Bilingualism of Supreme Court Judges – Exempt from the Official Languages Act

Description

JUSTICE AND HUMAN RIGHTS

Bilingualism of Supreme Court Judges

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Issue | The Supreme Court is exempt from certain language requirements pertaining to the appointment of judges. The issue has recently sparked political and public debate.

Synopsis | Existing laws impose certain language requirements on the Supreme Court, but the requirement that Supreme Court judges be able to understand both official languages is not among them. Instead, it is one criterion taken into consideration when appointing judges to Canada's highest court. Some people would like bilingualism to be mandatory, while others want to maintain the status quo.

Timing | Since May 2008, five amending private members' bills have been tabled in the House of Commons. The bills sought to make the ability to understand both official languages a requirement for appointment to the Supreme Court. All five bills died on the *Order Paper*.

The Supreme Court of Canada was created in 1875 under the *Supreme Court of Canada Act* (SCA).

The *Constitution Act, 1867* (section 133), the *Canadian Charter of Rights and Freedoms* (sections 16 and 19), the *Official Languages Act* (OLA, parts II and III) and the *Rules of the Supreme Court of Canada* (Rule 11) require the Supreme Court to observe a number of principles related to Canada's linguistic duality. These requirements are in line with the right of Canadians to use either official language in courts established by Parliament. Oral and written communication with the Supreme Court can therefore be in English or French. Simultaneous translation is provided under certain conditions.

Criteria for Appointing Judges

The OLA applies to all courts, but the Supreme Court, for a variety of reasons, including geographic representation, is not subject to sections 16 and 17 of this Act. Those sections deal with judges' comprehension of the official languages and the authority to make related rules of procedure. The OLA does not require Supreme Court judges to understand proceedings equally well in English and French without the assistance of an interpreter, as it does for judges in other federal courts.

The SCA sets out a number of conditions for the appointment of Supreme Court judges. Federal

judicial advisory committees are given the task of assessing candidates, and “professional competence and overall merit are the primary qualifications.”[1]Other non-mandatory criteria, such as comprehension of the two official languages, also come into play in the assessment of candidates.

Supreme Court of Canada.

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“Supreme Court of Canada.” Image: Wikipedia.org.

Legislative Activity

Five bills calling for mandatory bilingualism have been tabled in the House of Commons. Bill C-548 (May 2008) sought to amend section 16 of the OLA to require that the Supreme Court, like other federal courts, ensure that its judges be capable of hearing cases in either language without the assistance of an interpreter. Bill C-559 (June 2008) would have established a similar requirement to understand both official languages by amending section 5 of the SCA instead. A similar bill, C-232, was introduced three times (since November 2008) and had just been referred to a Senate committee when the 40th Parliament was dissolved. All of these bills died on the *Order Paper*.

Arguments for Requiring Judges to be Bilingual

Advocates of mandatory bilingualism believe that comprehension of the two languages must be a requirement for newly appointed judges.

They take the view that this is first and foremost a question of principle, stating that the highest court in the land should reflect Canadian values, one of which is linguistic duality. They argue that it is also a question of individual rights: Canadians have the right to be heard in the language of their choice. The argument is rooted in the contention that there are many opportunities today for judges to learn the other official language before they are appointed to the Court. It is based also on the nature of federal statutes. Federal statutes are written in English and French, and the two versions are equally authoritative, which must be taken into consideration when interpreting them. Proponents of mandatory bilingualism argue that simultaneous translation may not be enough to do justice to the complexity and subtlety of arguments and legal language. Finally, this group raises the following principle: the equality of the two languages recognized in case law also provides for the equal treatment of Anglophones and Francophones.

Arguments for the Status Quo

Opponents of mandatory bilingualism believe that compromising the quality of decisions by focusing on language skills would be unacceptable.

They take the view that this issue is first and foremost one of capacity, maintaining that the pool of candidates proficient in both languages is too small, especially considering the geographic criteria applied to the appointment process. They assert that measures should therefore be taken to develop second-language learning opportunities throughout the country before making bilingualism mandatory. They also argue that the issue is one of competence, contending that judges are experts in law, not language. They believe that access to simultaneous translation and written documents, as well as reviewing cases before hearing them, is sufficient. According to this group, while it may be desirable to have bilingual judges, requiring all judges to be bilingual before they take up their duties would be unrealistic, and excellent jurists could be passed over for appointment to the bench.

http://www.lop.parl.gc.ca/content/lop/researchpublications/cei-03-e.htm

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