën, "Language Rights" in Michel Bastarache, ed, *Language Rights in Canada* (Montréal: Éditions Yvon Blais, 1987) at 3.

evidence regarding the impact of unilingualism and bilingualism on public institutions and, to the best of our knowledge, no empirical evidence regarding its impact on judicial behaviour.[3]

This lack of comprehensive empirical evidence about the behavioural impact of institutional multilingualism is not distinctly Canadian; it is a feature of the judicial politics and comparative constitutional studies in general.[4] It seems that the question of the interaction of law and languages has garnered more interest from sociolinguists and anthropologists than legal scholars.[5] To be fair, the specific issue of judicial bilingualism might not be as politically salient in other multilingual jurisdiction as it is in Canada; the institutional design of the Supreme Court of Canada is perhaps unique in providing both for official institutional bilingualism while also allowing some cases to be heard by judges who do not understand the official language of the parties.

In Belgium, for example, each chamber of the *Cour de Cassation* is subdivided into French and Flemish sections of five judges each and the cases are argued in

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3. There have been numerous normative debates on language rights and institutional multilingualism both in Canada and elsewhere. See *e.g.* Will Kymlicka & Alan Patten, eds, *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003). See also Philip Van Parijs, *Linguistic Justice for Europe and for the World* (Oxford: Oxford University Press, 2011); David Robichaud, "Cooperative justice and English as a lingua franca: the tension between optimism and Anglophones free riding" (2015) 18 Crit Rev Intl Soc & Pol Phil 164. From a constitutional design perspective, see Sujit Choudhry, "Managing linguistic nationalism through constitutional design: Lessons from South Asia" (2009) 7 Intl J Constl L 577. See also the special issue of the King's Law Journal dedicated to this topic. *Special Issue: Translinguistic Law: Law and Language in Transnational Spaces* (2014) 25 King's LJ 137.
4. Sujit Chouhdry complains that "despite their salience, these issues have attracted relatively minimal attention in the literature on both comparative constitutional law and constitutional design." See Choudhry, *supra* note 3 at 578.
5. There is considerable empirical and ethnographic literature on multilingualism in the courtroom, especially in the United States. See *e.g.* Diana Eades, "Participation of Second Language and Second Dialect Speakers in the Legal System" (2003) 23 Annual Review of Applied Linguistics 113; John B Haviland, "Ideologies of Language: Some Reflections on Language and U.S. Law" (2003) 105 Am Anthropologist 764; Philipp Sebastian Angermeyer, "Creating Monolingualism in the Multilingual Courtroom" (2008) 2 Sociolinguistics Studies 385; Amy H Liu & Vanessa A Baird, "Linguistic Recognition as a Source of Confidence in the Justice System" (2012) 45 Comp Pol Stud 1203. For a good overview of the field, see generally Alan Durant & Janny HC Leung, *Language and Law* (London: Routledge, 2016). However, to the best of our knowledge, there has never been any empirical analysis of the impact of the linguistic proficiency of judges on judicial behaviour in an institutionally multilingual setting.

the language used by the lower courts.[6] In Switzerland, the Federal Tribunal is composed of 38 judges and the nomination process takes into consideration, among other things, linguistic proficiency in the three official languages (German, French, and Italian).[7] Since the Tribunal sits in panels of three or, in more important cases, panels of five judges, all cases can be heard by a panel fluent in the language of the parties[8]. In India, even though English and Hindi are official languages, article 348 of the Constitution provides that English is the language of the National High Court.[9] Likewise, in Kenya, even though English and Keswahili are official languages,[10] the rules of proceedings of the Supreme Court of Kenya provide that English is the only language of the Court.[11]

Janny Leung suggests that approximately one quarter of the jurisdictions worldwide are multilingual.[12] An in-depth comparative analysis is thus far beyond the scope of this article. However, the institutional design of the Supreme Court of Canada that recognizes institutional bilingualism without imposing any specific linguistic requirement for its sitting judges raises special concerns about the impact of unilingualism on judicial behaviour.

Despite its prominent resurgence in the last ten years or so, the question of the place given to French and English at the Supreme Court of Canada is not new. Section 133 of the *British North America Act, 1867* provides that French and English "may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec."[13] Despite this provision, early in its history, proceedings in French before the Supreme Court of Canada paled in comparison to the Judicial Committee of the Privy Council where Law Lords were more acquainted with French law and French language more generally. The Supreme

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6. *Loi du 15 juin 1935 concernant l'emploi des langues en matière judiciaire*, art 27, online: <www.axl.cefan.ulaval.ca/europe/belgiqueetat-loi1935.htm>.
7. Tribunal Fédéral Suisse, *Le Tribunal Fédéral Suisse: Le troisième pouvoir de l'état fédéral*, (Lausanne: Tribunal Fédéral Suisse, 2016), online: <www.bger.ch/files/live/sites/bger/files/pdf/fr/bg_broschuere_a4.pdf>.
8. See *Loi fédérale sur les langues nationales et la compréhension entre les communautés linguistiques*, art 6.
9. *The Constitution of India* (1950), art 348.
10. *The Constitution of Kenya* (2010), art 7(2).
11. Kenya, *Supreme Court Rules* (2012), art 6, online: <www.kenyalaw.org/lex//sublegview.xql?subleg=No.%207%20of%202011>.
12. Janny HC Leung, "Negotiating language status in multilingual jurisdictions: Rhetoric and reality" (2016) 209 Semiotica 371.
13. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 133, reprinted in RSC 1985, Appendix II, No 5.

Court of Canada's unilingualism thus became a recurrent grievance of Quebec politicians and lawyers in the first decades of the existence of the Court.[14] Even once it became the final appellate authority in the Canadian legal system in 1949, the Supreme Court of Canada remained largely a unilingual institution. When the number of seats reserved for members of the Quebec bar and bench increased from two to three in 1949, Prime Minister Louis Saint-Laurent recognized that "[t]he Quebec Bar [was] the only [bar] from which it [could] be expected that French speaking lawyers [would] ever be appointed to the Supreme Court."[15] It was only in the 1960s that the Court came under the scrutiny of the *Royal Commission on Bilingualism and Biculturalism* (the "Commission"). As part of the Commission, in 1969 Peter H Russell published the first, and to date the only, thorough study on the place given to French and English in the work of the Court. In his report, Russell lamented the fact that "by any reasonable measure of bilingualism, the Court has failed."[16] But Russell came short of recommending that all judges should be bilingual even though he stressed that

> [i]f the services of such a national tribunal are to be shared on an equal basis by both French-speaking and English-speaking Canadians, changes must be made in either the Supreme Court's personnel or its method of conducting its business or both which will make it as convenient for French-speaking Canadians to use their native language in the Court as it is for English-speaking Canadians to plead their cases in English.[17]

Things changed only incrementally with the adoption of the first *Official Languages Act* in 1969[18] and, more importantly, the *Canadian Charter of Rights and Freedoms* in 1982.[19] The former established French and English as the official languages of Canada and gave individuals the right to give evidence in the language of their choosing in any proceedings in criminal matters and before any court created by an act of Parliament.[20] The Supreme Court of Canada also installed a system of simultaneous translation for the unilingual judges and the

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14. Peter H Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Ottawa: Queen's Printer, 1969) at 21.
15. See *e.g.* James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 198.
16. Russell, *supra* note 14 at 213.
17. *Ibid* at 215.
18. *An Act Respecting the Status of Official Languages in Canada*, 17-19 Eliz II c 54 [*Official Languages Act*, 1969].
19. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
20. *Official Languages Act*, 1969, *supra* note 18, s 11

public. More importantly, for the purposes of this article, section 19(1) of the Charter protects the right to be heard in one's official language but it does not specify whether that imposes an obligation of bilingualism on the part of the sitting judge or judges. The Supreme Court of Canada itself got entangled in this debate in the 1986 case *Société des Acadiens v Association of Parents*[21] in which it had to decide whether the right to be heard in one's official language includes the right to be heard by a panel of judges fluent in that language. Even though the case concerned the capacity of a judge from New Brunswick to understand a case brought in French pursuant to section 19(2) of the *Charter*, the necessity of having judges with sufficient proficiency in French and English at the Supreme Court of Canada itself was also indirectly at play.

In *Société des Acadiens*, the majority held that "there is no language guarantee [in the Constitution] … that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice."[22] The Court thus closed the door to an interpretation of section 19(1) of the *Charter* which would require all its members to be bilingual.[23] The new 1988 *Official Languages Act* partly remedied the situation by providing a requirement for all federal courts to be institutionally bilingual, *i.e.*, that the judges hearing a case must be able to understand the parties in the official language of their choice "without the assistance of an interpreter."[24] The *Official Languages Act* does not require all members of a given court to be bilingual, but only those hearing a case that requires the mastery of both official languages. In practice, this leaves enough room for chief justices to make sure that they have enough bilingual judges to fulfill their institutional obligations. The *Official Languages Act*, however, explicitly excludes the Supreme Court of Canada from its ambit.[25] The Court is thus now the only court with federal jurisdiction where a Francophone litigant cannot be sure that, were they to choose to plead their case in French,

21. *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549, 27 DLR (4th) 406.
22. *Ibid* at 574-75.
23. Power and Roy note, however, that if the courts were to revisit *Société des acadiens*, it could in all likelihood be overturned in light of many decisions of the Supreme Court of Canada since then, including *R v Beaulac*, [1999] 1 SCR 768, 173 DLR (4th) 193. See Mark C Power & Marc-André Roy, "Le droit d'être compris directement par les tribunaux canadiens, à l'oral comme à l'écrit, sans l'entremise de services d'interprétation et de traduction" (2015) 45 RGD 403 at 425-26. See also, Alyssa Tomkins, "Does Beaulac Reorient Judicial bilingualism?" (2008) 39 Sup Ct L Rev (2d) 171.
24. *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 16(1)(a).
25. *Ibid*, s 16(1).

they would be understood by the full panel of judges hearing the case without the assistance of an interpreter.

Before we move forward, it should be noted that our study is not a theoretical or a doctrinal examination of linguistic rights.[26] Our analysis is meant to inform the debate about judicial bilingualism and to complement it with empirical evidence. The increased interest in this question, since approximately 2006, appears to us to be driven by political debates rather than doctrinal developments. Despite the sensitivity of the issue, no thorough study has empirically assessed the actual impact of bilingualism and unilingualism on the Supreme Court of Canada. Even if doctrinal debates have an important role to play in this on-going discussion, our analysis is meant to inform the broader political debate about this important policy choice. Notwithstanding our hope that this study will inform future normative debates, it should be seen first and foremost as a contribution to the growing empirical literature on judicial behaviour in Canada. By focusing on language proficiency, we hope to shed light on an important aspect of a judge's background that is rarely (if ever) studied by scholars of judicial behaviour.

The article is divided in four parts. In Part I, we discuss the framing of the debate about judicial bilingualism in Canada over the last decade and survey the empirical literature on bilingualism at the Supreme Court of Canada. In Part II, we outline the difficulty of studying bilingualism at the Court and explain the methodology and coding techniques we have relied on for this study. In Part III, we present the main findings of this study namely, the relationship between language and panel size, assertiveness, caseload, and deference. In Part IV, we discuss the signification of these results and suggest some avenues for further research on judicial bilingualism in Canada and other jurisdictions.

I. FRAMING THE DEBATE ABOUT BILINGUALISM: LANGUAGE AS A LEGAL OR AN IDENTITY REQUIREMENT?

The politically charged debate about bilingualism of Supreme Court of Canada judges emerged into prominence after 2006. During their reign from 1993 to 2006, the federal Liberals had appointed only functionally bilingual judges to the highest court, at least according to our own classification which we discuss below. However, since the appointment of Justice Marshall Rothstein to the Court in

26. For a doctrinal analysis of constitutional linguistic rights and their impact on bilingualism at the Supreme Court of Canada see *e.g.* Power & Roy, *supra* note 23.

2006, the debate about the bilingual capacities of Supreme Court of Canada judges has been ignited multiple times and has not seemed to diminish in intensity.

A. DEBATING MANDATORY BILINGUALISM FOR SUPREME COURT OF CANADA JUDGES

On 1 March 2006, Prime Minister Stephen Harper selected Justice Rothstein from a shortlist left by the former Liberal government as his first nomination to the Supreme Court of Canada. Justice Rothstein was known to be an acute legal mind but his nomination was subject to criticism because he did not speak French.[27] Despite being questioned on this issue during his appearance before the Ad Hoc Parliamentary Committee reviewing his nomination, his appointment did not trigger immediate intense political controversy. However, it has had considerable ripple effects in setting the footing for arguments that surfaced soon thereafter. Since then, nine bills have been tabled in the House of Commons to address the issue of bilingualism at the Court.

When Justice Michel Bastarache resigned in 2008 and the Conservative government of Stephen Harper was tasked with choosing his successor as its first full Supreme Court of Canada appointee, many were scared by the possibility that a government seen as having little sympathy for official bilingualism might appoint a unilingual judge from the Maritimes. In anticipation of this eventuality, in May 2008, following the nomination of Justice Rothstein, then-Liberal MP Denis Coderre introduced Bill C-548 to amend the *Official Languages Act* and to require that judges of the Supreme Court of Canada understand oral argument in both official languages without the assistance of an interpreter.[28] Similarly, Bill C-559 introduced in June 2008 would have amended section 5 of the *Supreme Court Act* to add bilingualism as a requirement for Supreme Court of Canada judges.[29] Both bills died on the order paper. After the general election of October 2008, Bill C-232, similar in substance to C-559, was first introduced in November 2008, and again in January 2009, and March 2010 respectively in

27. See *e.g.* Yves Boisvert, "Un processus utile et sans danger," *La Presse* (28 February 2006), online: <numerique.banq.qc.ca/patrimoine/details/52327/2203140?docsearchtext=Rothstein%20bilingue>.
28. Bill C-548, *An Act to Amend the Official Languages Act (understanding the official languages – judges of the Supreme Court of Canada)*, 2nd Sess, 39th Parl, 2008 (Sponsored by D Coderre) [Bill C-548].
29. Bill C-559, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Sess, 39th Parl, 2008 (Sponsored by Y Godin).

the first, second, and third sessions of the 40th Parliament.[30] Bill C-232 finally passed through the House of Commons but died on the Order Paper while at the Second Reading stage in the Senate when the 2011 federal elections were called. During that time, Stephen Harper appointed Justice Thomas Cromwell to the Supreme Court of Canada at the end of 2008. With the nomination of Justice Cromwell, a bilingual judge from the Nova Scotia Court of Appeal, the question of Supreme Court bilingualism temporarily receded to the political background despite the continuous pressure from opposition parties to enshrine this requirement into law.

The May 2011 general federal election provided Stephen Harper's Conservatives with their first majority government. Shortly after the election, NDP Member of Parliament Yvon Godin introduced Bill C-208, which was similar in substance to Bill C-232, on 13 June 2011.[31] The issue was thus already a hot topic when Prime Minister Harper appointed to the Supreme Court of Canada, on 21 October 2011, Justices Andromache Karakatsanis and Michael Moldaver, both from the Court of Appeal for Ontario. Justice Karakatsanis became fluent in French thanks to a French immersion program in Quebec for federal judges administered by the Office of the Commissioner for Federal Judicial Affairs of Canada. She had attended the program for two weeks every summer during the past eight years and, though not completely trilingual (she also speaks Greek), she could still show a very respectable mastery of the French language. However, when Justice Moldaver was questioned by members of the Ad Hoc Parliamentary Committee of the House of Commons about his fluency in French, he had to apologize for his complete lack of knowledge of the language and to recognize that he had let pass all the opportunities that Justice Karakatsnis had seized to learn French.[32] Justice Moldaver was the second unilingual anglophone to be appointed by Stephen Harper to the highest court in less than five years following the appointment of Justice Rothstein in 2006.

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30. Bill C-232, *An Act to Amend the Supreme Court Act (understanding the official languages)*, 3rd Sess, 40th Parl, 2010 (Sponsored by Y Godin) [Bill C-232].
31. Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Sess, 41st Parl, 2011 (Sponsored by Y Godin). This bill was again reinstated in 2013 but was defeated on second reading on 7 May 2014. Bill C-208, *An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Sess, 41st Parl, (Sponsored by Y Godin); House of Commons, *Hansard*, 41st Parl, 2nd Sess, No 82 (7 May 2014), online: <www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-82/hansard>.
32. Hélène Buzzetti, "*Nominations à la Cour suprême – Mauvais quart d'heure pour le juge Moldaver*," *Le Devoir* (20 October 2011), online: <www.ledevoir.com/politique/canada/334020/nominations-a-la-cour-supreme-mauvais-quart-d-heure-pour-le-juge-moldaver>.

The issue had been so hotly debated that the Liberals, elected into government in October 2015, promised during the 2015 federal campaign to appoint only bilingual judges to the Court but did not go so far as to promise to entrench such a requirement into statute.[33] Accordingly, Prime Minister Trudeau released a new administrative procedure on 2 August 2016 for the appointment to the Court.[34] Under this new process, "an independent and non-partisan [seven member] Advisory Board has been given the task of identifying suitable candidates who are jurists of the highest caliber, *functionally bilingual*, and representative of the diversity of our great country."[35]

The application questionnaire comprises a section asking candidates whether they are able, without further training, (1) to read and understand court materials in both official languages; (2) to discuss legal matters with their colleagues in both official languages; (3) to converse with counsel in court in both official languages; and (4) to understand oral submissions in both official languages.[36]

This express requirement of functional bilingualism was not met with universal approval. The Atlantic Provinces Trial Lawyers Association ("the Association") introduced in the Nova Scotia Supreme Court a constitutional challenge to the

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33. In its 2015 electoral platform, the Liberal Party of Canada wrote: "We will ensure that all those appointed to the Supreme Court are functionally bilingual." See Liberal Party of Canada, "Real Change: A New Plan For A Strong Middle Class" (2015), online: <www.liberal.ca/files/2015/10/New-plan-for-a-strong-middle-class.pdf>.
34. Prime Minister of Canada, News Release, "New process for judicial appointments to the Supreme Court of Canada" (2 August 2016), online: <pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process>.
35. *Ibid* [emphasis added]. The Office of the Commissioner for Federal Judicial Affairs, on its website, to which the new appointment procedures refer, has defined functional bilingualism as:

> The Government has committed to only appoint judges who are functionally bilingual. The Supreme Court hears appeals in both English and French. Written materials may be submitted in either official language and counsel may present oral argument in the official language of their choice. Judges may ask questions in English or French. It is expected that a Supreme Court judge can read materials and understand oral argument without the need for translation or interpretation in French and English. Ideally, the judge can converse with counsel during oral argument and with other judges of the Court in French or English.

Canada, Office of the Commissioner for Federal Judicial Affairs Canada, "Qualifications and Assessment Criteria" (2016), online: <www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html> [Commissioner for Federal Judicial Affairs, "Qualifications and Assessment Criteria"].
36. Canada, Office of the Commissioner for Federal Judicial Affairs Canada, "Questionnaire for the Supreme Court of Canada Judicial Appointment Process" (2016), online: <www.fja-cmf.gc.ca/scc-csc/Questionnaire-SCC-Judicial-Appointment-Process.pdf> at 4.

new procedure,[37] arguing that it jeopardizes regional representation among the Court, which they characterized as a constitutional convention. Even though the Association did not explicitly address the question of bilingualism, others in the Atlantic Provinces went the extra mile and argued that mandatory bilingualism conflicts with regional representation at the Court in general.[38] On 17 October 2016, Prime Minister Trudeau selected Justice Malcolm Rowe, a bilingual judge from the Newfoundland and Labrador Court of Appeal, from among the short-listed candidates submitted by the Advisory Board to fill the seat left vacant by the retirement of Justice Cromwell on 1 September 2016.[39] The appointment of Justice Rowe proved critics from the Atlantic Provinces wrong and the Association decided to drop its constitutional challenge.

Separately, Senator Murray Sinclair, former Chairman of the Truth and Reconciliation Commission and Perry Bellegarde, National Chief of the Assembly of First Nations, raised concerns that mandatory bilingualism would impose an additional burden on potential First Nations judges in that they would have to learn not one, but two additional languages to qualify for the top court.[40]

Both bodies agree, in substance, that mandatory functional bilingualism is discriminatory insofar as it trumps other important elements, such as regional

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37. Sean Fine, "Lawyers challenge Ottawa on Supreme Court appointment changes," *The Globe & Mail* (19 September 2016), online: <www.theglobeandmail.com/news/national/lawyers-challenge-ottawa-on-changes-to-supreme-court-appointments/article31951207>.
38. See *e.g.* Jackson Doughart, "Supreme Court can be bilingual without every judge being so," *Chronicle Herald* 12 August 2016), online: <thechronicleherald.ca/opinion/1388032-opinion-supreme-court-can-be-bilingual-without-every-judge-being-so>. These concerns echo those of former Justice John Major who expressed the view that mandatory bilingualism would be detrimental to Western representation on the Court. See Janice Tibbetts, "Legal community divided over bilingualism on Supreme Court," *Vancouver Sun* (2 May 2010), online: <www.vancouversun.com/Legal+community+divided+over+bilingualism+Supreme+Court/2977850/story.html>.
39. Chantal Hébert, "Rowe's Supreme Court appointment sets bilingualism bar quite a bit higher," *Toronto Star* (27 October 2016), online: <www.thestar.com/news/canada/2016/10/27/rowes-supreme-court-appointment-sets-bilingualism-bar-quite-a-bit-higher-hbert.html>.
40. Kristy Kirkup, "Top court's bilingual rule a barrier to indigenous judges: Sinclair, Bellegrade," *The Globe & Mail* (22 September 2016), online: <www.theglobeandmail.com/news/national/supreme-courts-bilingual-requirement-unfair-sinclair-bellegarde/article32011596>. It is noteworthy, however, that according to the 2016 national census, only 15.6 per cent of the Canadian Aboriginal population reported being able to conduct a conversation in an Aboriginal language. See Canada, Statistics Canada, "Census in brief: The Aboriginal languages of First Nations people, Métis and Inuit" (25 October 2017), online: <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016022/98-200-x2016022-eng.cfm>. We thank an anonymous reviewer of this article for pointing out this statistic.

or minority representation, that should play a more prominent role in the appointment process.

In October 2017, anticipating the appointment of a judge from western provinces to replace Chief Justice Beverly McLachlin who would retire at the end of 2017, NDP Member of Parliament François Choquette tabled two bills successively that were similar in substance to the ones which had been introduced in the previous years—one amending the *Supreme Court Act*[41] and the other amending the *Official Languages Act.*[42] The Liberal government, with their new administrative appointment procedure in place, decided to vote against the bills. Bill C-203, which would have amended the *Supreme Court Act* was defeated in the House of Commons on 25 October 2017 even though 17 Liberal Members of Parliament broke ranks. At the time this article was written, the other bill was still at first reading. These bills have rehashed once more the arguments that have now become common place about mandatory bilingualism for Supreme Court of Canada judges. NDP Member of Parliament and renowned advocate of Indigenous rights Romeo Saganash argued, for example, that the bill would "perpetuate colonialism."[43] The federal NDP Leader, Jagmeet Singh, followed step after the nomination of Justice Sheilah L. Martin, on 29 October 2017 in replacement of Chief Justice McLachlin. However, like the appointment of Justice Rowe a year earlier, the appointment of Justice Martin, a bilingual judge of the Alberta Court of Appeal, seems to have appeased for now the concerns of the advocates of mandatory bilingualism.

41. Bill C-203, *An Act to Amend the Supreme Court Act (understanding of the official languages)*, 1st Sess, 42nd Parl, 2015 (Sponsored by F Choquette).
42. Bill C-382, *An Act to Amend the Official Languages Act (Supreme Court of Canada)*, 1st Sess, 42nd Parl, 2017 (Sponsored by F Choquette).
43. Hélène Buzzetti, "Romeo Saganash combat le bilinguisme à la canadienne," *Le Devoir* (9 November 2017) online: <www.ledevoir.com/politique/canada/512463/saganash-s-oppose-au-bilinguisme-colonial-a-la-cour-supreme>.

B. FRAMING THE DEBATE ABOUT MANDATORY BILINGUALISM

The debate about bilingualism of the judges of the Supreme Court of Canada has been framed around two competing categories: language as an *identity* and language as a *legal* requirement.[44]

In the first category which we term "language as an identity requirement," commentators have argued that bilingualism is an asset necessary to represent Quebec and other francophone communities in the judicial system.[45] While being desirable, various political commentators like Barbara Kay,[46] politicians like former Minister of Justice Rob Nicholson[47] and former Supreme Court of Canada judge Justice John Major[48] have expressed the obvious concern that mandatory bilingualism would narrow the pool of competent candidates and

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44. We were tempted to use Hugo Cyr's formulation of "adjudicative capacity" as opposed to "judicial legitimacy." However, we thought that talking about identity and legal requirement was closer in spirit to the empirical literature on judicial decision-making. See Hugo Cyr, "The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada" (2014) 67 SCLR (2d) 73. The difference in the framing of linguistic proficiency for Supreme Court of Canada judges tracks more general debates about the desirability of official bilingualism. François Charbonneau finds that Anglo-Canadian advocates of bilingualism generally frame it as a question of principle while adversaries generally object to mandatory bilingualism on pragmatic grounds. Both groups thus generally talk past each other according to Charbonneau. The debate about mandatory bilingualism for Supreme Court of Canada judges seems to follow a similar pattern. See François Charbonneau, "Un dialogue de sourds?: Les arguments invoqués par les défenseurs et les détracteurs du bilinguisme dans l'espace anglo-canadien" (2015) 5 Min Ling & Soc 13.

45. Interestingly, the Supreme Court of Canada seems to have adhered at least in part to this "identity" requirement regarding judges coming from Quebec in the *Nadon Reference*. The majority wrote:

> The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada [emphasis in original].

See *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 49, [2014] 1 SCR 433 [*Nadon Reference*].

46. See *e.g.* Charles Huband, "Unilingualism needs no apology," *Winnipeg Free Press* (23 December 2011), online: <www.winnipegfreepress.com/opinion/analysis/unilingualism-needs-no-apology-136178703.html>.

47. See *e.g.* the comments of then-Minister of Justice Rob Nicholson on this issue, La Presse canadienne, "Nomination des Juges: Le mérite plus crucial que le bilinguisme, dit Nicholson," *Le Devoir* (12 November 2012), online: <www.ledevoir.com/politique/canada/363793/nomination-des-juges-le-merite-plus-crucial-que-le-bilinguisme-dit-nicholson>.

48. Tibbetts, *supra* note 38.

make the selection process unfair for those who might not have had the chance to grow up in a multilingual environment.[49] This complaint is arguably a fair point when one considers that, according to the 2011 Census, only 10.2 per cent of the Canadian population outside of Quebec could sustain a conversation in French.[50] Moreover, this "identity" requirement could conflict with other valid identities and prevent their representation on the Court. In other words, for those opposing mandatory bilingualism, appointing bilingual judges should not trump the appointment of, for example, women, visible minorities, or First Nations judges. These considerations share in common the fact that they see fluency in both official languages as an *extra-legal* factor,[51] *i.e.*, as a factor that is valuable in that it makes the Court more representative of one linguistic community or more attuned to the social dynamics in some segments of the Canadian population, but not as a legal competence per se. Just like the fact of being a woman is not supposed to influence the content of the law, one can argue that women judges have a different perspective on certain issues and they bring into their legal judgment these valuable extra-legal considerations.[52] By analogy, speaking French can connect a judge to the social reality of francophones and this might

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49. See Barbara Kay, "Of course Justin Trudeau wants bilingual judges: he's the product of bilingual privilege," *National Post* (28 July 2015), online: <news.nationalpost.com/full-comment/barbara-kay-of-course-justin-trudeau-wants-bilingual-judges-hes-the-product-of-bilingual-privilege>.

50. The numbers are almost the same for the 2016 Census with 10.3 per cent. See Canada, Statistics Canada, "English, French and Official Minorities Languages in Canada" (2 August 2017), online: <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016011/98-200-x2016011-eng.cfm>.

51. The case of First Nations judges is somewhat more complex. What we say here is not that First Nations judges would not bring valuable *legal* competence in their Indigenous tradition to the bench. What we say is simply that the complaint of advocates of First Nations judges seems to imply that proficiency in French is not a legal competence.

52. For a defence of this view, see Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall LJ 507. In the Canadian context, the empirical evidence regarding this question seems to be mixed and inconclusive. Compare Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis by Appeal Court Data" (1993) 8 CJLS 135 and James Stribopoulos & Moin A Yahya, "Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario," (2007) 4 Osgoode Hall LJ 315. For a recent review of the literature in the Canadian context, see Donald R Songer, Miroslava Radieva & Rebecca Reid, "Gender Diversity in the Intermediate Appellate Courts of Canada" (2016) 37 Just System J 4. The idea that women judges bring a different perspective to judging more generally is often times influenced by the work of Carol Gilligan. See Carol Gilligan, *In a Different Voice: Psychological Theories and Women's Development* (Cambridge: Harvard University Press, 1982). For a critical discussion of Gilligan's ideas, especially in the judicial context, see Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill LJ 91.

influence their outlook on certain issues. From a slightly different, though related perspective, Supreme Court of Canada judges should arguably reflect or represent Canadian diversity and, thus, knowledge of French and English gives preference to one specific identity at the expense of other identities more prevalent in the composition of Canadian society.

We term the second approach "language as a legal requirement." Supporters of this conception include former-Commissioner of Official Languages Graham Fraser,[53] former Supreme Court of Canada Justice Claire L'Heureux-Dubé,[54] former University of Ottawa professor Sebastien Grammond,[55] and the author and legal commentator Philip Slayton.[56] All of these individuals emphasize that speaking French is an essential part of the Canadian lawyer's toolkit. As former Supreme Court of Canada justice and prominent advocate of Canadian bilingualism Justice Bastarache points out, given that federal laws as well as the laws of Quebec, Ontario, Manitoba, New-Brunswick, and Newfoundland and Labrador are enacted in both official languages and that both versions have equal status, the ability to read the original legal text in both languages is a very useful interpretive tool.[57] Moreover, knowing both official languages gives the judge access to a wider range of doctrinal writings and judicial opinions from lower courts across the country and increases the quantity of legal information that can feed into the decision-making process.

Those two approaches entail very different assumptions about the impact of bilingualism on judicial behaviour. Not all of them are easily measurable however. We discuss this in more detail in Parts III and IV below.

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53. Commissioner of Official Languages, *Beyond Obligations: Annual report 2009-2010*, vol I (Canada: Office of the Commissioner of Official Languages, 2010) at 32. See also Graham Fraser, "In defence of a bilingual Supreme Court," *Maclean's* (2 August 2016), online: <www.macleans.ca/politics/ottawa/in-defence-of-a-bilingual-supreme-court>.
54. Hélène Buzzetti, "*Cour Suprême – Le Bilinguisme des juges est essentiel, dit Claire L'Heureux-Dubé*," *Le Devoir* (27 April 2010), online: <www.ledevoir.com/politique/canada/287807/cour-supreme-le-bilinguisme-des-juges-est-essentiel-dit-claire-l-heureux-dube>.
55. See *e.g.* Sebastien Grammond & Mark Power, *Should Supreme Court Judges be Required to be Bilingual?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2011).
56. See *e.g.* Philip Slayton, *Mighty Judgment: How the Supreme Court of Canada Runs your Life* (Toronto: Allan Lane Canada, 2011) at 250.
57. *Charter*, *supra* note 19, s. 18(1). Michel Bastarache, *The Law of Bilingual Interpretation* (Toronto: LexisNexis, 2008). Perhaps because of his status as a defender of Canadian bilingualism, Justice Bastarache refused to take a side on the issue of mandatory bilingualism for Supreme Court judges. See also Michel Bastarache, "Bilingual Interpretation Rules as A Component of Language Rights in Canada" in Lawrence M Solan & Peter M Tiersma, eds, *The Oxford Handbook of Language and Law* (Oxford: Oxford University Press, 2012) at 159.

C. MEASURING JUDICIAL BILINGUALISM

Leaving aside the normative debate, there seems to be some empirical evidence that the Supreme Court, as an institution, remains largely unilingual. For example, a study by Peter McCormick published in 2004 suggests that the level of penetration of francophone ideas was not as high as anglophone ideas.[58] Only one out of the twenty authors most cited by the Court during the 1985-2004 period wrote mainly in French (Albert Mayrand).[59] Moreover, of the twenty most cited journal articles, only one was in French and was cited only four times while many other articles in English were cited much more frequently. Though McCormick himself did not break down the ratio of French and English citations, Sebastien Grammond and Mark Power, using his numbers, found that the ratio of citations of English and French publications by the Court in the 1985-2004 period was 7:1.[60]

Another study conducted by Black and Richter suggests that, between 1985 and 1990, the number of citations of anglophone treatises outnumbered by far francophone ones.[61] Out of the sixteen most cited legal treatises, the only French one was tied for last place with two other English treatises.[62]

Having reviewed this body of literature, Grammond and Power summarize it as follows:

> [U]nilingual judges […] are unable to draw upon the rich body of Canadian literature written in French. […] 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.[63]

Academics have suggested that the lower penetration of francophone legal ideas is not limited to the citation of law journal articles or legal treatises. For example, Professor Michel Doucet of the University of Moncton argued that unilingual judges in general might have a hard time following oral arguments

58. Peter McCormick, "The Judges and the Journals: Citation of Periodical Literature by The Supreme Court of Canada, 1985-2004" (2004) 83 Can Bar Rev 633 [McCormick, "Judges and Journals"].
59. *Ibid*.
60. Grammond & Power, *supra* note 55, n 26.
61. Vaughan Black & Nicholas Richter, "Did She Mention My Name?: Citation of Academic Authority by the Supreme Court of Canada, 1985-1990" (1993) 16 Dal LJ 378.
62. *Ibid*.
63. Grammond & Power, *supra* note 55 at 9.

or written submissions in French, therefore leading to wrong decisions.[64] This is obviously a matter of great concern, but it is also highly speculative and it remains to be seen how this hypothesis could be empirically tested.

Despite those cogent debates, no study has tried to empirically measure the actual impact of unilingualism on the Supreme Court of Canada's decision-making. There have been *alleged* consequences and indirect evidence about the impact of francophone ideas but no direct measurement of the actual impact of unilingualism. This kind of enterprise can be difficult because language probably plays a marginal role among many other factors. However, we are confident that when the decisions are pooled together, it is possible to see some trends and some differences between judges who can and those who cannot speak French. We will now turn to the measures of the impact of unilingualism and bilingualism on judicial behaviour at the Supreme Court of Canada.

II. DATA SET

In order to perform an empirical analysis of the behaviour of unilingual and bilingual judges, we combined data that we generated on the language proficiency of each judge to the dataset of Supreme Court of Canada decisions compiled by professors Andrew Green and Benjamin Alarie of the University of Toronto Faculty of Law.[65] Our analysis uses all of the Court's decisions from January 1969 to July 2013 and compares judges' behaviour depending on whether they heard cases argued in English or French. In three of the four dimensions explored—panel-size, assertiveness and caseload—our data suggests that the judges' behaviour is correlated to their level of mastery of both official languages. This article does not purport to be a statistically significant prediction of the behaviour of unilingual judges; it is simply an empirical analysis of the plausibility of some alleged impacts of the appointment of unilingual judges to the Supreme Court of Canada.

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64. *Canada, Justice and Human Rights Committee of the House of Commons*, 2nd Sess, 40th Parl (15 June 2009) (Michel Doucet), online: <openparliament.ca/committees/justice/40-2/31/michel-doucet-1/only> [Doucet, Justice and Human Rights Committee].
65. For more information on their dataset, see Benjamin A Alarie & Andrew J Green, C*ommitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges*, (Oxford: Oxford University Press, 2017) [Alarie & Green, *Commitment and Cooperation*].

A. LANGUAGE PROFICIENCY DATA

We coded all 42 judges of the Supreme Court of Canada who served between 1969 and 2013 according to their linguistic capacities. We grouped them in three broad language categories: (1) unilingual (anglophone), (2) "unknown," and (3) bilingual. In order to tease out the effect of regional origin, we divided the bilingual category in two: bilingual from Quebec, and bilingual from the rest of Canada. Even though it is difficult to assess objectively the actual level of proficiency of judges in French and English, we have relied on three elements to categorize them. We first looked at objective biographical elements as published on the Court's website.[66] We ranked in the bilingual category all judges who have had a bilingual education, *i.e.*, who have studied in two different institutions, one of which is anglophone and the other one francophone. Surprisingly, eleven judges (26 per cent) had a bilingual education.[67] Then, we looked at their professional experience and ranked in the bilingual category the judges who had significant work experience in the two official languages. Finally, for the remaining judges we looked at subjective assessments of their proficiency in French either by their biographers or by the mainstream media (such as printed newspapers). Judges identified as unilingual are exclusively English speakers.

> **Unilingual**: Estey, Dickson, McIntyre, Wilson, Sopinka, Stevenson, Major, Rothstein, Moldaver
>
> **Unknown**: Martland, Ritchie, Spence, Laskin
>
> **Bilingual from R of Canada**: Cartwright, Judson, Hall, La Forest, Cory, McLachlin, Iacobucci, Bastarache, Binnie, Arbour, Abella, Charron, Cromwell, Karakatsanis, Le Dain
>
> **Bilingual from Quebec**: Abbott, Fauteux, Pigeon, Beetz, de Grandpré, Pratte, Chouinard, Lamer, L'Heureux-Dubé, Gonthier, LeBel, Deschamps, Fish, Wagner

For the subjective assessment, we had to establish a cut-off point. Since the bills introduced on mandatory bilingualism and the new appointment procedure use the criterion of understanding oral argument without the assistance of an interpreter, we used this criterion as the cut-off. It is important to note that this criterion should not always be taken as the appropriate threshold for any kind of study. For example, if one wants to assess the level of penetration of francophone *academic* legal ideas among anglophone judges, one might want to look at a judge's ability to *read* French, not necessarily to *understand* it orally. Likewise, if one

66. Short biographies of all past and present justices are available at Supreme Court of Canada, "Judges of the Court," online: <www.scc-csc.ca/judges-juges/index-eng.aspx>.
67. These are Justices Abbott, Hall, Beetz, de Grandpré, Pratte, Chouinard, Le Dain, Gonthier, LeBel, Deschamps, and Fish.

wants to assess whether francophone judges can work in French at the Court, as the former Commissioner of Official Languages Graham Fraser among others have suggested, one might want to look at a judge's capacity to *speak* French.[68] However, since this is the first study on the question, we have decided to rely on the threshold used by the main advocates of mandatory bilingualism in the legal community,[69]—the capacity to "read materials and understand oral argument without the need for translation or interpretation in French and English."[70]

With this criterion in mind, there were still borderline cases. For example, in their biography on Chief Justice Brian Dickson, Robert J. Sharpe and Kent Roach explain that Dickson learned French while he was sitting on the bench but never became fluent. They say:

> After his appointment at the Supreme Court of Canada, Dickson took regular lessons from a French-language tutor and participated in summer immersion programs for judges, including a session at Laval University when he stayed with a French family. His modest proficiency in French perhaps never quite matched his genuine enthusiasm for bilingualism, but, in his early years on the Court, the other anglophone judges had such limited capacity in French that he regularly sat on leave applications and appeals from Quebec. He asked Chief Justice Gérard Fauteux, who served as chief justice for less than a year after Dickson's appointment to the Court, whether he should spend his time learning civil law or French and 'he very strongly advised learning some more French'. He prepared himself for hearing Quebec appeals with meticulous care, even to the extent of figuring out the questions he would put to counsel and having his questions translated in advance of the oral hearing. He even wrote a short judgment in French, with much help from Pigeon.[71]

Because he could not formulate his questions directly in French and because his level of proficiency in French was low (or non-existent) when he arrived at the Court, we ranked him as unilingual.

Ellen Anderson, in her biography of Justice Bertha Wilson writes:

> Wilson's spoken French (somewhat Scots-accented in accordance with her self-proclaimed status as a member of an 'oral minority') was clearly competent. She could read French slowly but confidently; occasionally she would call on her court attendant, Jean-Marie Plourde, for help when she got stuck with an idiom. But in no way did she consider herself to be bilingual, comfortably capable of following the oral submissions of French-speaking counsel or the questions put to counsel by the French-speaking members of the Court. 'There wasn't a day passed that I

68. See also Fraser, *supra* note 53.
69. See *e.g.* Grammond & Power, *supra* note 55. Bill C-232, *supra* note 30 and Bill C-548, *supra* note 28.
70. Commissioner for Federal Judicial Affairs, "Qualifications and Assessment Criteria," *supra* note 35.
71. Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: Osgoode Society for Canadian Legal History, 2003) at 413.

> didn't feel that I was missing something through that gap' she said, adding, 'I can remember counsel, one French-speaking counsel whose whole argument had been conducted in French saying one day, "I know that Justice Wilson is desperate to ask a question and she is not doing it because she does not think she can articulate it in French, please do it in English, I am perfectly fluent in English."' He was right; she swallowed her embarrassment and spoke up.[72]

Because Justice Wilson could hardly formulate a question in French and because she reports that she was missing parts of the arguments going on in French, we also ranked her as unilingual.

The most difficult case was perhaps Justice Bora Laskin. Philip Girard's biography on the former Chief Justice does not address the specific issue of his fluency in French, even if he acknowledges that Chief Justice Laskin was not especially comfortable in French.[73] According to Girard's—who clerked for Estey in 1979-1980—best recollections,[74] Laskin could read French but was not bilingual. As best as he can remember, and according also to one of Girard's colleagues who clerked for Chief Justice Laskin in 1981-1982, Alan N. Young, Chief Justice Laskin did not use earphones for simultaneous translation during oral arguments conducted in French. However, as Girard himself admits, his recollections go back more than 30 years ago and it would be difficult now to give an objective assessment of Chief Justice Laskin's proficiency in French. We ranked Chief Justice Laskin in the "unknown" category.

We ranked the judges for which there was not enough information in the "unknown" category to minimize the impact of a wrong coding. Overall, four judges were ranked in this category because of lack of information.[75] That being said, the behaviour of those judges was close to those ranked in the unilingual category and suggest that they were probably closer to unilingual than bilingual.

Because we studied only the impact of English unilingualism, we have decided to code all francophone judges as bilingual. There are three reasons for this. First, it is generally agreed that on average the proficiency in English of francophone judges is much higher than the proficiency in French of anglophone judges.[76] Second, if there is little objective information about the level of proficiency in French of anglophone judges, there is virtually no information whatsoever about the proficiency in English of francophone judges (except

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72. Ellen Anderson, *Judging Bertha Wilson: Law as Large as Life* (Toronto: Osgoode Society for Canadian Legal History, 2001) at 186.
73. Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: Osgoode Society for Canadian Legal History, 2005) at 430.
74. Email from Philip Girard, (1 April 2016) on file with author.
75. These are Justices Martland, Ritchie, Spence, and Chief Justice Laskin.
76. See Russell, *supra* note 14. See also Buzzetti, *supra* note 54.

for the objective biographical elements identified above). Third, as the level of proficiency in English demonstrated by francophone judges is generally high, drawing a boundary between them could be difficult. Creating two linguistic categories for francophone judges would exaggerate minor differences, reporting them as bigger than they are in reality.

The list of all judges who served between 1969 and 2013 with their respective coding and the reason for such coding are found in Appendix A of this article.

B. SAMPLE

We examined all decisions of the Supreme Court of Canada from 1969 to 2013 compiled by Benjamin Alarie and Andrew Green of the Faculty of Law at the University of Toronto.[77] We have used this time-frame for two reasons. First, the only in-depth analysis of the impact of language proficiency on judicial decision-making at the Supreme Court of Canada by Peter H. Russell was published in 1969 and we thought it was time to revisit some of the reasons that motivated his work as part of the *Royal Commission on Bilingualism and Biculturalism*.[78] The study by Russell is a great source of information and of qualitative and quantitative analysis. However, Russell did not attempt to classify systematically all judges according to their proficiency in French and English. Though he discussed some judges' specific level of fluency in French, he only relied on the province of origin when quantitatively assessing judicial behaviour. To the best of our knowledge, ours is the first study of judicial behaviour that takes language proficiency as the independent variable. Second, the first *Official Languages Act* was originally passed in 1969 and we thought it would be interesting to measure whether this general milestone in Canadian linguistic policy, despite the lack of a formal entrenchment of mandatory bilingualism for Supreme Court of Canada judges, has had an impact on judicial behaviour.

In order to identify cases likely to have been argued in French, we have used the decisions from the Quebec Court of Appeal as a proxy for francophone cases. This entails two obvious limitations. First, this obscures the fact that other cases from the rest of Canada can bring into play the requirement of mandatory institutional bilingualism. However, we assume that these are rather marginal since the proportion of francophones outside Quebec has always been significantly smaller than the proportion of anglophones in Quebec during the period we are studying. Thus, there was a higher probability, *ceteris paribus*, that cases in our sample were argued in English in Quebec than that cases were argued

77. The information regarding the coding and the data set can be found in Alarie & Green, *Commitment and Cooperation*, *supra* note 65.

78. Russell, *supra* note 14.

in French in the rest of Canada. Even if our categorization ranks francophone cases from the rest of Canada in our "English" category and anglophone cases from Quebec in our "French" category, by doing so we erred on the side of caution and potentially down-played the actual impact of language on judicial behaviour. Second, we are conscious that some cases from the Federal Court of Appeal might have been argued in French. Because it is harder, in terms of coding, to assess the language used by the Federal Court of Appeal we decided to leave them aside and to include them in our anglophone category. Again, if we were able to disentangle Federal Court of Appeal cases that were argued in French from those that were argued in English, the differences might be starker. Here again we erred on the side of caution.

The cases are therefore grouped in two categories depending on their regional origin – *i.e.*, cases from Quebec and cases from the Rest of Canada ("RoC"), including the Federal Court of Appeal. Throughout the remainder of this article, we will constantly compare judges' behaviour when faced with these two broad categories of cases: cases likely to have been argued in English (RoC cases) and cases likely to have been argued in French (Quebec cases). In order to tease out the impact of legal specialization in civil or common law, our analysis is also restricted to federal law cases, *i.e.*, cases for which all judges are supposed to have a more or less equal knowledge of the law. These areas of federal law are: aboriginal law, administrative law, citizenship, immigration and refugee law, civil rights and liberties and human rights, criminal law and procedure, division of powers, intellectual property law, and international law.

III. FINDINGS

Looking at all federal law cases from 1969 to 2013, we measured four different potential impacts of judicial unilingualism. We tried to assess whether it affects: (a) the size and the composition of the panel, (b) the level of assertiveness of individual judges, (c) the linguistic composition of the caseload of each judge and, (d) the level of deference towards francophone appellate courts.

A. PANEL SIZE AND COMPOSITION

We first looked at the size of the panel in cases originating from Quebec to see if language proficiency could be determinant of the panel size. Our first hypothesis can be stated thus:

> **H1**: *Since unilingual judges might have a harder time understanding cases coming from Quebec because they are argued in French, they will be assigned to fewer Quebec cases and the average panel-size for cases from Quebec will be smaller.*

Unsurprisingly, the average size of the panel for all cases coming from Quebec (6.57), regardless of the area of law, was significantly smaller than cases from the rest of Canada (7.11). One easy explanation is that civil law cases coming from Quebec are generally heard by smaller panels, therefore reducing the overall average panel-size for Quebec cases.[79]

As previously noted, to tease out the impact of legal specialization in civil and common law from the impact of linguistic proficiency, we looked at the average panel size in areas of federal law only. Overall, for federal law cases, the average panel-size between 1969 and 2013 was 7.45 judges for the RoC and 7.18 judges for Quebec cases. The difference between the average panel-size for cases coming from Quebec (7.18) compared with those coming from the rest of Canada (7.45) is thus also smaller in federal law cases and cannot be explained by legal specialization. Moreover, federal law cases coming from Quebec are heard on average by significantly smaller panels than federal law cases coming from the rest of Canada regardless of the time period: As shown in Table 1, the discrepancy is observed across the courts of all chief justices. The only three provinces whose differences in average panel size are statistically significant[80] are Quebec with an average of 7.18 judges, Newfoundland and Labrador with an average of 6.75 judges, and Ontario with an average of 7.69 judges. The smaller average panel-size for Newfoundland and Labrador can be explained by the higher proportion of "as of right" cases coming to the Court from this province during this period since they tend to be heard by smaller panels. The proportion of "as of right" cases from Newfoundland and Labrador (57 per cent) was the highest among all provinces and substantially higher than the national average (30 per cent). The proportion of "as of right" appeals from Quebec (29 per cent), in comparison, was close to the national average.

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79. The *Supreme Court Act* requires that three of the nine justices of the Supreme Court of Canada come from Quebec. This ensures that the Supreme Court is composed of a minimum of civil law trained judges. The Chief Justice can thus use these three judges to compose panels of five judges where they form a civilist majority. See *Supreme Court Act*, RSC 1985, c S-26, s 6.

80. Following the examples of Stribopoulos & Yahya, *supra* note 52 and Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47 Osgoode Hal LJ 1 and others, we report P-values for statistical tests based on the assumption that every studied case is independent and drawn randomly from a large population of all possible cases. This assumption of independence might not always be satisfied. For instance, larger panels in cases from Ontario could theoretically be linked to smaller panels in Quebec due to the judges' limited time. Therefore P-values should be interpreted with caution. We report them anyway, as they are a useful interpretation tool. Unless specified otherwise, the P-values reported are for two-sided T-test for difference of means, assuming equal variance.

TABLE 1: AVERAGE PANEL SIZE FOR SUPREME COURT OF CANADA CASES, 1969-2013

		Cases from Rest of Canada Mean panel size (N)	Cases from Quebec Mean panel size (N)	Diff. of means[b] P value
Only Federal Law	Cartwirght Court (1969[a]-1970)	6.91 (45)	5.00 (5)	0,111
	Fauteux Court (1970-1973)	6.98 (95)	6.83 (12)	0,773
	Laskin Court (1973-1984)	7.64 (509)	7.44 (110)	0,198
	Dickson Court (1984-1990)	6.92 (426)	6.58 (76)	0,039
	Lamer Court (1990-2000)	7.36 (693)	6.75 (100)	0,001
	McLachlin Court (2000-2013[a])	7.90 (567)	7.77 (128)	0,278
	All Courts (1969-2013)	7.45 (2335)	7.18 (431)	0,001
All Areas of Law	Cartwright Court (1969a-1970)	5.85 (146)	5.16 (25)	0,012
	Fauteux Court (1970-1973)	5.87 (302)	5.42 (77)	0,005
	Laskin Court (1973-1984)	7.03 (967)	6.34 (300)	< 0,001
	Dickson Court (1984-1990)	6.81 (611)	6.32 (133)	< 0,001
	Lamer Court (1990-2000)	7.25 (972)	6.58 (168)	< 0,001
	McLachlin Court (2000-2013a)	7.88 (883)	7.58 (222)	0,004
	All Courts (1969-2013)	7.11 (3881)	6.57 (925)	< 0,001

a. Studied cases range from 1 January 1969 to 27 July 2013

b. Two sided T-test for difference of means, assuming equal variance

The logical next step was to inquire into whether language proficiency has an impact on who sits on those cases and whether it is a plausible explanatory factor for the difference in average panel-size. We looked at the panel composition to see if unilingual judges were more likely to be left aside in federal law cases from Quebec. To do so, we looked at the probability of a judge *not to sit* on a given case. The results are reproduced in Table 2 below. The results show that language is correlated with the likelihood to be exempted from federal law cases from Quebec. For example, unilingual and unknown judges had a probability of 30 per cent of being exempted from federal law cases coming from Quebec while bilingual judges had a probability of 17 per cent and Quebec judges a probability of only 11 per cent of being exempted from such cases. Interestingly, these results suggest that Quebec judges were as likely to be exempted from civil law cases from Quebec as they were to be exempted from federal law cases coming from Quebec. Meanwhile, RoC bilingual judges were still much more likely to sit on civil law cases than their unilingual colleagues even if they might not have any training in this area. Thus, legal specialization in civil or common law is perhaps overemphasized when it comes to describing the actual work of the Court. Regional and linguistic elements play, in all likelihood, a significant role when it comes to assigning judges to cases argued in French.

TABLE 2: PROBABILITY OF BEING "EXEMPTED" FROM A CASE, PER LINGUISTIC GROUP, FOR CASES FROM THE ROC AND QUEBEC

	Justice's linguistic group	Cases from RoC	Cases from Quebec	Diff. of pct P value
Only Federal Law	Unilingual	25%	30%	< 0,001
	Unknown	24%	27%	0,331
	RoC Bilingual	21%	17%	< 0,001
	Quebec	25%	11%	< 0,001
All Areas of Law	Unilingual	18%	39%	< 0,001
	Unknown	21%	50%	< 0,001
	RoC Bilingual	15%	20%	< 0,001
	Quebec	27%	11%	< 0,001

This suggests that the level of fluency in French might be an important factor influencing both the size and the composition of the panel in cases coming from Quebec, regardless of whether they are federal law cases or provincial law cases. This sheds new light on the grievance expressed by some critics of judicial unilingualism who argue that francophone litigants cannot have a fair hearing at the Supreme Court of Canada because some judges cannot understand their oral argument.[81] While this can be true when the Court hears a francophone case with a full panel of nine judges, this situation may be less frequent than is generally expected because francophone cases are heard on average by smaller panels and unilingual judges are most likely to be the ones left aside in those cases. When the Court is composed of seven or eight bilingual judges, francophone litigants can be heard most of the time by a panel of five or seven bilingual judges, a pattern compatible with our data. On the other hand, if anglophone judges are left aside in cases in their area of expertise because they are argued in French, the francophone litigants might "lose" these judges' otherwise valuable voice simply because their case is argued in French.

B. ASSERTIVENESS

The second dimension that we investigated is the level of assertiveness of unilingual judges in cases coming from Quebec. Assertiveness can be defined as the fact of making one's voice heard. We thus measured it as the probability that a judge will write an opinion every time he or she hears a case. Judges who write opinions more often are considered more assertive. Assertiveness is somewhat linked to collegiality[82] (judges who are more collegial are often less assertive, they tend to "go with the flow") but it captures a different dimension of a judge's behaviour.[83] A low level of assertiveness, measured as a low probability of writing an opinion, indicates that a judge often prefers to endorse the opinion of one of his or her colleagues, be it in a majority, a concurrence, or a dissent, rather

81. See *e.g.* Doucet, Justice and Human Rights Committee, *supra* note 64.
82. On collegiality generally and its impact on judicial behaviour in the Canadian context, see Benjamin Alarie & Andrew Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada" (2007) 58 UNBLJ 73 and Alarie & Green, C*ommitment and Cooperation*, *supra* note 65 at ch 8.
83. Here is an example of a situation where assertiveness and collegiality are not linked. In a case coming from Quebec, a decision could have one majority opinion and two dissents, all three opinions being authored by a Quebec judge. If bilingual judges join one of the dissents, this would normally be seen as not being collegial because they do not follow the majority. However, they cannot be described as being assertive because they do not write an opinion, they simply decide to follow another colleague who is not in the majority.

than expressing his or her own views. Therefore, with regards to the level of assertiveness of unilingual judges, we made the following hypothesis:

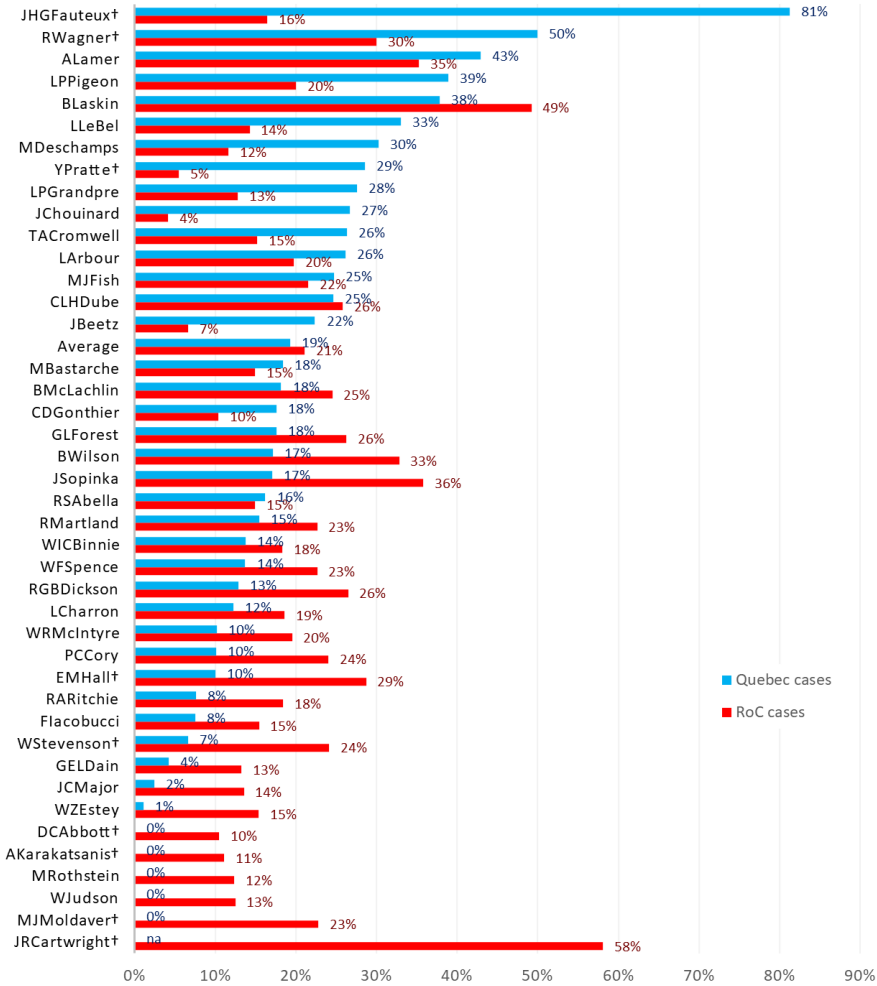
> **H2**: *Unilingual judges are less assertive in cases where they cannot understand the oral arguments or the briefs submitted and are thus more likely to join their fellow bilingual colleagues either in the majority, in a concurrence, or a dissent in francophone cases.*

To measure the level of assertiveness, we looked at the probability that a judge writes an opinion when sitting in a federal law case coming from Quebec or the RoC. Assertiveness is thus not correlated to panel size; it simply measures the probability that, when a judge hears a case, he or she writes an opinion in that particular case. Since it is difficult to sort out which judge was more active in the drafting process when an opinion was co-authored, we looked at both solo opinions (*i.e.*, the opinion of the majority, a concurrence, or a dissent that was signed by only one author) and joint opinions despite that the differences are small.

Figure 1 below shows the probability, for each judge, of writing a solo opinion when hearing a federal law case from Quebec and from the rest of Canada between 1969 and 2013. For example, in federal law cases coming from Quebec that Justice Fauteux heard from 1969 onward, he wrote a solo opinion 81 per cent of the time. Similarly, Chief Justice Wagner wrote a solo opinion in 50 per cent of federal law cases coming from Quebec that he heard in his first year. At the other extreme, Justices Moldaver, Karakatsanis, Rothstein, Judson, and Abbott never wrote a solo opinion in a federal law case coming from Quebec.

On average, a judge had a probability of 19 per cent of writing a solo opinion when he or she sat on a federal law case coming from Quebec. Interestingly, all unilingual judges had a probability of writing a solo opinion that is lower than the average judge on the Court.

FIGURE 1: PROBABILITY OF WRITING A SOLO OPINION, PER JUSTICE, FOR FEDERAL LAW CASES HEARD FROM QUEBEC AND THE ROC, 1969-2013



†: Heard less than 150 federal law cases from 1969 to 2013.

The picture becomes even clearer when judges are aggregated by linguistic group. Table 3 below reproduces the data shown in Figure 1 by individual judges (and adds joint opinions) once aggregated by linguistic group. Table 3 outlines

the probability that a judge from a given linguistic group will write a solo or a joint opinion in a federal law case coming either from Quebec or the RoC. When grouped together, it becomes manifest that unilingual judges are significantly less likely to write an opinion in a federal law case if it originates from Quebec. For example, a unilingual judge has a 12 per cent chance of writing a solo opinion when he or she hears a case coming from Quebec, while a bilingual judge has 15 per cent chance, and a Quebec judge has 29 per cent chance. On the other hand, a unilingual judge has a 26 per cent chance of writing a solo opinion in a federal law case coming from the RoC as compared to 20 per cent for a bilingual judge and 18 per cent for a Quebec judge. This suggests that there is a correlation between the level of proficiency in French and the probability of writing an opinion in a federal law case from Quebec.

TABLE 3: PROBABILITY OF WRITING AN OPINION PER LINGUISTIC GROUP WHEN HEARING A FEDERAL LAW CASE, 1969-2013

Justice's linguistic group	Solo opinion		Solo or joint opinion		Diff. of pct[a] P value
	RoC case	Quebec case	RoC case	Quebec case	
Unilingual	26%	12%	27%	14%	< 0,001
Unknown	20%	10%	20%	11%	< 0,001
RoC Bilingual	20%	15%	23%	17%	< 0,001
Quebec	18%	29%	19%	31%	< 0,001

a. Two sided T-test for difference of percentage in solo opinion. Using solo or joint opinion yields similar results.

Interestingly, these numbers also suggest that bilingual and Quebec judges are *less* likely to write opinions in cases coming from the rest of Canada than their unilingual colleagues. There are two complementary possible explanations for these findings. The first explanation is that judges might either volunteer for or be assigned by the Chief Justice to write an opinion in cases in which they can speak the language used by the parties. This linguistic separation of labour is normally not captured by other accounts of the internal workings of the Court.[84] The

84. Emmett MacFarlane, for example, in his analysis of the work of the Supreme Court of Canada, never touches on the question of language. See Emmett MacFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*, (Vancouver: UBC Press, 2013).

second and related explanation is what might be termed "assertiveness aversion."[85] Since bilingual judges (and even more so Quebec judges) must devote more time to francophone federal law opinions, they have less time overall to devote to other decisions, therefore reducing their level of assertiveness in RoC cases. Because of their increased caseload in francophone federal law cases, bilingual judges might have the tendency *not to voice* their opinion when it comes to anglophone federal law cases because this would increase their overall caseload and they thus prefer to go along with their colleagues. In other words, increased caseload for one linguistic group on the bench could have the indirect effect of silencing the judges of this group in other cases.

C. CASELOAD

The third dimension that we examined is the linguistic distribution of the federal law caseload of each judge. By looking at this, we wanted to assess the claim that Quebec and bilingual judges write more opinions for Quebec federal law cases than their unilingual colleagues. We made this hypothesis:

> **H3**: *Because they have a low proficiency in French, the proportion of the opinions of unilingual judges for federal law cases coming from Quebec as compared to those coming from the RoC (i.e., their federal law caseload) will be lower than their bilingual colleagues.*

Before we move forward, it is important to note that this dimension is correlated with our two previous findings, namely that unilingual judges hear fewer federal law cases coming from Quebec than their bilingual and Quebec colleagues and, even when they hear them, they have a lower probability of writing an opinion in the case. Given that unilingual judges hear fewer federal law cases and write less often in those cases, their overall federal law caseload will be, *ceteris paribus*, composed of fewer of those cases than their bilingual and Quebec colleagues. This gives a picture of the linguistic distribution of the federal law caseload of each individual judge.

As shown in Figure 2, Supreme Court of Canada judges wrote on average 14 per cent of their federal law opinions in cases coming from Quebec and 86 per cent in cases coming from the rest of Canada. Interestingly, bilingual judges write a significantly higher proportion of their federal law opinions for cases coming from Quebec than their unilingual colleagues.

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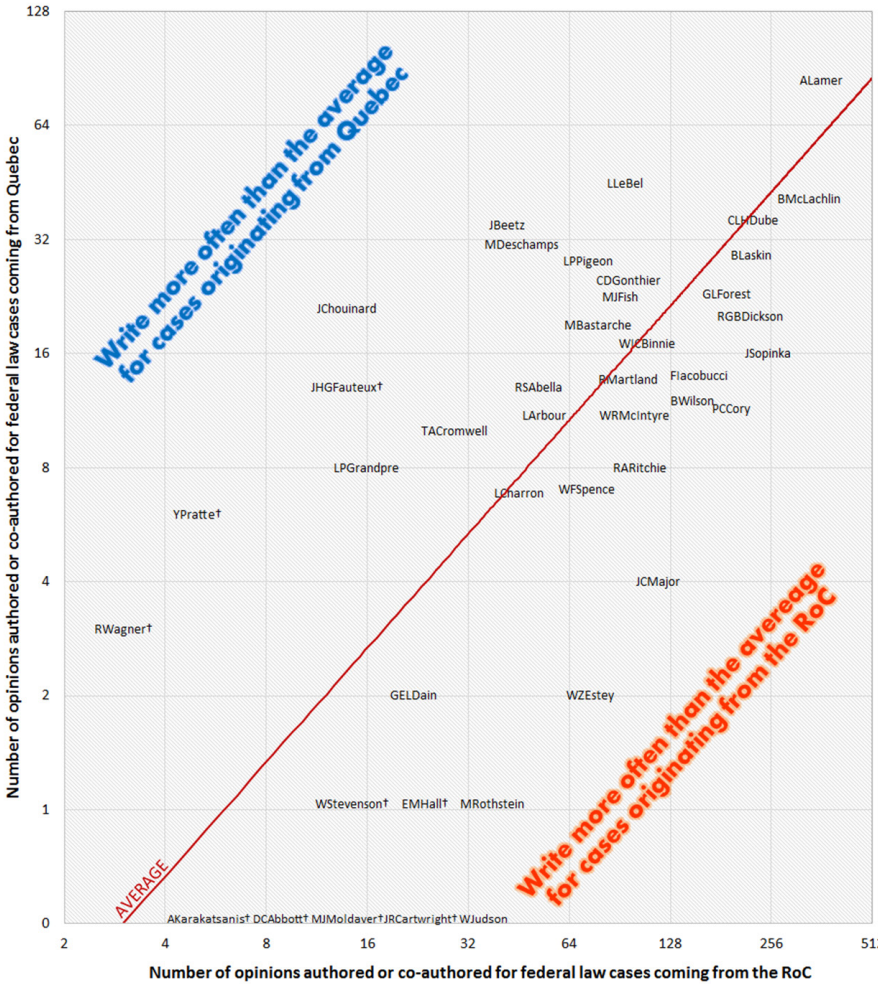
85. Epstein, Landes & Posner repeatedly use the concept of "dissent aversion." We borrow the concept from them but use it in a slightly broader way to capture assertiveness in general and not only dissents. See especially Lee Epstein, William Landes & Richard Posner, *The Behavior of Federal Judges* (Cambridge: Harvard University Press, 2013) ch 6.

This suggests that language might play a role similar to legal specialization in the composition of the caseload of each judge. Donald Songer has shown that judges tend to specialize in one or two areas of law that represent a larger share of their caseload.[86] It seems that language plays out in the same way and might be another kind of specialization that superimposes itself over other legal specialization. Some judges thus become "French experts" as others are criminal law experts or corporate law experts.

86. Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) at 131-32.

FIGURE 2: DISTRIBUTION OF JUSTICES, PER OPINION AUTHORED OR CO-AUTHORED, FOR FEDERAL LAW CASES FROM QUEBEC AND THE ROC, 1969-2013



† : Heard less than 150 federal law cases from 1969 to 2013.

One must remember that the proportions shown in Figure 2 are for federal law cases, *i.e.*, cases for which judges are presumed to be equally competent (even though their degree of specialization may indeed vary). However, irrespective of

their degree of specialization in federal law, the caseload coming from Quebec is distributed unevenly between unilingual and bilingual judges partly along linguistic lines. For example, Justice Rothstein, a federal law expert who served for 14 years on the Martial Court, the Federal Court, and the Federal Court of Appeal before being appointed to the Supreme Court of Canada, wrote only one opinion in a federal law case coming from Quebec: A short seven paragraph dissent co-authored with the bilingual Chief Justice McLachlin.[87] Similarly, Justice William McIntyre, who was considered to be a criminal law expert, wrote only 10 per cent of his federal law opinions in cases coming from Quebec. The problem with this kind of linguistic specialization is that it might silence the valuable voice of unilingual experts that cannot address important issues in their field simply because they were raised in a case where they could not understand the language of the parties.

If we assume that all cases are equally complex and equally labour-consuming, this suggests that bilingual and Quebec judges devote more time to Quebec federal law cases than their unilingual colleagues. As we will discuss in the next section, this might be problematic in that it can reinforce the "two solitudes" on the bench. When judges are grouped in their linguistic categories as presented in Table 4, the results show clearly the difference between unilingual, unknown, bilingual, and Quebec judges in terms of the proportion of all the opinions they write for federal law cases (*i.e.*, the number of opinions they write either as author or coauthor in the majority judgement, a concurrence or a dissent).

TABLE 4: DISTRIBUTION OF INDIVIDUAL FEDERAL LAW CASELOAD, PER LINGUISTIC GROUP, 1969-2013

Justice's linguistic group	**Proportion of opinions written (majority, concurrence and dissent)**	
	Cases from Qc	**Cases from RoC**
Unilingual	7%	93%
Unknown	8%	92%
RoC Bilingual	12%	88%
Quebec	25%	75%
Uni. vs Bilingual P value	< 0,001	< 0,001

87. *R v Ouellette*, 2009 SCC 24.

D. DEFERENCE

The last dimension that we examined is the impact of language on the level of deference towards appellate courts. We measure the level of deference as the likelihood of a judge overturning the lower court's decision. Scholars have often noted that common law judges might be more deferential towards civil law appellate courts than towards common law ones.[88] While this hypothesis is highly plausible, especially in private law cases, it is also possible that unilingual judges are more deferential towards francophone appellate courts even if the ruling is in an area of federal law. With regard to the level of deference, we thus made the following hypothesis:

> **H4**: *Unilingual judges will be more deferential towards the Court of Appeal when they cannot fully understand the case coming before them and will therefore tend to have a lower overturn rate in these cases compared to other judges.*

After inspection, this hypothesis is not supported by the data. If our hypothesis were right then unilingual judges would have a lower overturn rate in federal law cases from Quebec than their bilingual and Quebec colleagues. However, when we inspect unilingual, bilingual, unknown, and Quebec judges' overturn rates, the linguistic groups do not behave differently. There seems to be no significant difference in their level of deference for federal law cases coming from Quebec and from the RoC. Table 5 presents the proportion of cases where each linguistic category of judges voted to overturn the Quebec Court of Appeal's decision as compared to cases coming from other appellate courts from the RoC. Interestingly, there is almost no statistically significant difference between linguistic groups in their overturn rate.

88. See *e.g.* Snell & Vaughan, *supra* note 15 at 228-229. The authors comment on the decision *Lachine v Industrial Glass Co Ltd*, [1978] 1 SCR 988, in which Justices Pigeon and Pratte dissented while Justices Laskin, Judson, and Spence formed the majority, upholding the decision of the Quebec Court of Appeal. Snell and Vaughan do not touch on the question of the impact of language proficiency on the behaviour of the three anglophone judges (Justices Laskin and Spence are classified in our "unknown" category). By focusing only on federal law cases, we tried to tease out the impact of language from the impact of the different legal traditions.

TABLE 5: LEVEL OF DEFERENCE OF INDIVIDUAL JUDGES PER LINGUISTIC CATEGORY FOR FEDERAL LAW CASES COMING FROM QUEBEC AND FROM THE ROC, 1969-2013

Judges' linguistic group	Votes to overturn		Diff. of pct P value
	Lower court from the RoC	Lower court from Quebec	
Unilingual	42%	52%	< 0,001
Unknown	41%	46%	0,128
RoC Bilingual	44%	51%	< 0,001
Quebec	42%	51%	< 0,001

These results should be interpreted with caution to ensure that one does not infer from them more than is actually warranted. Let us start with what the results tell.

The results *do show* that individual judges at the Court disagree more often with the Quebec Court of Appeal than they do with other appellate courts, regardless of their proficiency in French. These findings for the behaviour of individual judges are not very surprising given that previous studies have already shown that decisions of the Quebec Court of Appeal are overturned more often by the Supreme Court of Canada than most other appellate courts in Canada.[89] Our results tell us also that this does not seem to be influenced by the linguistic capacities of the individual judges.

However, the results *do not show* whether Quebec, bilingual, and unilingual judges vote in the same way. Imagine a court constantly split 5-4 where unilingual and bilingual judges are systematically on opposing sides. Even if they all vote 50 per cent of the time to overturn the Court of Appeal, the results in the aggregate would not tell us much about this pattern despite the fact that bilingual and unilingual judges would vote completely differently. Thus, the results do not tell us whether Quebec, bilingual, and unilingual judges vote differently. They simply tell us that, overall, Supreme Court of Canada judges vote as frequently to overturn the decisions of appellate courts regardless of their linguistic proficiency. Also, the results do not tell us whether unilingual judges follow the leadership of

89. Michael H Lubetsky & Joshua A Krane, "Appealing Outcomes: A Study of the Overturn Rate of Canada's Appellate Courts" (2009) 47 Osgoode Hall LJ 131.

their bilingual or Quebec colleagues by voting with them. Finally, the results do not tell us whether unilingual judges vote differently in Quebec cases than they do in cases from the RoC. We think that future research should try to assess the impact of linguistic proficiency on those dimensions of judicial behaviour.

IV. CONCLUSION AND FUTURE RESEARCH

Since this study is the first that seeks to assess empirically the impact of unilingualism at the Supreme Court of Canada, the results are provisory and exploratory in nature. There are still many blind spots and the results here do not prove that there is a causal link between unilingualism and judicial behaviour but simply a statistically significant *correlation* between these two variables. Further studies should try to control for other confounding variables such as temporal factors, the province of origin of the judge, the complexity of the case, the area of law at issue, or the appointing party. Moreover, other ways of categorizing the level of fluency in both official languages (*e.g.*, native speaker, second language, unilingual, etc.) might lead to slightly different results. Despite this, our results suggest four different conclusions.

First, language proficiency of individual judges might affect the size and the composition of panels at the Supreme Court of Canada. This is based on our finding that the panel size for federal law cases was statistically significantly lower for federal law cases coming from Quebec than for those coming from the RoC. Moreover, since unilingual judges were more likely to be "exempted" from federal law cases coming from Quebec than their Quebec and bilingual colleagues, this suggests that language might influence both the size and the composition of panels.

Second, our findings suggest that linguistic proficiency might have an impact on the level of assertiveness of judges. This conclusion is based on our finding that unilingual judges have a lower probability of writing a solo or a joint opinion when they hear a federal law case coming from Quebec than their bilingual colleagues, a relationship that is the opposite when the Court hears a federal law case coming from the RoC.

Third, our findings suggest that linguistic proficiency might influence the individual distribution of federal law caseload. This conclusion, in line with the two previous findings, is based on the fact that Quebec and bilingual judges write a higher proportion of their federal law opinions in cases coming from Quebec than their unilingual colleagues.

Fourth, our findings suggest that, all other things being equal, linguistic proficiency does not seem to affect the level of deference towards appellate courts. This conclusion is based on our findings that unilingual, bilingual, and Quebec judges have a similar overturn rate for federal law cases coming from Quebec. Further research should try to see whether this is true across all areas of law or whether judges are more prone to be deferential in certain kinds of cases, such as linguistic rights or federalism cases.

These findings are important for three main reasons. First, in federal law cases coming from Quebec, bilingual judges might have more influence than unilingual judges. Since the panel size is on average smaller, a lack of bilingualism might be detrimental to unilingual judges because they cannot make their voices heard in a significant proportion of cases of importance for the whole country. However, we have not taken into consideration the level of complexity and the importance of the cases.[90] It is possible that unilingual judges are more assertive in more complex and important issues. Future research should explore this question.

The second reason is that this linguistic separation of labour might perpetuate "two solitudes" at the Court.[91] Because Quebec and bilingual judges sit, write, and devote more of their time to francophone cases than their unilingual colleagues do, francophone judges are more likely to write for a francophone audience, using francophone citations while anglophone judges are more likely to write for an anglophone audience using anglophone citations. When one takes into consideration the additional fact that media coverage of the Court is very different in francophone and anglophone media,[92] this is hardly fertile ground for any kind of cross-breeding of the two legal solitudes of Canadian law.

The third reason is directly related to the form of normative debates we have discussed in Part I. Since language proficiency seems to affect panel size

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90. On "complexity" and the distribution of opinion-writing, see Peter McCormick, "Judgment and Opportunity: Decision Assignment on the McLachlin Court" (2015) 38 Dal LJ 271.
91. On this issue, see Roderick A MacDonald, "Legal Bilingualism" (1997) 42 McGill LJ 119. See also Jean-François Gaudreault-Desbiens, *Les solitudes du bijuridisme au Canada* (Montréal: Éditions Thémis, 2005). Interestingly, Peter McCormick pointed out that the decisions of the Court of Appeal of Quebec represented only 3 per cent of cross-citations among Canadian Courts of Appeal while the decision of the Court of Appeal for Ontario represented 40 per cent of all such citations. Given the size of the province and the caseload of its Court of Appeal, this is hardly explainable only in terms of the civil/common law distinction. See Peter McCormick, "Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices" (1993-1994) 22 Man LJ 286 at 297.
92. On the difference between French and English media coverage of the Supreme Court of Canada, see Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada*, (Vancouver: UBC Press, 2006) at 49-56.

and opinion writing, *bilingualism looks like a legal characteristic*. By this we mean that language, like other legal skills, seems to play a role in explaining who sits on which cases, who voices his or her opinion, and on which cases judges devote most of their time. Thus, at least when it comes to describing the actual working of the Court and the behaviour of its judges, linguistic proficiency is like another legal characteristic. In other words, it is as if language proficiency superimposes itself as an additional layer of specialization in addition to traditional subject matter legal specialization. As for the impact of bilingualism as an "identity" requirement discussed in Part I, future research should try to assess whether unilingual, bilingual, and Quebec judges vote differently. At least when it comes to deference to francophone appellate courts, it seems that linguistic identity does not play a critical role—*i.e.*, Quebec and bilingual judges do not seem to have any stronger "affiliation" to the Quebec Court of Appeal than their unilingual colleagues. Admittedly, our results are only provisory and future research should try to assess whether the "identity" dimension of linguistic proficiency influences other aspects of judicial behaviour.

As we pointed out in the introduction, the empirical literature on the impact of multilingualism in judicial institutions is almost non-existent both in Canada and in other jurisdictions. Here are five paths that are worth exploring in future studies:

1. Does unilingualism influence the level of penetration of legal ideas coming from the other linguistic legal culture?[93] In other words, do judges tend to cite less treatises, journal articles, or appellate courts' decisions when they are not or less fluent in this language?
2. What is the impact of francophone interveners as compared to anglophone interveners? Some studies suggest that interveners at the Supreme Court of Canada have a moderating effect on judicial behaviour.[94] Is the relative impact of such interveners greater for anglophone submissions as compared to francophone submissions? Are anglophone interveners more successful at influencing the vote of unilingual judges than francophone interveners?

93. Peter McCormick has studied the level of citations of journal articles cited by the Supreme Court of Canada. Even though his findings are interesting from an aggregate perspective, he does not break down citations for individual justices nor does he calculate the number of francophone and anglophone citations. McCormick, "Judges and Journals," *supra* note 58.
94. Benjamin RD Alarie & Andrew J Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall LJ 381.

3. What is the impact of law clerks in easing lower levels of fluency in the other official language? In other words, do we see a different pattern of decision-making when judges have more bilingual law clerks? What is the optimal number of bilingual law clerks above which adding one more bilingual clerk does not make any difference in the outcome? Has the overall level of bilingualism of the Court increased over time?
4. What is the impact of lower levels of assertiveness on actual outcomes? If unilingual judges are less assertive in francophone cases, they will be more likely to cast a vote that differs from their preferred outcome. It would be interesting to measure the difference between their average liberal voting score for federal law cases coming before them in English as compared to those coming before them in French and to see if there is a difference. Do these differences reflect the leadership of their Quebec or bilingual colleagues? Does the linguistic composition of the Court influence its median voter?
5. What is the impact of language proficiency in other multilingual jurisdictions? Do the patterns identified here are the same in other institutional contexts and what mechanisms can alleviate the differences between unilingual and multilingual judges?

On a final note, we hope that this positive discussion will make future normative debates about the requirement of mandatory bilingualism at the Supreme Court of Canada more empirically informed.

V. APPENDIX A

Judges	Category	Reason
Cartwright	Bilingual (From Qc)	Writer's assessment
Fauteux	Bilingual (From Qc)	Bilingual teaching experience (McGill and Ottawa)
Abbott	Bilingual (From Qc)	Bilingual Education (McGill and Dijon) and presumption of bilingualism (from Quebec)
Martland	Unknown	Not enough information
Judson	Bilingual	Writer's assessment
Ritchie	Unknown	Not enough information
Hall	Bilingual	English and French education (Sask) and French work experience (SCC site, taught French)
Spence	Unknown	Not enough information
Pigeon	Bilingual (From Qc)	Writer's assessment
Laskin	Unknown	Media coverage
Dickson	Unilingual	Biographer's assessment
Beetz	Bilingual (From Qc)	Bilingual Education (UdeM and Oxford)
de Grandpré	Bilingual (From Qc)	Bilingual Education (McGill and Collège St-Marie)
Estey	Unilingual	Media coverage
Pratte	Bilingual (From Qc)	Bilingual Education (Laval and UToronto)
McIntyre	Unilingual	Biographer's assessment
Chouinard	Bilingual	Bilingual Education (Laval and Oxford)
Lamer	Bilingual (From Qc)	Presumption of bilingualism (from Quebec)
Wilson	Unilingual	Biographer's assessment
Le Dain	Bilingual	Bilingual education and teaching experience
La Forest	Bilingual	Media coverage and biographer's assessment
L'Heureux-Dubé	Bilingual (From Qc)	Presumption of bilingualism (from Quebec)
Sopinka	Unilingual	Media coverage

Gonthier	Bilingual (From Qc)	Bilingual Education (Collège Stanislas and McGill)
Cory	Bilingual	Writer's assessment
McLachlin	Bilingual	Writer's assessment
Stevenson	Unilingual	Writer's assessment
Iacobucci	Bilingual	Media coverage
Major	Unilingual	Writer's assessment and media coverage
Bastarache	Bilingual	Bilingual Education and Teaching (UdeM and UOttawa)
Binnie	Bilingual	Media coverage
Arbour	Bilingual	Bilingual education and teaching experience (UdeM education and Osgoode Hall teaching)
LeBel	Bilingual (From Qc)	Bilingual Education (ULaval and UToronto)
Deschamps	Bilingual (From Qc)	Bilingual Education (UdeM and McGill)
Fish	Bilingual (From Qc)	Bilingual Education (Mcgill and Paris)
Abella	Bilingual	Media coverage
Charron	Bilingual	Bilingual education and teaching experience (Carleton Education, Ottawa French teaching)
Rothstein	Unilingual	Media coverage and personal testimony during the hearings before the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada
Cromwell	Bilingual	Media coverage
Moldaver	Unilingual	Media coverage and personal testimony during the hearings before the Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices
Karakatsanis	Bilingual	Media coverage and personal testimony during the hearings before the Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices
Wagner	Bilingual (From Qc)	Presumption of bilingualism (from Quebec)