**Discussion Paper**

**Impacts of Official Language Modernization on Indigenous Inclusion in the Federal Public Service Workplace**

Prepared for

Deputy Minister Wilson

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# Introduction

**Methodology**

* Engaged OL Working Group members (TBS-OCHRO (OLCE) and CDI, ESDC, DFO, IEXN, PCH, and PSC) and other federal departmental reps (Justice, Anti-Racism Ambassador Network (ARAN), Anti-Racism Secretariat, etc.) in sharing insights in the paper’s development.
* Applied an Indigenist critical lens to the issue of official language impacts on Indigenous federal employees. The paper’s arguments, options, and conclusions exposed the fact that a diversity of OL Working Group member views exist in relation to the OL problem.
* Conducted key word string searches in academic databases (e.g., *Public Policy and Administration*, *Sociology*, *Management,* *Scholars Portal*, etc.) and *Google* and *Google Scholar*. Grey literature, Federal Government data sets (e.g., PIMART, PSC, etc.), and academic journal articles were also reviewed.
* Paper was written from a place that recognizes the complexity of Indigenous identity, the diversity of Indigenous voices, and intercultural perspectives to think about official language of work requirements differently in a colonial government context.
* Mostly non-Indigenous scholarship, given the nature of the topic and the available body of scholarship.

## Context

The *Impacts of Official Language Modernization on Indigenous Inclusion in the Federal Public Service Workplace* discussion paper was prepared and is being tabled by Gina Wilson, Deputy Minister of Indigenous Services Canada (ISC) and Champion for Federal Indigenous Employees, with deputy heads to provoke deeper thinking and discussion on linguistic and cultural plurality in relation to implementing a modernized *Official Languages Act* and its related instruments.

Since 2018, select senior leaders and departmental “officials”[[1]](#endnote-1) have collaborated with the Indigenous Federal Employee Network (IFEN) and the Official Languages Working Group members (OLWG)[[2]](#endnote-2) to determine the extent to which some official language policies may constitute systemic barriers faced by Indigenous federal employees and how to address these.[[3]](#footnote-1) The OLWG subsequently produced a list of policy initiatives for consideration and action. IFEN’s expectations and mandate differed from what was proposed, highlighting the challenge of finding a common path forward.

Indigenous employee perspectives on Official Language requirements are deeply tied to “Indigenous identity”[[4]](#endnote-3), “reconciliation”[[5]](#endnote-4), and Canada’s colonial history and treatment of Indigenous Peoples over the years. Some Indigenous federal employees, for example, position their views from an Indigenous treaty-rights lens, which does not necessarily reflect the views of those Indigenous employees who may voluntarily self-identify based on their perception of their identity and/or those who understand themselves as rights-holders but are not treaty rights holders.[[6]](#footnote-2) There are also distinctions between First Nations, Inuit, and Métis views of the OL issue and that within those distinctions there are multiple voices and multiple points of view and experiences within the public service. As one can well imagine, this goes beyond the mere idea of voluntary self-identification for employment equity purposes and access to language training and assessment within our system.

This discussion paper offers a critical analysis of the role that section 91 of the *OL Act* and other relevant legislation and language of work policies and practices may play in contributing to systemic barriers for Indigenous federal employees. Application of a critical Indigenist lens shed light on the intersection between the OL Modernization framework (policies, legislation, directives, and practices), Indigenous identity, reconciliation, “anti-Indigenous racism”[[7]](#footnote-3), “substantive equality”[[8]](#footnote-4), rights-recognition, linguistic and cultural pluralism, and employment equity self-identification. This highlights the need to consider how modernization of the *Official Languages Act*, including Part VI and section 39 (1)[[9]](#footnote-5), is operationalized within the federal system and the implications this will have for the implementation of [An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples*](https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#h-1301574) (*the UN Declaration Act*), the *Indigenous Languages Act*, the *Multiculturalism Act*, and the *English and French: Towards a substantive equality of official languages in Canada framework* legislative and administrative measures moving forward.[[10]](#endnote-5) Moreover, it emphasizes the need to bring intersecting pieces of legislation and the Charter”[[11]](#footnote-6) into conversation together to pro-actively resolve the barriers faced by Indigenous employees in securing bilingual positions. This will require the establishment of a more inclusive application and understanding of OL requirements (i.e., accounting for positions requiring Indigenous cultural or linguistic competencies).

The analysis sets the stage for influencing policymaking and thinking on OL Modernization policy efforts in support of improving Indigenous representation, retention, and career advancement conditions in the Public Service; however, it is only a small component of a comprehensive action plan that will link Many Voices, One Mind (MVOM) 2.0, and other pending reports and work that touch on official language modernization. Increased horizontal collaboration and coordination by key federal partners (TBS-OCHRO, PSC, Anti-Racism Secretariat, PCH-Official Languages Branch, CIRNAC, Justice Canada, ISC, KCII and Indigenous Networks and employees, with support from KCII) will assist in the development of a comprehensive and integrated OL policy approach, including strengthening its interconnections with other related horizontal policy areas, that sets out concrete actions (see Options for Consideration for more details) under the following thematic areas:

* Reconciliation: Giving Effect to the *UN Declaration Act.*
* Anti-racism and Substantive Equality: Extrapolate principles from Section 15 of the Charter of Rights and Freedoms legal decisions, and human rights laws and decisions linked to “s. 2”[[12]](#endnote-6) of the *Canadian Human Rights Act* to create an analytical framework;[[13]](#footnote-7) and the application of a racial equity/anti-racism framework lens on OL related policies, practices, tools, and evaluation assessment methods. Use of the two frameworks is intended to help guide, inform, and determine whether OL policies, actions, laws, and practices support the redress of barriers/inequities that Indigenous employees may face in securing bilingual positions. They will also help to determine whether reform is needed or not.
* Equity, Diversity, and Inclusion: Improving horizontal alignment and linkages between the OL modernization pillars, implementation of MVOM Action Plan, the federal Anti-Racism Framework, the Clerk’s Call to Action, and the *Public Service Employment Act,* “s. 31 (3)”[[14]](#endnote-7).

As public servants we need to be able to recognize these differences and intersections and reflect on how they impact on policymaking in relation to official language of work requirements, second language training framework development, and practices to ensure that Indigenous employees have equal opportunities to obtain employment and advancement in the federal public service and renew the relationship with Indigenous Peoples. It is important for all of us to think about the system within which we work, and how it can hinder or support a new Canada and bureaucracy built on partnerships with Indigenous peoples, including Indigenous federal employees. Therefore, a decision was made to share the *Impacts of Official Language Modernization on Indigenous Inclusion in the Federal Public Service Workplace* paper with key departmental partners (PSC, TBS-CDI, TBS-OCHRO, ESDC Labour Program, DFO, IEXN, Canadian Heritage, Federal Anti-Racism Secretariat, and Justice Canada) and the federal Indigenous networks (e.g., Indigenous Seniors Leaders Circle (ISLC), Indigenous EX Network (IEXN), Indigenous Federal Employee Network (IFEN)). The paper incorporates federal partner input as a way of strengthening the content in a positive and meaningful way. Where possible KCII adopted partner comments; however, it did not adopt all suggestions since the paper is written from an Indigenist critical lens and should be read from this lens.[[15]](#footnote-8) An Indigenist critique highlights the clash between opposing ideologies in connection with each one’s “cultural assumptions, values, and beliefs” (Bell 2003; van Dijk 1993 cited in Sue 2015, p. 37).[[16]](#endnote-8) KCII plans to share the paper with Indigenous employees and networks (e.g., Indigenous Training and Development and Community of Practice (ITDCOP) and Indigenous Advisory Circles) in advance of engaging with them to build a fulsome set of options for consideration. KCII has also prepared a presentation entitled An Official Languages Data Story that is a companion piece and supplementary to the paper.

## Outline

In 2017/18, the “Many Voices, One Mind Action Plan”[[17]](#endnote-9) (MVOM Action Plan) consultations with Indigenous employees revealed a common theme that the language requirements of positions paired with lack of access to French language training posed a significant barrier to advancement for Indigenous federal employees (KCII 2017). At that time Indigenous employees also offered several “recommendations”[[18]](#endnote-10) for further consideration. In particular, the MVOM Action Plan found that English-speaking Indigenous employees were affected more so than French-speaking Indigenous employees.[[19]](#footnote-9) These barriers continue to manifest in different ways because of key sections (e.g., s. 91, 36 (2), etc.) of the “*Official Languages Act (*OLA*)*”[[20]](#endnote-11) and other policies, decisions, and operational approaches related to language of work requirements for federal positions.[[21]](#footnote-10)

First, over the last 21 years the proportion of positions identified as bilingual rose by 6.6% from 35.3% in 2000 to 41.9% in 2021 (TBS 2022 e).[[22]](#footnote-11) The linguistic profile of bilingual positions has steadily climbed from requiring an intermediate level of proficiency to an advanced one that requires a Level C in oral interaction. The modernized *Official Languages Act* does not specifically mention a linguistic profile; however, a review of the minimum level of second language proficiency for supervisors and managers in designated bilingual regions is part of the non-legislated reform commitments found in the English and French: Towards a substantive equality of official languages in Canada document.[[23]](#endnote-12) It should be noted that almost twice as many supervisory positions are located in bilingual regions which can pose a barrier for Indigenous anglophone employees aspiring to advance their careers. And even if Indigenous anglophone employees successfully attain a CBC level, it might be one less barrier they face, but it is not inconceivable they would continue to face other systemic barriers that could negatively influence their career success in the federal workplace. As well, there is an absence of discussion on how this pattern impacts on the preservation and revitalization of Indigenous languages and culture committed to in the MVOM Action Plan (KCII 2017).[[24]](#endnote-13)

Second, a 2021 decision, [Canada (Commissioner of Official Languages) v. Office of the Superintendent of Financial Institutions](https://www.canlii.org/en/ca/fca/doc/2021/2021fca159/2021fca159.html?searchUrlHash=AAAAAQAmInNlY3Rpb24gOTEiOyAib2ZmaWNpYWwgbGFuZ3VhZ2VzIGFjdCIAAAAAAQ&resultIndex=4), 2021 FCA 159, ensured a workplace uses both official languages in a unilingual English region.[[25]](#endnote-14) While the decision creates an opportunity for federal institutions to choose the means that will enable them to better communicate and create a work environment conducive to the use of official languages in bilingual regions, it also opens the door to impose further linguistic profile changes on English essential positions in other unilingual regions should a similar scenario arise.[[26]](#footnote-12) The 2020-2021 Official Languages Annual Report suggests that 74.7% (8,770) of Indigenous employees were anglophones whereas 25.3% (2,967) were francophones (TBS 2022e).[[27]](#endnote-15) Additionally, the ruling has the potential to make recruitment and retention of Indigenous employees in unilingual English regions increasingly difficult if higher language of work requirements become a new norm as a result of new court remedies or Commissioner of Official Languages (COL) recommendations requiring linguistic profile changes. For instance, 4,281 Indigenous federal employees self-identified in Western Canada, which has higher rates of Indigenous anglophone employee representation (TBS 2022e).

Third, Indigenous employees occupied 4% (3,841 of 94,210) of “bilingual positions”, which required the following levels of proficiency in oral interaction: 1) Level C: 37.6% (1,446 of 3,841); 2) Level B: 61.6% (2,367 of 3,841); and 3) Level A: 0.4% (14 of 3,841) (TBS 2022e).[[28]](#footnote-13) However, in the period from 2015 – 2020, Indigenous employees Second Language Exam (SLE) test pass rates continued to show poorer results in both French oral (53.8%) and writing (50.6%) interactions compared to the reference group (PSC 2023; PSC 2021b; PSC 2020).[[29]](#footnote-14) Indigenous employees, those self-identifying, also have higher rates of retesting and consistently had a higher number of second and third retake attempts for reading, written, and oral interactions (in both B and C levels).[[30]](#footnote-15) Poor SLE test rates in French oral and writing interactions and the number of retakes should not be ignored because of the potential for discrimination in “standardized testing”[[31]](#endnote-16). In 2021, for example, the Ontario Divisional Court rebuked standardized testing in [Ontario Teacher Candidates’ Council v. The Queen (2021 ONSC 7386)](https://www.canlii.org/en/on/onscdc/doc/2021/2021onsc7386/2021onsc7386.html) based on a Section 15 Charter of Rights and Freedoms challenge.[[32]](#footnote-16) It deemed the Province of Ontario’s standardized math proficiency test (MPT) discriminatory against racialized teacher candidates.[[33]](#endnote-17) This case opens the door for Indigenous employees to potentially launch a similar Section 15 Charter challenge with respect to the standardization of French language testing. The case also raises questions about the neutrality of TBS OL related Directives (e.g., mandatory learning and OL and people management, etc.), which are based on dominant values, beliefs, and ideologies.[[34]](#endnote-18) On the surface it appears that OL directives presume that everyone can become bilingual, and everybody can learn a second official language as needed. However, TBS has made an exception for persons with language-learning disabilities but it has not yet considered, for example, the different experience and worldview of those Indigenous employees schooled in their culture and language from those of mixed ancestry with English or French language experience (more details are provided in the OL Data Deck).[[35]](#footnote-17) As a result, the TBS OL related instruments and policies may inadvertently disadvantage certain Indigenous employees more than others beyond those with learning disabilities.

How much more difficult is trying to pass proficiency tests for Indigenous employees?

These findings consider the need for a fuller examination of how the application and interpretation of section 91 of the [Official Languages Act](https://laws-lois.justice.gc.ca/eng/acts/O-3.01/page-1.html#h-384138) and any associated legislation and language of work policies and practices can intentionally and/or unintentionally contribute to systemic barriers in the recruitment, retention, and advancement of Indigenous employees in the Core Public Administration (CPA). This paper also takes into consideration other federal equity, diversity, inclusion, Indigenous languages, and anti-racism initiatives as part of the analysis. The paper concludes with a series of findings and options for consideration on how best to address OL requirements that continue to pose a systemic barrier to Indigenous persons seeking to join the CPA, stay in the CPA, and/or advance their careers in the CPA.

# Official Languages Policy and Legal Framework

“Section 91”[[36]](#footnote-18) of the OLA requires institutions to set the language requirements objectively when needed to meet their duties under the Act, including the linguistic profile of bilingual positions and whether to objectively staff a position, before any staffing action.[[37]](#endnote-19) Additionally, the *Public Services Employment Act[[38]](#endnote-20)* highlights that official languages are an essential qualification (Section 30 – 2) that form part of the definition of merit. Once the language requirements and linguistic profile, if applicable, are established, then the choice of staffing actions is selected. For bilingual positions that means, based on policy requirements, whether to pursue an imperative or non-imperative staffing approach.[[39]](#endnote-21) Interestingly, the requirement to staff bilingual positions imperatively starts with meeting the qualification standards identified in the *PSEA*, unless there are exceptional circumstances for a bilingual position.[[40]](#endnote-22) Staffing action data tell a story of how language of work requirements has played out for the Indigenous federal employee population over the past few years.

According to the most recent PSC data[[41]](#footnote-19), for example, there was a dramatic increase in non-imperative appointments between 2014-15 and 2020-21 (PSC 2022a) due to many factors.[[42]](#footnote-20) More specifically, in 2020/21 70% (313) of non-imperative appointments were made via a non-advertised appointment process of which 47% (208)[[43]](#footnote-21) occurred in five organizations (PSC 2022a).[[44]](#endnote-23) The EC-07 group had the most non-imperative appointments with Indigenous employees occupying only 3.8% (147 of 3,879) of EC-07 positions or 1.2% of Indigenous employees (147 of 11,889) (TBS 2021). The 2021-22 PSC annual report also indicated that in 2019-20, Indigenous Peoples made up 4.9% of non-advertised appointments, a decrease from 2018-19 where it was 5.4% (PSC 2022a). Although the number of Indigenous applicants to advertised jobs (external hires) increased from 2019-20 to 2020-21, the share of applicants decreased from 3.2% in 2019-20 to 2.9% in 2020-21 and they returned to 3.2% in 2021-2022 (PSC 2022a).[[45]](#footnote-22) While Indigenous applicants made up 3.2% of applicants in 2020-21, they only made up 4.0% of appointments compared to a workforce availability of 4% (PSC 2022a). However, this data has limitations in capturing what is really happening considering Indigenous self-identification rate fluctuations could impact on workforce availability calculations.[[46]](#endnote-24) Of the 10,916 Indigenous applicants in the 2020-21 timeframe, 3.6% identified as Inuit, 42.1% as Metis, 46.9% as First Nation and 7.3% as other (PSC 2022b). The analysis suggests that under-representation is a consideration and that the pool of Indigenous bilingual persons is relatively limited. It also raises questions about why Indigenous persons did not apply for the advertised positions and why the percentage of Indigenous Peoples decreased considering there were more non-advertised positions. Lastly, it is not possible to match the number of appointments and the number of advertised non-imperative processes since one process can lead to multiple appointments. For example, if there were 32 non-imperative appointments following an external advertised process, it does not automatically mean that there were 32 non-imperative external advertised processes.

Moreover, application of official language requirements, including the required level of proficiency in the second official language and the choice to staff a position imperatively or non-imperatively, to a position is also guided by Treasury Board policies, directives, and standards in relation to implementing Parts IV, V and VI of the OLA.[[47]](#footnote-23) It also ensures that federal institutions comply with the principles, directives and regulations relating to official languages (Office of the Commissioner of Official Languages 2022). The Treasury Board [Directive on Official Languages for People Management](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=26168) (the Directive)[[48]](#endnote-25), for example, reinforces that “bilingual positions are staffed with candidates who meet the language requirements at the time that they are appointed, unless exceptional staffing situations exist”[[49]](#endnote-26). Correspondingly, 48 organizations used the [Public Service Official Languages Exclusion Approval Order](https://laws-lois.justice.gc.ca/eng/regulations/SI-2005-118/index.html)[[50]](#endnote-27) and [Public Service Official Languages Appointment Regulations](https://laws-lois.justice.gc.ca/eng/regulations/SOR-2005-347/index.html)[[51]](#endnote-28) in the 2020-2021 fiscal year (PSC 2021(a)). The Directive was amended on September 1, 2021, to better address persons with disabilities in relation to official languages.[[52]](#endnote-29)

The Government of Canada also has obligations stemming from several other pieces of legislation that pertain to official languages and Indigenous individuals’ employment in the CPA. First, the *Canadian Human Rights Act* (1985) **ensures equal opportunity to any individuals who may be the victims of “discriminatory practices”** [[53]](#endnote-30) (CHRA 1985, s. 10) **based on a set of “prohibited grounds”** [[54]](#endnote-31) **related to employment matters. Second, u**nder the *Employment Equity Act* (1995), the Treasury Board and the Public Service Commission must collect information to establish the representation of employees from the four designated groups: women, Aboriginal peoples, persons with disabilities and members of visible minorities (paragraph 9 (1)(a)). The workforce information must then be used to assess the underrepresentation of the designated groups (paragraph 9(1)(a)).[[55]](#endnote-32) There is also a requirement to address underrepresentation by reviewing employment systems and identifying employment barriers against members of designated groups (paragraph 9(1)(b)).[[56]](#endnote-33) Third, there is a requirement to treat official language proficiency as an essential qualification as per “section 30”[[57]](#endnote-34) of the [Public Service Employment Act](https://laws-lois.justice.gc.ca/eng/acts/p-33.01/) (PSEA) prior to making an appointment. And fourth, the *Multiculturalism Act,* preserves, enhances, and embeds cultural difference in Canadian society and strives to achieve equity, and uphold Canada’s commitment to human rights. Regardless, the embedment of multiculturalism in a framework of bilingualism does not come without its challenges.[[58]](#footnote-24)

To better address this tension, the Charter of Rights and Freedoms (the Charter) provides additional avenues of support.[[59]](#footnote-25) On the one hand, Section 27 of the Charter (preservation and enhancement of a multicultural society) recognizes Canada’s Indigenous population, French and English linguistic duality, and ethnic, racial, and religious diversity more fully.[[60]](#endnote-35) This provision could be interpreted as cultural diversity or more broadly in terms of collective rights and affirmative measures aimed at preserving the distinct culture and language of other groups (Meyerhoff 1994, p. 916).[[61]](#footnote-26) Legal scholar, Patricia Hughes (2012) reaffirms this idea and suggests that the concepts of equity, diversity, equality, or substantive equality are often used interchangeably and underscore the notion of pluralism (p. 247). Therefore, sections 27 and 15 of the Charter speak directly to the idea of pluralism and equality (Meyerhoff 1994; Persaud 2022; Gibson 1990). While s. 27 is constrained by linguistic dualism (Meyerhoff 1994; Persaud 2022; Gibson 1990), Section 15 (right to equality) promises equality and fairness to all under the law and permits measures to improve the conditions of disadvantaged individuals or groups (Canadian Heritage 2022b).[[62]](#endnote-36) When read together Sections 15 and 27 can advance equality and unity while also helping to address the complexities of a multicultural society, including discrimination.[[63]](#footnote-27) Legal scholars Bain and Bakht, and Persaud (MA Laws student) add a new dimension to the debate by arguing for an expansive and “purposive interpretation”[[64]](#endnote-37) of s. 27 to better address “intersectionality”[[65]](#footnote-28). While their research shows that section 27 and its goal of preserving and enhancing a multicultural society and intersectionality can play a larger role in anti-discrimination law, it also provides insight into how the federal policy domain could better design OL measures using a substantive equality framework (based on intersectionality). This makes sense given the Government of Canada’s commitment to reconciling its relationship with all Indigenous Peoples, including Indigenous federal employees.[[66]](#footnote-29)

Finally, an evolving federal framework supports the Public Service to implement elements of “diversity and inclusion”[[67]](#endnote-38) and address wellness and anti-racism in the workplace.[[68]](#endnote-39) These strategies have a direct and/or indirect link to the “OL legal and policy framework”[[69]](#endnote-40) when it comes to increasing Indigenous employee representation, removal of any barriers to retention and career advancement, and monitoring, evaluating, and reporting on Indigenous inclusion. Presently, the Government of Canada is awaiting the *Employment Equity Act* Review Task Force renewal report, which will likely include advice on how to address a range of workplace equity, diversity, and inclusion issues.[[70]](#endnote-41) It is possible the Task Force’s work may include recommendations that impact on *OLA* Modernization policy and administrative efforts and other areas to better support equity groups. Additionally, the Clerk recently released a [Forward Direction Call to Action](%E2%80%A2%09Call%20to%20Action%20forward%20direction%20message%20to%20deputies%20-%20Privy%20Council%20Office%20-%20Canada.ca) not only asking Deputy Heads to prioritize OL language training for Indigenous and other racialized employees, but to also set goals, measure progress, and be accountable on many different fronts with respect to anti-racism, equity, and inclusion in the federal workplace.

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# Official Languages Act Modernization

*An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts* received royal assent on June 20, 2023. One of the changes introduced in the modernized *Official Languages Act* is a provision that, in bilingual regions, managers and supervisors must be able to operate in both official languages when communicating with employees (e.g., conducting performance appraisals and having sensitive conversations). The modernized Act states that, in bilingual regions, every employee can be supervised in the language of their choice, regardless of the linguistic designation of their position.[[71]](#footnote-30) This means an employee occupying a unilingual position could still request to be supervised in the other official language. More specifically, it means all supervisory positions in bilingual regions will have to be bilingual; however, they will not be required to meet the new requirement if they held their position prior to June 20, 2025.[[72]](#footnote-31)

If this is the case, then cumulatively, all “supervisory positions”[[73]](#footnote-32) in bilingual regions will be bilingual CBC as per the Directive. Non-imperative staffing will remain a possibility if the institution takes measures to guarantee respect for employee language rights. In addition, all manager positions in bilingual regions, unless the incumbent does not have to interact, either verbally or in writing, with anybody, will be identified bilingual and will be staffed imperatively. All of these changes apply irrespective of the classified group and level of the position, for example, it could be an entry-level CR-4 position with supervisory responsibilities (salary range $50,821 to $54,857) or a senior AS-7 position with managerial responsibilities (salary range $100,220 to $114,592) (PSAC 2023).[[74]](#footnote-33) When implementing changes, departments/organizations will be encouraged to review their organizational structures and work descriptions, and adjust them accordingly, to ensure that positions identified as supervisory positions do, in fact, include supervisory duties. The impact on Indigenous employees is presently unclear given they mostly hold positions in the Administration and Foreign Services, Administration Support, and the Operational classification groupings (see OL data deck for more details).

This proposed change will also have other implications for Indigenous employees (mostly anglophone) in terms of meeting language of work requirements. As it stands, 5.2% (12,336) of employees self-identified as “Indigenous”[[75]](#footnote-34) compared to CPA employees of 236,133 (TBS 2023).[[76]](#endnote-42) Of which, Indigenous employees only held 4.1% (4,000 of 98,550) of the bilingual positions in the CPA (TBS 2023).[[77]](#footnote-35) Interestingly, the Indigenous employee linguistic profile in 2020/21 indicates that 32.7% (3,841[[78]](#endnote-43) of 11,737) have either a level B or C (TBS 2022(e); however, from 2015 – 2020, Indigenous employees SLE test rates showed poorer results in both French oral (59.9%) and writing (52.3%) interactions compared to the reference group (PSC 2023).[[79]](#footnote-36) Additionally, the overall success rate for SLE testing in advance French oral interaction was only 33.1% in 2021-2022 while the written was 42.3%, including Indigenous Executives Level C oral interactions at 55.7% (PSC 2022c). The data also confirms the pass rate in English is 50.9% for Indigenous employees versus 59.8% for the reference group (a difference of - 8.9%) (PSC 2023; PSC 2021b).[[80]](#endnote-44) PSC analysis indicates higher SLE pass rates in English testing, especially where it concerns oral and writing language skills and when the proficiency level required is high (level C). Therefore, Indigenous employees not only seem to have lower SLE success rates in written and oral interactions at the C-level, but they also have higher rates of “anglophone speakers”[[81]](#footnote-37) which could further serve to limit career advancement opportunities and retention rates in the future even with adequate access to French language training. At this point, the story is less clear on the experience of Indigenous francophone employees with OL related matters and how it impacts on them. A further study is necessary to better understand their experience(s) in terms of recruitment, retention, and career advancement.

The “*Employment Equity Promotion Rate* *Study – Three Year Update”[[82]](#endnote-45)* raises other considerations for government to think about in relation to OL Modernization. The data suggests, for instance, that Indigenous employees have consistently experienced lower promotion rates overall compared to their non-Indigenous counterparts, as follows: 1) 2001 – 2018, -7.5%; 2) 2006 2019, -8.4%; 3) 2007 – 2021, -8.5%; and 2008 – 2021, -7.5% (PSC 2022b).[[83]](#footnote-38) Mostly, this occurred in the Administration Support, Administration and Foreign Services, and Scientific and Professional categories (PSC 2022 b).[[84]](#endnote-46) From 2008 – 2021 promotion rates to and within the executive category for Indigenous employees relative to their employment equity counterparts were, i.e., -10.8% within the EX-group, 6.7% from EX minus 1 (feeder group) to EX and EX equivalent, 21.7% from feeder groups (EX-minus-1 level) to the (EX) group only (PSC 2022b). The PSC’s promotion study concluded that Indigenous employees were less likely to apply to a staffing process and indicated that there may be a barrier. While the study did not directly conclude that there is a barrier because of this finding, it did state that underrepresentation in promotions may be a result of barriers encountered at the application stage or during the staffing process. Given that 42% of positions in the CPA have bilingual language requirements, that bilingual positions are staffed imperatively and the percentage of Indigenous employees with bilingual capabilities is lower, it is safe to assume that language requirements could be considered one of many factors impeding Indigenous employees from applying and/or succeeding in competitions for advancement purposes.[[85]](#endnote-47) Therefore, increased alignment between OL modernization efforts (e.g., second language training framework, etc.), the Clerk’s Call to Action, and the MVOM Action Plan implementation is necessary to better address OL and MVOM Action Plan policy gaps and solutions in relation to recruitment, retention, and career advancement.[[86]](#endnote-48)

Moreover, the pool of available Indigenous candidates will be minimal for both external and internal staffing processes. For external processes, the Assembly of First Nations estimates that only 10% of First Nation individuals are bilingual. At the time of their submission to the Bill C-13 consultation process, they claimed that the bilingual language requirements would limit First Nations eligibility to these positions to 10 percent of the First Nations population. This is the portion of First Nations Peoples who speak both English and French (AFN 2022). Not only are there fewer Indigenous candidates in general, even within that group, the applicant pool of 42% (and rising) of positions in the CPA will be extremely limited. Language requirements of positions are clearly a systemic barrier to employment and advancement of Indigenous employees in the CPA. Distinctions-based concerns about official languages modernization are difficult to address since the Inuit Tapariit Kanatami and the Métis National Council did not make a formal submission to the Standing Committee on Official Languages.[[87]](#footnote-39) Regardless, a future focus on language-of-work policies and operational practices must consider the potential for impacts on Inuit federal employees located in bilingual regions.

The Treasury Board Secretariat (TBS) has also identified a series of “issues and findings”[[88]](#endnote-49) concerning Section 91, which it plans to address through a three-year action plan. The 2022-2025 Action Plan contains three “pillars”[[89]](#footnote-40) in which eight targeted initiatives will tackle language requirement deficiencies and inconsistencies in connection with awareness/training, compliance, and Section 91 policy related matters (TBS 2022b). As part of this work, there is a strong focus on developing a language training framework to guide institutions in ensuring inclusive language training opportunities are prioritized for and accessible to members of equity-seeking groups. The framework aims to consider the needs of Indigenous federal employees in a way that supports a culture that promotes bilingualism in the workplace as well as ongoing learning and the regular use of second official language skills.[[90]](#footnote-41) To improve maintenance of second language skills, TBS will also include tools on how to regularly use and maintain these skills in the Language Training framework. While important, a Treasury Board access to language framework is not a mandatory instrument such as a policy, directive, or standard. Frameworks provide guidance for the management of the area it focuses on; however, there are no mandatory requirements, see for example the [Foundation Framework for Treasury Board Policies](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=13616), [Framework for the Management of Risk](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=19422), [Policy Framework for the Management of Compensation](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=12084) and [Framework for the Management of Compliance](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=17151). Despite the work to develop a framework for language training, there is some concern that it will not have the force of a mandatory policy instrument, which effectively means that departments will not be bound to implement any requirement. Bill C-13, as adopted, puts some of the legislative and administrative proposals identified in the OL Modernization pillars into place such as strengthening a central agency, internal levers of accountability and coordination, and bilingualism in the public service.[[91]](#endnote-50) Moreover, since there is no centralized fund and language training funding is the responsibility of Deputy Heads, it is conceivable that departmental cost saving measures may impact on Indigenous employee access to language training.

Moreover, TBS is currently undertaking a review of the Qualification Standards in Relation to Official Languages (A-B-C) to reduce barriers from a diversity and inclusion lens in collaboration with the Public Service Commission. Steps are also being taken to increase the minimum second-language requirements for positions that involve the supervision of employees in bilingual regions. This new requirement would only apply to new positions and the timeframe for its implementation will provide time to plan and prioritize language training for feeder groups and to develop recruitment plans. Current position holders would be protected by incumbent rights. This is significant because the Indigenous population grew by 0.1% in the CPA. While the Black and racialized populations grew by 0.7% and 2.4% respectively, and persons with disabilities grew by 1% since March 31, 2020, to March 31, 2023 (Clerk of the Privy Council and Secretary to the Cabinet 2023, p. 25). KCII’s analysis of the Clerk’s report suggests that Indigenous employee growth is stagnant at the non-Ex level (ibid, p. 26). While the Ex-group grew by 0.8% for Indigenous employees, the Black and racialized employee categories grew 0.7% and 3.5% respectively, and persons with disabilities grew 1.8% (ibid, p. 26). Ex groups in all areas sustained continued growth (ibid, p. 26). And the Indigenous Ex-group grew faster than Indigenous non-Ex groups.

# Other Observations and Findings

The MVOM Action Plan remains the strategic reference document of Deputies, its commitments and intended outcomes for Indigenous inclusion in the public service should be upheld.[[92]](#footnote-42) The Knowledge Circle for Indigenous Inclusion notes that although departments have attempted to address access to language training issues, increase Indigenous employee recruitment, and improve linguistic profile barriers through non-imperative staffing approaches over the last 6 years, the 2018/19, 2019/20, and 2020/21 MVOM scorecard findings and the departmental responses to the Clerk’s Call to Action underscore that more is still needed.[[93]](#endnote-51) A comparative analysis of departmental and agency Year 1 responses to the Clerk’s Call to Action and the MVOM Progress Scorecards indicates that low rates of providing access to and/or finding a solution for language training persist, as follows:

* + Year 1 responses only had 8 organizations (out of 68) mention equity-seeking groups or all employees and/or in a few cases Indigenous and equity-seeking groups were prioritized for language training in relation to career advancement. Five organizations stated they offered language training, and one suggested the OL requirement was a barrier for those unable to access language training.
	+ Additionally, the 2018/2019, 2019/20, and 2020/21 MVOM scorecard found:
		- language proficiency requirements posed a significant barrier to promoting Indigenous talent into the EX-ranks.
		- more and earlier language training opportunities in Indigenous employees’ careers was needed.
		- low participation of Indigenous employees in language training.
		- less than 14% (6 out of 46) of organizations could identify how many Indigenous employees had made a request for language training (French or English).
		- fewer than 16% (7) of organizations had committed to offering language training to Indigenous employees in feeder groups for potential management positions.

These findings are of interest to the Federal Government because of its efforts to implement both the MVOM Action Plan and the UN *Declaration Act*, in addition to the work being done on anti-racism and reconciliation and the *Employment Equity Act* review.

## Reconciliation

The Government of Canada has committed to reconciling its relationship with all Indigenous Peoples, including Indigenous federal employees.[[94]](#footnote-43) As part of this commitment, [An Act respecting the *United Nations Declaration on the Rights of Indigenous Peoples*](https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#h-1301574) (*the UN Declaration Act*) and the [Indigenous Languages Act](https://laws-lois.justice.gc.ca/eng/acts/i-7.85/page-1.html) were enacted*.* Both recognize the import of Indigenous languages to the health, well-being, and prosperity of Indigenous Peoples, including Indigenous federal employees. These pieces of legislation raise several additional considerations for the Federal Government to think about.

First, the English and French: Towards a substantive equality of official languages in Canada document (Guidance Document) aims to support the preservation and enhancement of Indigenous languages. The *Official Languages Act* expressly recognizes that the protection it offers to official languages does not limit, repeal, or affect other language rights, including Indigenous language rights. Further, linguistic pluralism is recognized through the *Indigenous Languages Act* (the Act).[[95]](#footnote-44) The Act also states in Section 5 (g) that it contributes to implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as it relates to Indigenous languages. This provision along with its “sub-articles”[[96]](#footnote-45) highlight a conundrum for government with respect to those Indigenous federal employees falling under Indigenous citizenship laws. This is a significant matter since the purpose of the *UN Declaration Act* is to implement the UNDRIP articles, including the right to language (Article 13).[[97]](#footnote-46) A point that is both relevant and applicable to achieving internal reconciliation with Indigenous federal employees. And it begs the question, how will the *OL Act* and the *Indigenous Languages Act*, and their associated policies and practices consider and apply UNDRIP Article 13 to those Indigenous employees falling under Indigenous citizenship laws in the federal workplace (as per UNDRIP Articles 3, 9, and 33)[[98]](#footnote-47)? Indigenous federal employees that are treaty- and Section 35 rights-holders, like other Indigenous Peoples, not only have a constitutional right to the protection of their culture, customs, traditions, and languages but also one under Section 25 of the Charter. Of relevancy to this discussion is the idea that 56.19% of federal institutions leveraged the multilingual capacity, cultural competency, and cultural expertise of employees in designing, developing, and implementing programs, policies, and services (Canadian Heritage 2021b).[[99]](#footnote-48) A *Report on the* *Use of Indigenous Languages in Canada’s Public Service* indicates that employees who use Indigenous languages not only contributed to the delivery of culturally appropriate services to clients, but also to the provision of essential and emergency services at the community-level, and the promotion and preservation of Indigenous languages (PSAC & TBS 2023).[[100]](#footnote-49) An enhanced Indigenous languages profile within the bureaucracy is useful to not only leverage the cultural, but also the linguistic capacity of Indigenous employees in the provision of high-quality services to Indigenous Peoples.[[101]](#endnote-52) This point flags a second question, how can government create policy opportunities to embed equity and linguistic and cultural plurality into a modernized horizontal suite of language and culturepolicies designed for Indigenous federal employees to provide high-quality services? Suffice it to say, pertinent legislation in addition to legal and human rights laws principles can help shape and inform a wholistic and integrated approach to language and culture policymaking while still respecting OL work requirements.[[102]](#footnote-50) This is important considering the following: 1) Part VI requires federal institutions to “consider the institution’s mandate, the public served and the location of the offices” (*OL Act* 2023); 2); 2) the requirement to interpret s. 83 of the *OL Act* with the preservation and enhancement of Indigenous languages; and 3) the Guidance Document identifies the need to account for positions requiring Indigenous cultural or linguistic competencies. In the spirit of reconciliation, there is a need to accommodate the growth and application of Indigenous languages in the work of the Public Service and hence the OL work related policies and practices and the application of s. 91 of the *OL Act*.

[Standing Senate Committee on Official Languages (44th Parliament, 1st Session)](https://sencanada.ca/en/Content/Sen/Committee/441/OLLO/56267-E)

“Aboriginal groups tell us that "official languages" **must refer to the United Nations Declaration on the Rights of Indigenous Peoples**, UNDRIP, and to the fact that Aboriginal people cannot rise in the hierarchy of the federal government if they do not speak both English and French. The fact that they do not speak both French and English is often a consequence of our historically colonial situation.” - Senator Clement

“The issue of Indigenous languages is very close to my heart, because as Commissioner of Official Languages, everything to do with language rights is to some extent our contribution to reconciliation…I think we need to find a way for **the Official Languages Act and the Indigenous Languages Act to reinforce each other** to create a more inclusive linguistic environment.” - Mr. Théberge, (Commissioner of Official Languages)

Second, there is a legislative obligation in the *UN Declaration Act* for an Action Plan that includes “measures that will address injustices, combat prejudice and eliminate all forms of violence and discrimination against Indigenous people” (Justice 2021b). The Truth and Reconciliation Calls to Action also include similar measures that recognize and support Indigenous languages as a fundamental and valued element of Canadian culture.[[103]](#endnote-53) The TRC report also underscores the impacts of residential schools and other forms of colonialism on Indigenous Peoples, and the need to address ongoing systemic barriers to their success and well-being. The Guidance Document flags the need to support the “recruitment and retention of public servants that reflect the diversity of the Canadian population, the Government will recognize a more inclusive application of official language requirements” (Canadian Heritage 2021a). Thus, it stands to reason that this will translate into equal opportunities to obtain employment related to bilingual positions to improve their advancement in federal institutions. Therefore, it is significant that policymakers ensure that a modernized *Official Languages Act* uses an inclusive approach that works in an integrated manner with the *Indigenous Languages* and the *Multiculturalism Acts* in a manner that upholds the importance of official languages but not to the detriment of Indigenous employees own Indigenous languages and cultures. Finally, the language requirements of positions as well as the lack of access to language training have been repeatedly identified as a systemic barrier to the successful employment and advancement of Indigenous individuals in the CPA. Measures must be taken to address these issues and satisfy legislative requirements.

Third, it is necessary to rethink how OL requirements are operationalized within the federal system, including the parameters set out in *English and French: Towards a substantive equality of official languages in Canada for modernization*. Although the government has aligned the modernized *Official Languages Act* with the UNDRIP through an external-facing Action Plan, it has yet to meaningfully engage with Indigenous employees across the federal system on an OL and Indigenous languages strategy and approach for addressing OL work requirement barriers in addition to the intersecting points found in select pieces of legislation (e.g., *Multiculturalism Act, Indigenous Languages Act*, etc.).[[104]](#footnote-51) This will require government to think about Indigenous employees differently than its current approach to voluntary self-identification for employment equity purposes. The KCII *Discussion Paper: Self-identification and Indigenous identity* is helpful on this front because it underscored the entanglement of human rights, rights-recognition, “Indigenous identity”[[105]](#footnote-52), and employment equity self-identification data methods.[[106]](#footnote-53) The paper highlighted the need to rethink how Indigeneity is defined and operationalized within the federal system and the implications this will have for both the implementation of the *UN Declaration Act* and the current Employment Equity Framework.

Interestingly, recent litigation by several First Nations over the validity of six new Métis communities and the prioritization of Métis rights over First Nations treaty rights has brought this issue to the forefront once again.[[107]](#endnote-54) The Métis National Council is concerned the number of people illegitimately self-identifying as Métis will continue to rise. This situation could spill-over into the federal workplace and potentially contribute to the skewing of Métis French language capability rates. For example, we know that Indigenous employees held 4.1% (4,000 of 98,550) of bilingual positions. Of which Métis occupied 2.0% (1986) of the 4% while First Nations and Inuit combined held 2.1% of the bilingual positions. Further scrutiny of any recommendations pertaining to self-identification that the *Employment Equity Act* Review Task Force makes will need to be considered in relation to measuring success and addressing language requirement deficiencies and inconsistencies in connection with awareness/training, compliance, and Section 91 policy related matters.

Lastly, the *UN Declaration Act* aims to advance reconciliation, renew Indigenous-government relations, and implement concrete measures to “eliminate all forms of …racism and discrimination, including systemic racism…, against Indigenous peoples…” (Justice Canada 2021b). This suggests that reconciliation with Indigenous federal employees requires an anti-racism and substantive equality approach to take stock of and change OL policies, practices, and guidelines accordingly. One that not only applies a language-of-work rights lens, but also a racial equity lens to meet the objectives set out in the Clerk’s Call to Action on anti-racism, equity, and inclusion.[[108]](#footnote-54)

## Anti-Racism and Substantive Equality

Although an important Government of Canada priority, the OL Modernization agenda should not act in isolation of other government priorities and commitments. Anti-racism, equity, and inclusion are top of mind for senior officials; however, the application of anti-Indigenous racism thinking, and substantive equality approaches has been absent from government conversations to date. Anti-Indigenous racism and substantive equality can more aptly take employee differences into account, which could allow for differentiated treatment of Indigenous employees to achieve equality with respect to language of work requirements in the workplace. Substantive equality is about achieving true equality of outcomes for Indigenous employees and other employment equity groups. Because s. 15 (2) of the Charter acts in a way that shields ameliorative programs from claims of reverse discrimination, it permits the realization of an end goal of “equality in access, in opportunity, and of outcomes” (Nicholas 2023; Mason & Butler 2021; Government of Canada 2022).

As it stands, *OL Modernization* efforts may not have fully considered the recommendations of the Report entitled *Taking Action Against Systemic Racism and Religious Discrimination, including Islamophobia* (House of Commons 2018) on how to eliminate racial discrimination, inequality, and systemic racism. This report has a bearing on OL Modernization legislative and policy work since the Anti-Racism Secretariat was tasked with developing a federal anti-racism framework because of the report. The framework is designed to embed an anti-racism practice into the departmental review, development, and implementation of new and existing policies, programs, services, and legislation.[[109]](#footnote-55) To date, the Anti-Racism Secretariat was invited to participate in the CBC /Language Training discussion and the language training advisory committee; however, there is a need to revisit what role the Anti-Racism Secretariat should play in relation to any new work going forward.

While it is important to ensure the security and vitality of the French language and take measures to promote the substantive equality of both official languages, an expanded view of substantive equality is needed. One that takes all Indigenous federal employee (anglophone and francophone) views, needs, and experiences into account on language-of-work rights matters. Indigenous federal employees, some more than others, have experienced the “systemic racism”[[110]](#footnote-56) that is inherent in federal institutions. Therefore, it is equally important to recognize and diffuse the interplay of historical practices, dominant norms, and deeply rooted ideological assumptions that have historically disadvantaged Indigenous Peoples. Special measures could include but are not limited to the enrichment of OL Modernization policy efforts in revising OL qualification standards and those of SLE evaluations, fostering the use of Indigenous languages in the workplace, and/or developing an inclusive application of official language requirements based on a substantive equality framework. If put into practice, this type of thinking and framework could better serve to embed measures in OL policies, practices, and guidelines that will help overcome known disadvantages and achieve equality for all Indigenous federal employees.

## Equity, Diversity, and Inclusion

Prior to the enactment of the *UN Declaration Act*, there were numerous reports on diversity, inclusion, anti-racism, and linguistic duality. Specifically, the fall of 2017 was a busy month for government reports with the MVOM Action Plan, [Building a Diverse and Inclusive Public Service: Final Report of the Joint Union/Management Task Force on Diversity and Inclusion](https://www.canada.ca/en/treasury-board-secretariat/corporate/reports/building-diverse-inclusive-public-service-final-report-joint-union-management-task-force-diversity-inclusion.html) (Task Force Report) and [The next level: Normalizing a culture of inclusive linguistic duality in the Federal Public Service workplace](https://www.canada.ca/en/privy-council/corporate/clerk/publications/next-level/next-level.html) (Borbey-Mendelsohn Report)[[111]](#endnote-55) released within months of each other. While the MVOM Action Plan and the “Task Force Report”[[112]](#endnote-56) are clear in their identification of language requirements as barriers to employment and advancement of Indigenous employees, the Borbey-Mendelsohn Report hardly acknowledges the impact of official languages requirements on equity-seeking groups. There is one brief mention of “… other important objectives, including enhancing the representation of Indigenous peoples and persons with disabilities” but no acknowledgement of the distressing impact the failure to achieve the second language proficiency can have on individuals already facing numerous barriers. Furthermore, the Borbey-Mendelsohn Report confirms there is a perception that official language requirements are a systemic barrier for Indigenous employees; if there were no barriers there would be no need to exercise flexibilities.[[113]](#endnote-57)

There is a disconnect between the Government of Canada priorities of reconciliation, anti-racism, diversity, inclusion, and linguistic duality with linguistic duality gaining the most momentum in the CPA. While Indigenous voices are clearly saying that language requirements combined with a lack of access to language training are a systemic barrier to career advancement, the Borbey-Mendelsohn Report as well as the *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts* want to ensure that managers and supervisors are able to operate and communicate in both official languages such that employees can be supervised in the language of their choice. Whereas the “Commissioner of Official Languages”[[114]](#endnote-58) (COL)’s [Implementing Section 91 of the Official Languages Act: A Systemic Problem](https://www.clo-ocol.gc.ca/en/publications/other/2020/section-91-official-languages-act-systemic-problem) (Section 91 Report) calls for even higher levels of bilingualism for all supervisors (i.e., CBC linguistic profiles) to support the duties and functions of the position (e.g., having delicate conversations with employees, or conducting performance reviews). Additionally, cultural safety is another critical factor for managers and supervisors to consider when managing delicate exchanges with Indigenous employees given the wide range of lived and workplace experiences (e.g., employees in distress, Indigenous identity, discrimination, reconciliation, etc.).

Additionally, in his 2022-2023 Annual Report, the COL emphasized there were 207 language of work (Part V) complaints and 714 language requirements (Part XI, s. 91) complaints (Office of the Commissioner of Official Languages 2023, p. 16).[[115]](#footnote-57) Accordingly, the report indicates that 79% of the language of work complaints related to the use of French (e.g., internal communications, training and the provision of individual or central services) while the language requirements complaints focused mainly on the language designation of positions (ibid, p. 7 & 11). The latter point underscores the seriousness of not establishing institutional language profiles objectively, which arguably can result in an institution’s inability to create a bilingual work environment and provide quality services to the public (ibid, p. 10). Moreover, it seems the highest number of complaints in 2022-2023 and over a 10-year period (2013-14 to 2022-23) arose in the Quebec, National Capital Region (Quebec), National Capital Region (Ontario) regions (ibid, p. 16 & 18). There also was a steady increase in the number of complaints in the areas of the language of work and language requirements over the 10-year period with noticeable spikes arising during the COVID pandemic (ibid, p. 19). The 2022-23 report does not indicate who had made the complaints, for instance, anglophones or francophones nor does it include intersectional information. It is possible that the OL complaints procedure privileges some employee voices and not others, creating the potential for bias. Further research is necessary to deepen the government’s understanding of who accesses not only the COL complaints process, but other OL related processes as well given what the literature on ‘employee voice’ tells us.

The academic literature on ‘employee voice’ submits that many factors can impact on whether employees will participate in formalized grievance processes (Klaas, Olson-Buchanan & Ward 2012; Wilkinson, Donaghey, & Dundon, 2020; Bamberger, Kohn, & Nahum-Shani, 2008). Accordingly, the findings imply men are more likely than women to file grievances over pay, work assignment, working conditions, and supervision. While women are more likely to file grievances over gender discrimination, including sexual harassment, and to file lawsuits alleging gender discrimination (Bamberger, Kohn, & Nahum-Shani, 2008). Additionally, racialized groups (e.g., Asians and Latinos) are significantly less likely than Anglophones to file grievances over virtually any issue (Wilkinson, Donaghey, & Dundon, 2020).  And diverse workers voice issues/grievances may vary by gender, race, sexuality, etc (Bamberger, Kohn, & Nahum-Shani, 2008). In all instances, employee voices are often more likely to seek informal processes prior to engaging formally to resolve outstanding grievances/issues (Klaas, Olson-Buchanan & Ward 2012; Wilkinson, Donaghey, & Dundon, 2020; Bamberger, Kohn, & Nahum-Shani, 2008). The literature intimates the employee voice is a universalizing concept that applies to all workers equally regardless of the institutional focus on diversity and inclusion in the workplace (Bamberger, Kohn, & Nahum-Shani, 2008). Such an approach excludes visible minority, LGBTQ2+, Indigenous employees, and other racialized voices in both framing and organizing employee voice interventions emphasizing the potential for bias and systemic discrimination. Additionally, “white normativity”[[116]](#footnote-58) pushes us to think and reflect more fully on whose voices are being heard and whose are not heard in OL and other complaints and investigative processes.

As for Treasury Board official languages policies, the Treasury Board has demonstrated a willingness to modify the official languages policies to achieve key objectives. Indeed, the Directive was modified to allow non-imperative staffing of certain executive-level bilingual positions to accommodate persons with disabilities. TBS also confirmed that non-imperative staffing is an accommodation measure that can be taken in instances where the Government has an obligation to provide accommodations. Exploration is needed on whether this could be a consideration for internal non-imperative staffing at the EX-3 and 4 levels for Indigenous federal employees. Additionally, the [Policy on People Management](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32621) and [Directive on the Duty to Accommodate](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32634) require organizations to provide accommodation on all grounds of discrimination listed in the CHRA, not only for persons with disabilities. An argument could be made that non-imperative staffing is an accommodation measure available to all other employees except for EX-2 to EX-5.[[117]](#footnote-59) The Directive specifies that imperative staffing is the norm and non-imperative staffing can only take place in exceptional circumstances and must be justified in writing. Moreover, further exploration is necessary to determine if there are other best practices for granting exceptions. The current return to office approach, for example, recognizes attachment to community as a reason to grant an exception. It raises the question of whether this practice is suitable for linguistic reasons as well.

# Options for Consideration

This discussion paper has highlighted the ways in which the *OL Act* and other associated legislation and/or language of work-related policies and practices can intentionally and/or unintentionally contribute to systemic barriers for Indigenous federal employees in the absence of a substantive equality framework and lens being applied. Application of a critical Indigenist lens shed light on the intersection between the OL Modernization framework (policies, legislation, directives, and practices), Indigenous identity, reconciliation, rights-recognition, anti-Indigenous racism, linguistic and cultural pluralism, and employment equity self-identification methods. It also highlights the need to consider how modernization of the *Official Languages Act*, including Part VI and section 39 (1), is operationalized within the federal system and the implications this will have for the implementation of the *UN Declaration Act*, the *Indigenous Languages Act*, the *Multiculturalism Act*, and the *English and French: Towards a substantive equality of official languages in Canada framework* legislative and administrative measures moving forward.

The analysis sets the stage for renewing policymaking and thinking on OL Modernization to improve the conditions for Indigenous representation, retention, and career advancement in the Public Service; however, it is only a small component of a much-needed comprehensive action plan that will link MVOM 2.0, and other pending reports that touch on official languages modernization, companion papers, and Association of Professional Executives of the Public Service of Canada (APEX)[[118]](#footnote-60) reports/studies and findings. At first glance, it appears that most of OL systemic barriers apply to Indigenous anglophone employees; however, it is equally important to consider the experiences of Indigenous francophone employees with language of work struggles. This flags the importance of intersectionality and figuring out whether the burdens or barriers require more attention in certain areas.[[119]](#footnote-61) Lastly, more research is needed on how to better support a new Canada and strong bureaucracy that is built on partnerships with Indigenous peoples, including Indigenous employees. The following recommendations are positioned for KCII Indigenous Senior Leaders and Deputy Head consideration, but they must not be considered an exhaustive list.

Increased horizontal collaboration and coordination by key partners (TBS OCHRO-P&C (OLCE) and CDI, PSC, Anti-Racism Secretariat, PCH, CIRNAC, Justice Canada, ISC, KCII and Indigenous Networks and employees, with support from KCII) is necessary to modernize and develop a comprehensive and integrated OL framework that adds the following actions to enhance and build upon the existing OL Framework and other horizontal Action Plans/Strategies linked to Indigenous languages, the Clerk’s Call to Action, the MVOM Action Plan and other overlapping related initiatives:

1. **Giving Effect to the *UN Declaration Act*** (TBS-OLCE Lead/Justice Canada, PSC, PCH, TBS-CDI, ESDC-Labour and KCII support, as required)
2. People Management Policy Instruments: Review all Treasury Board policy instruments (e.g., 2012 Official Languages for People Management, 2017 Policy on Learning, Training and Development, etc.) and policy instruments to ensure alignment with the *UN Declaration Act*.
3. Administrative Measures: Change TBS policy and administrative measure of ‘imperative by default’ to instead promote non-imperative staffing actions for Indigenous employees. Such a measure needs to be available to all Indigenous employees regardless of group and level.
4. Revisit Past Recommendations: Re-examine all recommendations in key reports (e.g., MVOM Action Plan, Task Force Report, Borbey/Mendelsohn Report, etc.) to ensure alignment with the government’s legislative obligations under the *UN Declaration Act* before they are implemented.
5. OL Modernization and *UN Declaration Act*:
	1. Explore and recommend options on how the *OL Modernization* Framework and its associated policies and other pertinent legislation (e.g., *PSEA*, *Indigenous Languages Act*, *Multiculturalism Act*, etc.) will apply UNDRIP Article 13 (right to language) to self-identified Indigenous federal employees falling under Indigenous citizenship laws (refer to UNDRIP Articles 3, 9, and 33).

Develop a plan for aligning OL Modernization Framework measures (legislative and administrative) and those of the *PSEA* with the implementation of UNDRIP articles (Article 13 and others that may pertain to Indigenous languages).

Engage Indigenous federal employees on any proposed policy and administrative measures related to implementing aspects of the modernized *Official Languages Act* to ensure consistency with Article 13 in the UNDRIP.

Note: The Government of Canada must take all measures necessary, including “legislative, policy and administration measures” (Justice Canada 2021), to not only achieve the UNDRIP’s objectives, but to also ensure the laws of Canada are consistent with the UNDRIP.

* 1. Identify Indigenous language issues with Indigenous federal employees through a survey or engagement process.
	2. Conduct a gap analysis of internal federal policies and approaches to determine whether there is sufficient legislative and policy coverage (section 83, reference to modernized *Official Languages Act, Multiculturalism Act* s. 3 (2) e*,* OL Modernization Guidance Document*,* etc) to preserve and enhance Indigenous languages in the federal workplace.
	3. Develop a strategy complete with an Action Plan and funding options to address the use of Indigenous languages in the federal workplace.
	4. Explore and discusspolicy considerations to identify accommodation measures tied to Indigenous Rights related to a potential OL exemption.

Note: The *Indigenous Languages Act* states in Section 5 (g) that it contributes to implementation of the UNDRIP. This provision along with its “sub-articles”[[120]](#footnote-62) are applicable to Indigenous federal employees that are treaty and/or rights-holders.

1. **Substantive Equality and Anti-Racism**
2. Substantive Equality Approach: (TBS-CDI & OLCE & PCH Lead/ESDC-Labour, PSC, departmental representatives, Justice Canada & KCII as required)
	1. Design and implement a substantive equality approach that will take Indigenous federal employee views, needs, and experiences into account, including any recommendations from the *Employment Equity Act* review (see Annex A: A Draft Substantive Equality Model).[[121]](#footnote-63)
	2. Utilize the findings from the substantive equity approach exercise to inform language-of-work rights legislative, policy, and operational practices going forward.
	3. Apply a substantive equality lens (in conjunction with a culturally competent GBA+ lens) to all policies, tools and operational practices related to OL qualification and SLE evaluation standards and pertinent PSEA (s. 31 (3), etc.) and OLA legislative sections (e.g., s. 91, s. 36(2), etc.) in relation to positions requiring Indigenous cultural or linguistic competencies.
	4. Undertake two separate studies to better understand the experiences of Indigenous employees in the following areas and what policy, definitional, and legislative changes may be required: 1) Indigenous francophone, urban Indigenous employees, and other overlapping identity experiences (e.g., Indigenous persons with disabilities, etc.) concerning language of work requirements. This could for example include recommending changes to the barrier definition in clause 2 of the [Accessible Canada Act](https://can01.safelinks.protection.outlook.com/?url=https%3A%2F%2Flaws-lois.justice.gc.ca%2Feng%2Facts%2Fa-0.6%2FFullText.html&data=05%7C01%7Ccarolynlaude%40cmail.carleton.ca%7C8dce642344f740abf53a08db94649eee%7C6ad91895de06485ebc51fce126cc8530%7C0%7C0%7C638266932245730304%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C3000%7C%7C%7C&sdata=YquepskStYRG6%2BdVC6oHEK3CE9aBhU74e8rhsUT3pOk%3D&reserved=0) (ACA) and how it applies to speech/learning challenges experienced by indigenous community members when dealing with official language learning. And recognition of Indigenous sign language as one of the primary languages for communication by Deaf persons; and 2) conduct an examination of the COL and other OL related complaints processes to better understand – who participates and who does not.

Note: This approach better recognizes and diffuses the interplay of historical practices, dominant norms, and embedded ideological assumptions that have historically disadvantaged Indigenous employees. Substantive equality is both a process and an end goal relating to outcomes that seeks to acknowledge and overcome the barriers that have led to the inequality in the first place. When substantive equality in outcomes does not exist, inequality remains (Nicholas 2023).

1. OL Modernization and Pro-actively Setting the Conditions to uphold the intent of Section 15 Special Measures and S.2 CHRA:
	1. Identify, recommend, and implement special language-of-work measures to improve the conditions of Indigenous federal employees, for example:

1) language exemptions for those with many years of service, and/or those with Indigenous language proficiency.[[122]](#footnote-64)

2) use of Indigenous languages in the workplace, including the identification of positions where use of an Indigenous language is recognized as a second required language at work.

3) propose Indigenous language proficiency as a criterion for receiving a Bilingual Bonus (especially in regions where the population of Indigenous Peoples is high).

* 1. Undertake research and policy development to identify those Indigenous federal employees who are have difficulty in learning an OL in terms of OL exemption considerations.
1. Racial Equity Lens: (TBS-OLCE & PSC Lead/PCH-Anti-Racism Secretariat Lead, TBS-CDI departmental representatives, & KCII as required)

Apply the federal anti-racism framework to:

* 1. any proposed materials and tools aimed at addressing investigative errors, omissions and improper conduct resulting from biases or barriers that disadvantage members of equity-seeking groups.
	2. any proposed PSC evaluation assessment methods and mitigation tools/measures to ensure they are bias and barrier free.
	3. any proposed directives/policies/legislation aimed at increasing the Treasury Board’s powers and authority to enact policies, directives, and other policy instruments, and compliance of federal institutions.
	4. any materials/tools associated with the following items:

1) creation of an accountability and reporting framework for measuring official languages.

2) revision of the official languages’ qualification standards and the standards for second language evaluations and minimum second language requirements for bilingual supervisory positions in designated bilingual regions; and

3) approaches involving a more inclusive application of official language requirements for those positions requiring Indigenous cultural or linguistic competencies.

* 1. any TBS materials/tools addressing language requirement deficiencies and inconsistencies in connection with awareness/training, compliance, and OL policy related matters concerning the various sections (e.g., s. 91, s. 36(2), s. 31, etc.). This should also include any relevant PSEA sections and policies related to language of work requirements.

Note: Several considerations relate to this section. First, the work must incorporate an intersectionality and a culturally competent GBA+ lens in addition to the application of the federal anti-racism framework. Second, clarity is needed on how PSC’s new authorities to address bias will tie into a substantive equality approach and the application of the federal anti-racism framework. Third, the OL Modernization guidance document contemplates legislative and administrative proposals under relevant pillars (i.e., strengthening a central agency, internal levers of accountability and coordination and bilingualism in the public service), which should take into consideration how a racial equity lens, intersectionality, and a GBA+ lens will be applied. And fourth, clarity is needed on how the 2022-2025 OL s. 91 Action Plan could fit within the context of substantive equality and a racial equity lens.

1. **Equity, Diversity, Inclusion and Reconciliation** (TBS-CDI Lead/PSC, PCH, PSC, departmental representatives, TBS-OLCE, PCO, ESDC-Labour & KCII as required)
2. OL Modernization Pillar Linkages: Improve policy linkages and horizontal alignment between the OL Modernization relevant pillars[[123]](#endnote-59), the MVOM Action Plan, the proposed federal anti-racism framework, the Clerk’s Call to Action, the *Multiculturalism Act,* and the *Public Service Employment Act* to permit better collaboration on language requirements, SLE testing, and alignment of related policies, guidelines, and practices, for example:
	1. Increase alignment between OL modernization efforts and MVOM Action Plan to better address the following gap areas:
		1. Design, develop, and implement **deliberate and transparent approaches to identifying leadership potential (mid-career, managers, and student-levels), including the necessary supports for these future leaders to meet OL work requirement standards.**
		2. Determine if an accommodation measure is possible for internal non-imperative staffing at the EX3 and 4 levels for Indigenous federal employees.
		3. Explore use of ILP as part of the policy implementation of subparagraph “3(2)(e)”[[124]](#footnote-65) of the Canadian *Multiculturalism Act*.
		4. Explore the use of subsection “20(1), exclusion of positions and persons”[[125]](#footnote-66) of the PSEA in relation to OL exemption.
		5. Implement MVOM Action Plan items related to Indigenous language opportunities, including:

1) culturally appropriate languages training and support within the federal system.

2) creation of opportunities for Indigenous staff to use and be valued for using their Indigenous language; and

3) compensation for Indigenous language users in positions where Indigenous language use is required or an asset.[[126]](#footnote-67)

Note: The Report on the Use of Indigenous Languages in Canada’s Public Service provides insight and will help to guide future discussions on making Indigenous Languages a requirement and not an asset in relation to the matter of a bilingual bonus or compensation for Indigenous language use. It also advances the *UN Declaration Act* Action Plan item on access to federal services in Indigenous languages being led by Canadian Heritage.

* + 1. Develop a data capture tool to record Indigenous employee linguistic capacities that interfaces with the system for capturing official languages.

Note: Many federal institutions use informal systems for employees to disclose the various languages they speak and to make themselves available to provide services in those languages.

* + 1. Develop complementary behavioural insight/macro-simulation initiatives that identify the longer-term impacts of the OL Modernization changes on Indigenous employees. This work will help Deputy Heads and Central Agencies to not only better understand the extent of these impacts, but also how Indigenous employees with overlapping identities may experience discrimination differently and what changes are necessary within the federal system.
		2. Create a ‘right fit’ model that better reflects what it means to hire for Indigenous inclusion as opposed to hiring for representation. A model that incorporates flexibility into the application of official language requirements for any positions requiring Indigenous cultural or linguistic competencies. This action item should also include planning and implementation of a pilot project.

Note: Federal recruitment is mostly focused on hiring for representation purposes, which does not necessarily consider the types of skills that may be required for specific positions. Hiring for inclusion, on the other hand, consists of employees possessing, for example: 1) different ways of knowing based on Indigenous philosophies, cultural protocols, and teachings; 2) ways of being resulting from an Indigenous lived experience or community and cultural connections; and 3) ways of doing wherein Indigenous employees can offer Indigenist skill sets and thinking within the Public Service.

* + 1. Identify opportunities with TBS OLCE through their advisory committee to account for the specific needs of Indigenous persons and Indigenous persons with disabilities within the access to second-language training framework.
		2. Develop a language of work policy that sets out the approach for applying an Indigenous ‘right fit’ and inclusion lens on positions requiring Indigenous cultural or linguistic competencies and/or exceptions for employees with disabilities and other situations.
		3. Apply the *Employment Equity Act* Task Force review recommendations (e.g., self-identification, data justice, etc.).
		4. Undertake an OL diagnostic and gaps analysis that examines bilingualism by level, EE group, and region versus simply by population in addition to studying the impact of changing linguistic profiles of Indigenous employees and other equity-seeking groups.

Note: A gap analysis is needed to plan in preparation for investing in future language training for Indigenous employees.

# Conclusion

Indigenous perspectives on OL requirements are deeply tied to Indigenous identity, reconciliation, and Canada’s colonial history and mistreatment of Indigenous Peoples over the years. The Indigenous Federal Employee Network (IFEN) has worked tirelessly over several years to help shape OL policies to be more inclusive of the unique needs of Indigenous public servants and by extension increase representation.[[127]](#endnote-60) Different thinking and mindsets are needed if the Government of Canada is going to find concrete, realistic, and long-lasting solutions to remove language requirement barriers for Indigenous federal employees going forward.

At this juncture if we do not take additional steps to properly address language-of-work matters, Indigenous federal employees will continue to face difficulty in fully embracing their identity, culture, and being their authentic selves in the workplace. This is particularly significant as linguistic barriers will continue to systematically oppress and encourage Indigenous employees to assimilate to the recognized culture and languages of Canada without offering alternatives or accommodating for difference.

From an Indigenous inclusion perspective, better balance is needed between recognizing Indigenous federal employee difference and the development/renewal of Official Languages policies, directives, and operational approaches. If no steps are taken, a strong possibility exists that Indigenous employees will consider employment and career advancement opportunities with Indigenous institutions or outside of government. A situation that could unintentionally result in a higher representation of Indigenous federal employees who may not possess any form of Indigenous lived experience or community or cultural attachment.

# Annex A: A Draft Substantive Equality Model

**Funding for addressing Indigenous employee OL work requirements.**

**Need linkages between context, input, output, outcome, and informed by context, i.e., follow Treasury Board of Canada policy on results.**

**Context**

**(Must capture different points of departure and equalize them for FNMI and other categories)**

**Substantive Equality**

**Input**

**Resources – funding, people, and infrastructure**

**Outputs**

**activities & services**

**Outcomes**

**Results**

**Correcting inequities is about outcomes and the context and less about input and outputs.**

**Services and activities procured; programs delivered at departmental level.**

**Correcting OL work requirement deficiencies and inequities for Indigenous employees**

**We must ask ourselves:**

1. What does the starting/ departure point of Indigenous employees (e.g., FNMI, non-status, mixed ancestry, urban Indigenous, etc.) and the employee’s location (region, community, urban, etc.) look like? Ensures equity in the various points of departure.
2. Do we understand the root causes of the Indigenous employee’s OL needs and the problem?
3. What is the issue or problem that OL funding, and OL policy directives and/or OL policy approaches are trying to address?
4. Who is driving the requests for assistance with OL work requirements, career advancement, retention, and/or recruitment? Links back to the departure point of Indigenous employees.
5. What are the root causes of Indigenous employee needs that we are trying to address. Note: This could include OL work requirements, wellbeing, recruitment, retention, or career advancement related needs.
6. Can the funding or support for addressing OL work requirements and/or recruitment, retention, and career advancement be streamlined to capture and address the gaps driving the Indigenous employee’s need? Note: This should be based on the employee’s need.
7. What do we need to consider when tracking success?
* Why is the request for assistance being made in the first place?
* Has the Indigenous employee deficit (OL and recruitment, retention, and career advancement) been addressed?
* What happened to the Indigenous employee after receiving assistance/support to address their needs? Did they achieve language proficiency? Did their career advance? Were they successful in a competition? Did they stay in their position and/or within the government?

**Need to establish a baseline**:

* Identify the current state of play as it relates to the Indigenous employee OL landscape and Indigenous recruitment, retention, and career advancement/talent management (e.g., barriers, gaps, opportunities) to achieve Indigenous inclusion in the federal system.
* Information/data that captures the root cause of the barriers.

Note: This draft framework draws upon best practices identified in both the human rights literature on substantive equality and a model for measuring the achievement of substantive equality based on Jordan’s Principle.

# Endnotes

1. Departments include the Public Service Commission (PSC), Indigenous Services Canada (ISC), the Canadian Northern Economic Development Agency (CanNor), the Treasury Board Secretariat (TBS) - Official Languages Centre of Excellence (OLCoE), the Knowledge Circle for Indigenous Inclusion (KCII), etc.) [↑](#endnote-ref-1)
2. The working group brought together key partner representatives (e.g., PSC, OLCE, KCII, ESDC, IFEN, DFO, TBS-CDI, IEXN) to develop policy proposals and participate in OL reform work. [↑](#endnote-ref-2)
3. OLWG discussions focused on changes that would help Indigenous employees to progress through policy mechanisms such as non-imperative staffing at the executive level and adapted language training; however, IFEN wanted to focus on changes that would permit exemptions and/or lowering of language profiles for Indigenous public servants. IFEN surveyed Indigenous employees, but the survey results were not shared. IFEN members discontinued participation in the working group because their mandate required them to focus solely on full exemption instead of second language training and an SLE evaluation review to improve the testing process. [↑](#footnote-ref-1)
4. Indigenous identity is complex given its racist historicity and the present conditions that encase Indigeneity in the “social, economic and political systems of Canada that are rooted in dominant norms, values, ideologies and laws” (Hughes 2020) and not in Indigenous ways, practices, and laws. Essentially there are two schools of thought on Indigenous identity formation. First, some Indigenous Peoples, communities, and scholars (Keeptwo 2021) believe that only individuals can and should determine their Indigenous identity through self-identification. Whereas Indigenous scholars argue the responsibility lies with Indigenous governments to determine the criteria for who claims an Indigenous identity (Brayboy 2005; Deloria 1970, Vizenor & Lee 1999, & Warrior 1995 in Castagno & Lee 2007; Indigenous Bar Association 2011). In fact, Articles 33 and 9 in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), reinforce Indigenous Peoples right to “decide their own identities and procedures of belonging” (Justice Canada 2021) in addition to their right to belong to a community or nation. These divergent viewpoints expose a tension between the meaning of Indigenous identity and the validity of self-perception identity formation over ‘being Indigenous’. [↑](#endnote-ref-3)
5. Reconciliation means different things to different people. It is important to know that the language used by the government does not necessarily align with that of Indigenous perspectives. Indigenous perspectives are varied as well. For some Indigenous persons, the meaning of reconciliation can fluctuate from renewed relationships, transformations in either the political or socio-economic contexts to the preservation of the status quo. For others, it is the struggle for self-determination to reconcile Indigenous nationhood in a renewed legal and political relationship with the Government of Canada. [↑](#endnote-ref-4)
6. Making this distinction is necessary because not all Indigenous peoples have treaty rights and many section 35 constitutional rights-holders are not treaty peoples. Treaty-rights holders are those Indigenous persons who have certain rights specifically recognized under a treaty agreement between a specific First Nation, Métis, and/or Inuit group and the Crown. Whereas rights-holder have constitutionally protected Aboriginal rights to the land that were exercised prior to colonial rule. There is a further change to who is considered Aboriginal Peoples in Canada. In R v Desautel (2021), the Supreme Court found that **non-citizens and non-residents of Canada can claim an Aboriginal right under the Constitution** (para 23)**.** The decision confirms Aboriginal peoples of Canada signifies “modern-day successors of Aboriginal societies that occupied Canadian territory at the time of European contact” (Desautel 2021, para. 31) regardless of a present-day location outside of Canada. The court decided that excluding “Aboriginal peoples who moved or were forced to move, or whose territory was divided by a border, would add to the injustice of colonialism” (ibid, para. 33). Lastly, voluntary self-identification includes individuals who self-indigenize due to a distant Indigenous ancestor from hundreds of years ago, but these persons do not have recognized rights. [↑](#footnote-ref-2)
7. Anti-Indigenous racism affects Indigenous Peoples, including Indigenous federal employees, on three-levels: “interpersonal, cultural, and systemic” (Churchill & Pulfer 2019, p. 34). However, systemic, and interpersonal racism are what form the basis for undermining the collective rights of Indigenous Peoples. It is the effects of “Whiteness, including White identity and White resistance” (Ward 2018, p. 16) and “race and state-constructed identities” (Ontario Anti-Racism Directorate 2021) that reinforce dominant ideas of how Canadian society should operate and the role of Indigenous Peoples within that social fabric. The same is equally true in the public service context. [↑](#footnote-ref-3)
8. Substantive equality means giving extra help when it is needed. It also recognizes that disadvantaged people have different points of departure, and they must be provided with opportunities (Mason & Butler 2021; Hughes 2012; Nicholas, 2023; ISC 2019; Sinha et al 2021; Gaspard 2022). Recently, Justice Abella characterized substantive equality as “a remedy for exclusion and a recipe for inclusion” (cited in Sinha et al 2021, p. 25). In support, Gaspard (2022) claims the “true achievement of equality in points of departure” is to give everyone equal opportunity to thrive. This idea is embedded in s.2 of the *Canadian Human Rights Act (CHRA)* (ibid, p.5). Fredman (2016) suggests there is a need to interpret substantive equality more broadly considering the right to equality is a contested term (p. 714). And that the right to equality is responsive to “real wrongs” (ibid p. 714) no matter what the situation. Legal and scholarly views emphasize the importance of special measures and pro-active policy solutions to correct disadvantage and under-inclusion (Government of Canada 2022; Mason & Butler 2021; Nicholas 2023; Sinha et al 2021; Fredman 2016; Koshan 2014). To pro-actively address Indigenous employee barriers, then distinctions-based measures must reflect their unique needs, circumstances, and points of departure. Implementation of substantive equality should not only “embrace its relational and collective aspects” (p. 40), but also measure it for equal outcomes as opposed to sameness treatment (Sinha et al 2021, p. 27; Fredman 2016, p. 722). Substantive equality should instead focus on reducing the gap between the “more disadvantaged and the less disadvantaged.” (Fredman 2016, p. 722). Without action, inequality will remain. [↑](#footnote-ref-4)
9. Section 39 (1) commits to equal opportunities to obtain employment and advancement in federal institutions. It also promises equitable participation of English-speaking and French-speaking Canadians without regard to their ethnic origin or first language learned. Considering this interpretation, it is pertinent to question whether Part VI of the *OL Act* holds the potential to be an entry point to equity. If this is true, then what new steps and measures will the federal system take to provide Indigenous employees with equal opportunities to obtain employment related to bilingual positions to improve their advancement in federal institutions? Note: The provisions governing participation in the *OL Act* are not subject to court remedy; however, Part VI confirms the Commissioner of Official Languages can conduct investigations. Additionally, Part VI does not establish duties, nor does it confer rights with a basis in the Constitution. It also does not take precedence over other federal laws unlike other parts of the legislation. [↑](#footnote-ref-5)
10. ####  We also want to point out that Bill S-3 amends the Interpretation Act such that Acts of Parliament and regulations are to be construed as upholding the Aboriginal and treaty rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them. It also amends or repeals non-derogation clauses in the following sections of the other Acts: 1.‍1 of An Act to amend the Canadian Human Rights Act,  3 of the Indigenous Languages Act, and 2(2) of the United Nations Declaration on the Rights of Indigenous Peoples Act (Bill S-13, 2023, first reading of Senate).

 [↑](#endnote-ref-5)
11. This reference includes the *Indigenous Languages Act*, the *Multiculturalism Act*, the modernized *OL Act* (in particular Part VI), and the intentions of substantive equality as set out in section 15 of the *Charter of Rights and Freedoms* decisions, and s. 2 of the *Canadian Human Rights Act* and human rights laws. [↑](#footnote-ref-6)
12. Section 2 of the *Canadian Human Rights Act* (1985) states that:

[…] all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices [...]. [↑](#endnote-ref-6)
13. Gaspard (2022) suggests that the jurisprudential interpretation of section 15 of the Charter and human rights tribunal decisions are the richest sources in defining formal and substantive equality (p. 5). Additionally, she acknowledges that human rights laws have enriched the interpretation of section 15 of the Charter and vice-versa concerning substantive equality (ibid, p. 5). [↑](#footnote-ref-7)
14. Section 31(3), under the qualification standards section, states:

When establishing or reviewing qualification standards, the employer shall conduct an evaluation to identify whether they include or create biases or barriers that disadvantage persons belonging to any equity-seeking group. If a bias or barrier is identified during the evaluation, the employer shall make reasonable efforts to remove it or to mitigate its impact on those persons. [↑](#endnote-ref-7)
15. This type of lens problematizes institutional thinking, practices, and policymaking in a good way to honour Indigenous inclusion and bring Indigenous ways of knowing, being, and doing into the federal workplace. An Indigenist critical lens aims to decolonize western knowledge and practices while also creating space for different ways of “seeking, analyzing, and producing new knowledge” (Rix et al 2018). As Kovach (2009) and other Indigenous scholars argue, Indigenist research exposes “epistemic violence and domination” (Walker, 2013) and offers a counter-narrative to Western research paradigms (cited in Johnston, McGregor & Restoule 2018). Application of an Indigenist critical lens is designed to produce alternative ways of thinking about Indigenous inclusion in the public service and to create a truer practice of Indigenization within the government policymaking and operational setting. A critical Indigenist lens was used to examine Treasury Board and other federal official languages policies, various reports, and select data sources pertaining to Indigenous employees’ employment as well as the evolving language requirements concerning CPA positions. [↑](#footnote-ref-8)
16. On the one hand, the master narrative depicts historical and cultural themes of racial progress, of egalitarian relations, of a fair and just society, of equal access and opportunity, of meritocracy, of colour blindness, and emphasizes that discrimination is bad. Essentially, the master narrative or White Talk perpetuates power differentials and who controls the gateways to privilege and opportunities (Wing Sue 2015, p.45). Back Talk, on the other hand, constitutes the racialized story that opposes the master narrative (Wing Sue 2015, p.37). It is akin to telling on racism, which then requires people to act. [↑](#endnote-ref-8)
17. The [Many Voices One Mind: a Pathway to Reconciliation](https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/knowledge-circle/many-voices.html) (MVOM) strategy was published in December 2017 and developed by the Interdepartmental Circles on Indigenous Representation based on consultations with current and past federal public servants. The objective was “to better understand the challenges and barriers faced by Indigenous Peoples within the Public Service.” (KCII 2017). [↑](#endnote-ref-9)
18. Respondents recommended taking the following measures: 1) examine opportunities and programs to increase Indigenous employees’ access to culturally appropriate French language training and support during the language training process; 2) bilingual language exemptions; and 3) reduce French language requirements particularly when Indigenous employees work with Anglophone Indigenous communities (KCII 2017). [↑](#endnote-ref-10)
19. While Indigenous anglophone employee experiences with OL systemic barriers are more prominent, it would be short-sighted to assume that Indigenous francophone employees do not experience similar or different barriers. An engagement process is proposed to capture and shed light on the barriers/challenges experienced by Indigenous francophone and other Indigenous employees with intersecting identities and lived experiences. There will also be a need to further examine the intersection of equality rights and OL to better balance equity considerations, both Indigenous and linguistic, going forward. TBS-OCHRO highlighted that French-speaking employees, whether Indigenous or not, do, bear a linguistic equity burden because they are often not able to work in their language of choice to the same extent as English-speakers. This suggests they may experience a greater burden given their limited ability to work in their preferred language as opposed to when employees are asked to be bilingual but are then able to work in their preferred official language. The paper should be read with inclusion in mind to ensure the identification of intersectional and equality challenges faced by all Indigenous federal employees. [↑](#footnote-ref-9)
20. The purpose of the [Official Languages Act](https://laws-lois.justice.gc.ca/eng/acts/o-3.01/page-1.html) (OLA) is in part to “ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions…in communicating with or providing services to the public and in carrying out the work of federal institutions” (OLA, section 2 a). The modernized OLA also attributes powers to the Treasury Board Secretariat (TBS) for the general direction and coordination of the policies and programs to implement Parts IV (communication with and services to the public), V (languages of work) and VI (participation of English-speaking and French-speaking Canadians), and subsection 41(5) and 41 (7)(a.1) with Part VII (Advancement of Equality of Status and Use of English and French) (ibid, section 46). [↑](#endnote-ref-11)
21. KCII has developed a data presentation that is a companion piece to the OL discussion paper. The information offers insights into the claims of OL barriers continuing to manifest for Indigenous employees. [↑](#footnote-ref-10)
22. The highest percentage decrease was in French-essential positions (TBS 2022(e)). Additionally, it is important to point out that the obligation in s. 91 of the OL Act has not changed over the years. It requires that in the context of staffing actions, language requirements be established in an objective manner (qualitative in nature and not quantitative). In other words, it does not imply an identified number of bilingual positions, and/or French and English essential positions. Nor does it suggest that all the language profiles were established objectively and without bias during this period. [↑](#footnote-ref-11)
23. The proposed changes to 3.1 paragraph 36 (1)(c) are as follows and will come into force in two years: 1) create a work environment that is conducive to the effective use of both official languages; 2) managers and supervisors are able to communicate in both official languages with employees in carrying out their managerial or supervisory responsibilities; and 3) employees are supervised by their managers and supervisors in the official language of their choice, regardless of the linguistic identification of their position in designated bilingual regions. It is also important to point out that the Second Language Evaluation profile of CBC does not equate to near native fluency, but rather it refers to the level of second language proficiency for the 3 skills. The Treasury Board [Qualification Standards in Relation to Official Languages](https://www.canada.ca/en/treasury-board-secretariat/services/staffing/qualification-standards/relation-official-languages.html) also refer to Technical or Specialized Language Skills – Code P for language proficiency in one or more of the 3 language skills, possibly at a native or near native proficiency. Near-native fluency would probably relate more to the first than the second. [↑](#endnote-ref-12)
24. The MVOM Action Plan (2017) identified several action items with respect to greater inclusion of Indigenous languages use in the workplace, including the identification of positions where use of an Indigenous language is recognized as a second required language at work, creation of opportunities for staff to use and be valued for using their indigenous language, and compensation for Indigenous language users in positions where Indigenous language use is required or an asset (KCII 2017). [↑](#endnote-ref-13)
25. This decision was about the bilingual competency of specific positions to ensure communication between employees in a unilingual and a bilingual region in such a way that the burden of communicating in a second language does not fall solely on the bilingual employee in a bilingual region. The complainant (occupies a bilingual position in Montreal) regularly worked with colleagues (who held English essential positions) in the Ontario region (Toronto) to obtain information needed to prepare and produce reports for the public in French. All exchanges, verbal and written, were conducted in English. The complaint implied the Office of the Superintendent of Financial Institutions had not taken the necessary measures to ensure the use of both official languages as per section 36(2) of the *Official Languages Act*. It also questioned the need for OSFI to provide a service to bilingual generalists under the meaning of subsection 36(1)(a) and whether the Federal Court had erred in its interpretation of the principles set out in *Beaulac* applying only to the language rights of a provincial linguistic minority. The Court determined OSFI had breached its language duties to Mr. Dionne under [subsection 36(2)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-31-4th-supp/latest/rsc-1985-c-31-4th-supp.html%22%20%5Cl%20%22sec36subsec2_smooth) of the OLA, but not under [paragraph 36(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-31-4th-supp/latest/rsc-1985-c-31-4th-supp.html#sec36subsec1_smooth)(a) of the OLA. The decision to dismiss Mr. Dionne’s application was set aside, and the appeals were allowed. [↑](#endnote-ref-14)
26. The Honourable Peter Annis (2022), a retired Federal Court judge, states that the Court of Appeal decision in Canada (Attorney General) v Viola, [1991] 1 FC 373 [Viola] confirmed section 91 “was but a revised statement of the duty … to maintain the principle of selection based on merit” (p. 2). He claims that in the Office of the Superintendent of Financial Institutions (OSFI) decision, the “merit principle in staffing actions, enshrined in the 1988 OLA, has been trumped by language rights” (p. 3). His line of legal reasoning suggests Francophone language rights are regularly favoured over those of Anglophones because of how the “purposive interpretation principle” (from 1999 Beaulac decision) is applied (p. 3). The OSFI decision, he argues, is an example of how a Commissioner of Official Language order prioritized “Francophone language rights over the merit principle in federal institution staffing actions” (p.3). From his perspective, this suggests the potential for bias because the order upheld the language re-designation of 11 English essential positions and added two bilingual supervisory positions going beyond what the Applicant’s pleading requested (p.3). Additionally, he claims there was no supporting provision in the OLA for this order (p.3). Nonetheless, the counterargument suggests the Federal Court of Appeal (FCA) did use precedent and did not break new ground in the OSFI decision. According to the FCA, Annis’ reading of the Beaulac decision “is in no way supported by either the case law or the wording of the provisions at issue” (Labelle Eastaugh & Poliquin 2023). The FCA called Annis to task for promoting negative stereotypes and assuming without evidence that francophone employees receive preferential treatment (ibid 2023). The former Federal Court judge Annis presided over the *Dionne v. Office of the Superintendent of Financial Institutions, 2019 FC 879* [Dionne] decision. He argued that the FCA decision did not engage with the ‘merit staffing’ and OLA Section 91 discussion as set out in the Dionne decision. In contrast, the National Post authors, both lawyers, note the FCA relied on the standard definition of merit, which according to the *Public Service Employment Act* states “official language proficiency is part of the definition of merit” (ibid 2023). Former judge Annis offered the counter argument that the real legal question is whether the staffing of 13 positions in Toronto met the requirement of OLA s. 91, which stipulates that all positions must be based on merit (Annis 2023). There is some question about whether Annis’ rebuttal is somewhat biased because it seems to embrace a restrictive logic to French and Francophones regardless of the legal arguments. See the Annis rebuttal paper for a fulsome explanation of his legal reasoning on the failures of the FCA OSFI decision. Despite these legal wranglings, both Annis’ rebuttal and the FCA OSFI decision highlight the tension between achieving equality and striking a balance with respect to official languages. The Dionne decision did not require any changes to the present TBS OL policies. [↑](#footnote-ref-12)
27. This could have significant impact on regions in Western Canada where higher rates of Indigenous anglophone employee representation exists. According to the annual Employment Equity report, Indigenous federal employees self-identified, as follows: 1) Western Canada (4,281); 2) Ontario Region (1,332), a small portion of Eastern and Northern Ontario are designated bilingual which will impact on the Indigenous employee count; 3) Eastern Canada (899); and 4) Northern Canada (268) (TBS 2023). [↑](#endnote-ref-15)
28. The numbers do not tell us if there are employees occupying positions with a requirement for Level B that have SLE results indicating they achieved Level C. [↑](#footnote-ref-13)
29. The 2015 - 2020 data is the combined overall pass rates for Indigenous employees’ test taking in FR writing and oral interactions that can be broken down as follows: 1) FR oral intervention, Level B 75.7% (602) and Level C 28.4% and 2) FR writing oral intervention, Level B 50.2% (1417) and level C 40.7% (59). Whereas the 2021/22 SLE success rates for all persons indicate the poorest results arise in Level C French oral interaction (33.1%) and the highest pass rate is in Level B English oral interaction (93.7%). However, the data also flags that Indigenous employee English oral interaction was higher at 84.5% than the reference group (PSC 2022c). The PSC has observed higher SLE pass rates in English testing, especially with productive language skills (oral and writing) and when the proficiency level required is high (level C). Data from 2015 – 2020 confirms the pass rate in English is 50.9% for Indigenous employees versus 59.8% for the reference group (difference of - 8.9%), and pass rates in French of 28.4% and 37.1% respectively (difference of -8.7%) (PSC 2023). The pass and retest rates for the SLE program reflect the same patterns as self-reported official-language bilingualism in the population. Additionally, the Census data shows that Francophones have higher rates of official-language bilingualism than Anglophones, for instance: 9.2% of speakers whose mother tongue is English self-identify as bilingual; and 46.2% of speakers whose mother tongue is French self-identify as bilingual (PSC 2023; Statistics Canada 2016). [↑](#footnote-ref-14)
30. Rates of retesting are logically related to pass rates. That said, the differences are not unexpected given what we know about self-reported rates of bilingualism (PSC 2023). Census data, for example, shows that a smaller proportion of Indigenous Peoples report being able to conduct a conversation in English and French (10.5%) versus non-Indigenous peoples (17.9%) (Statistics Canada 2011). Group differences on the SLE tests both for pass rates and retesting rates are lower than expected given this baseline level of bilingualism. [↑](#footnote-ref-15)
31. The point concerning standardized testing is that it discounts cultural difference. Instead, it assumes that everyone is the same, has the same worldview, etc. and only permits certain types of accommodation. Moreover, an anti-racism lens has not been applied to government legislation, policy and practices with respect to OL related matters. This increases public service vulnerability to claims of systemic racism given that policies and practices are based on dominant ideologies, values, and beliefs that did not necessarily account for cultural difference. Considering this situation, the perpetuation of inequality may be at play depending on how bias was thought about at the time of developing the standardized testing methodology. Standardized testing can also be considered a tool of amelioration depending on how the data is used and interpreted. [↑](#endnote-ref-16)
32. The legislative provisions creating the math proficiency test (MPT) were deemed unconstitutional and therefore had no effect (OTCC 2021, para. 167 a, b, c). The decision found there were other, less detrimental, means to achieve the objective yet the province chose to move forward with the MPT despite its discriminatory effect. [↑](#footnote-ref-16)
33. The case determined that non-white ethno-racial teacher candidates were disproportionately unsuccessful at a higher rate than White candidates (OTCC 2021, para. 33). It also confirmed that “no universal measure for what level of statistical disparity is necessary to demonstrate disproportionate impact and the court should not craft rigid rules on this issue” (ibid, para. 62). Although the court did find the deleterious effect on diversity was somewhat ameliorated by allowing candidates to retake the test, it reasoned that this did not make the test any less discriminatory (ibid, para. 3). The court ultimately found that mandated assessments were a “biased barrier rather than a screen for quality” (OTTC 2021, para. 21c). [↑](#endnote-ref-17)
34. A universalized approach to policymaking, premised on the equal treatment principle, assumes everyone is the same. This understanding abstracts individuals from parts of their identity and treats them entirely on “merit.” (Fredman 2016, p. 718 & 719) Reasoning along these lines is highly problematic to different groups (e.g., Indigenous, visible minority, women, etc.) because ‘merit’ is often “a product of the dominant group” (Fredman 2016, p. 719). And it results in tremendous pressure on the groups experiencing disadvantage to conform to dominant ways and norms. [↑](#endnote-ref-18)
35. The IFEN Fact Sheet states: “Indigenous peoples in Canada come from a diverse range of linguistic and cultural backgrounds, and many have not had the same opportunities to learn and become proficient in an official second language as other public servants. In addition, Indigenous languages are the languages of this land. It is only through colonialism that English and French have been forced upon Indigenous peoples and prioritized as official languages. The proposed OL changes could result in the exclusion of capable and qualified Indigenous public servants from management positions in bilingual regions and could perpetuate systemic barriers to Indigenous peoples’ full participation in Canadian society. This is particularly concerning given commitments to the United Nations Declaration for the Rights of Indigenous People which calls for the full participation of Indigenous people in the public service” (IFEN 2023). Additionally, IFEN (2023) point out that Indigenous peoples may “feel like second-class citizens when they are required to meet bilingual language requirements, which may be more difficult for them to achieve due to historical and ongoing impacts of colonization, and the systemic discrimination they face in accessing education and employment opportunities”. [↑](#footnote-ref-17)
36. Section 91 of the *OL Act* indicates that “nothing in this Act authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken” (OLA 2023). In other words, it requires institutions to objectively establish the language profile of positions (unilingual, bilingual, either/or), based on the functions and responsibilities the incumbents will be required to perform, to ensure OL obligations are met. [↑](#footnote-ref-18)
37. Four possibilities exist for the language requirements of a position: English-essential, French-essential, bilingual or either/or. Additionally, the linguistic profile of a bilingual position is designed to reflect the level of skill required in the incumbent’s second official language, which the [Qualification Standards in Relation to Official Languages](https://www.canada.ca/en/treasury-board-secretariat/services/staffing/qualification-standards/relation-official-languages.html) has established as A, B and C in reading, writing and oral. Most bilingual positions have a profile requiring either an intermediate level (B) or an advanced level (C). [↑](#endnote-ref-19)
38. The PSEA does not fall under the jurisdiction of the PSC. Any minister can bring forward changes to the PSEA. [↑](#endnote-ref-20)
39. Imperative staffing necessitates that a candidate meets the language requirements and linguistic profile at the time of appointment whereas non-imperative staffing allows for the possibility of an individual who does not possess the language skills to be appointed. Managers must provide written justification when using a non-imperative staffing approach. [↑](#endnote-ref-21)
40. As per the *PSEA*, all qualifications need to be met at the time of appointment. For second language proficiency, in exceptional circumstances, a bilingual position may be staffed on a non-imperative basis. What this means is that the position has been identified as not requiring, at the time of the appointment, occupation by a person who meets the required level of proficiency in both official languages (see full definition at <https://laws-lois.justice.gc.ca/eng/regulations/SI-2005-118/page-1.html#h-611615>). [↑](#endnote-ref-22)
41. This is the most recent data to date. We anticipate the publishing of the 2021/22 data soon. [↑](#footnote-ref-19)
42. PSC has not indicated they would conduct a further study into the causes of such a drastic change (345% increase) although one can assume that the increasing number of positions requiring an advanced level of proficiency is limiting the pool of eligible candidates who meet all the merit criteria except for the official language requirements. [↑](#footnote-ref-20)
43. This number consists of advertised and non-advertised appointments. [↑](#footnote-ref-21)
44. Of the 313 appointments, 236 (75%) were done via internal non-advertised appointment process and 77 (25%) were done via an external non-advertised process. During this period, 6 non-advertised (EX1 and EX5) and 12 advertised (EX1 and EX2) non-imperative appointments occurred respectively. There was a total of 32 non-imperative appointments following an external advertised process and 100 non-imperative appointments following an internal advertised process. [↑](#endnote-ref-23)
45. Hundreds of thousands of applications are received annually in the federal public service; however, in 2021-22, the number of applicants (437 363) decreased by 8.3%. Despite a decrease in the number of applicants, employment equity group members continued to maintain a strong interest in joining the public service (PSC 2022 a). [↑](#footnote-ref-22)
46. The evidence suggests that Indigenous identity is not static, it occurs between the different Indigenous population groups. While employment equity data could help to paint a story of how identity is understood at different points in time, it must also take into consideration that Indigenous mobility arises both into and out of the Indigenous identity categories. Data from the 2011 and 2016 census periods, for example, showed greater flow patterns in the non-Status Indians and Métis population categories, and a lesser movement in the Status Indians and Inuit categories (O’Donnell & Lapointe 2019, p.6). While there was movement between the non-Status and Métis populations, much of the flow went into the non-Indigenous category (p. 6). The findings also showed that those entering the Indigenous population outnumbered those who left, and that Status Indian and Inuit response rates remained consistent over these census periods (p.11). The changes to respondent responses were attributed to several factors, for instance: 1) social environment; 2) interpretation of family history; 3) shifting understanding of First Nation Metis and Inuit identity; 4) perception that an Indigenous identity claim could lead to benefits (at the individual and collective levels); 5) legal or legislative changes; and 6) changes to the Indian Act eligibility criteria (p. 12). These statistical findings imply that Indigenous identity has a shifting dimension to it, which will require further consideration with respect to data collection and analysis, including how the WFA is calculated. [↑](#endnote-ref-24)
47. The provisions of the OL Act governing participation are not subject to court remedy because Part VI of the Act does not establish duties and does not confer rights with a basis in the Constitution. Unlike the other parts of the Act, Part VI does not take precedence over other federal laws. The Commissioner of Official Languages, however, can conduct investigations in this regard. (OLA 2023) [↑](#footnote-ref-23)
48. Managers are responsible for linguistic identification of a position and ensures that it reflects the functions and duties by 1) objectively determining if the position requires the use of one or both official languages; and objectively establishing the required level of proficiency in the second official language if the position requires the use of both official languages (TBS 2012, s. 6.2.1). [↑](#endnote-ref-25)
49. The Directive provides the following examples of what could constitute an exceptional staffing situation: 1) when the potential applicant pool is very limited due to the highly specialized nature of the duties and the knowledge needed for a position; and 2) when the institution receives an insufficient number of applications from members of one or the other official language community. [↑](#endnote-ref-26)
50. Non-imperative staffing is an exceptional staffing situation whose circumstances are defined by *the Public Service Official Languages Exclusion Approval Order,* under the jurisdiction of the PSC. Non-imperative staffing can take place by virtue of the [Public Service Official Languages Exclusion Approval Order](https://laws-lois.justice.gc.ca/eng/regulations/SI-2005-118/index.html) outlining three possible exclusions: 1) agreement to become bilingual; 2) medical grounds; and 3) eligible for an immediate annuity. [↑](#endnote-ref-27)
51. These regulations apply to those employees who have made an agreement to become bilingual and stipulate that the exclusion is for two-years with a possibility of a two-year extension to learn the second official language. [↑](#endnote-ref-28)
52. The TBS FAQs confirm that official languages and accessibility rights are key objectives in the Public Service. The amendment extends to EX-02 to EX-05 positions, which is already available to all other positions. It allows for an exemption for those employees with an impairment that prevents them from learning a second official language, while safeguarding bilingualism by ensuring that federal institutions take measures to respect the language rights of members of the public and of employees (TBS 2022a). [↑](#endnote-ref-29)
53. This arises when an employer, employee organization or employer organization establishes or pursues a policy or practice, or enters into an agreement impacting on “recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment” in which an individual or class of individuals of any employment opportunities is deprived or tends to be deprived based on a prohibited ground of discrimination (CHRA 1985, s. 10). [↑](#endnote-ref-30)
54. The prohibited grounds include race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. [↑](#endnote-ref-31)
55. Internal EE representation is then compared with their representation in the Canadian workforce based on data collected by Statistics Canada that relies on self-identification. [↑](#endnote-ref-32)
56. The *EE Act* (1995) obliges employers to address barriers that arise from the employer’s employment systems, policies, and practices in addition to instituting positive policies and practices and reasonable accommodations to achieve a degree of representation in each occupational group in the employer’s workforce that reflects their representation in the Canadian workforce or segments of the workforce that are identifiable by qualification, eligibility or geography (s. 5 (a) & (b)). [↑](#endnote-ref-33)
57. Appointments must be made based on merit and free from political influence as well as the Commission being satisfied the appointed person meets the essential qualifications for the work to be performed, including official languages proficiency (PSC 2003, s. 30 (1) & (2)). [↑](#endnote-ref-34)
58. There are two official languages in Canada. Section 16 (1) of the Charter confirms that English and French are the official languages and that federal government and parliamentary institutions, and the New Brunswick institutions of the legislature and government will use both official languages equally. In addition, section 20(1) of the Charter guarantees that members of the public have the right to communicate with and to receive available services from designated government, parliamentary, and legislative institutions in either of the official languages (Canadian Heritage 2022(b)). This highlights the reality and challenge of embedding multiculturalism into a bilingualism framework. [↑](#footnote-ref-24)
59. Meyerhoff (1994) posits the Charter's framers envisioned language rights and the multicultural provision as a means of protecting rights and achieving social cohesion (p. 917). Disparity between the rights and status of other linguistic and cultural groups arises when there is a strong focus placed on linguistic dualism. Under these conditions, multiculturalism is defined narrowly because there is no linguistic equality for other linguistic and cultural groups (ibid, p. 918). [↑](#footnote-ref-25)
60. Section 27 acknowledges the existence of many cultural groups, and maintains and promotes multiculturalism, and permits the courts to better account for a multicultural reality in Canada (Canadian Heritage 2022(b). It offers the courts an interpretive lens to better balance “individual and multicultural (and often collective) rights” (Brosseau & Dewing 2018). [↑](#endnote-ref-35)
61. Meyerhoff (1994) offers a simple way to view equality. First, he suggests that we must take into account two things: 1) “language is a fundamental component of culture, which multiculturalism in section 27 of the Charter purports to recognize” (p. 1008); and 2)”multiculturalism- if promoting cultural equality, preserving cultural diversity, and valuing cultural pluralism are serious goals-must account for, even if it does not advance, linguistic plurality” (ibid). He makes this point not to take away from the Charter’s official language provisions; instead, he proposes that is a way of coming “closer to the egalitarian definition, and would reduce the disparity in rights and status, and hence promote equality, between official language minorities and ethnic minorities” (p. 1008). [↑](#footnote-ref-26)
62. Section 15 of the Charter aims to protect those groups who are socially, politically, and legally disadvantaged in Canadian society based on certain characteristics. The Supreme Court of Canada interprets this right as protecting substantive equality in which “laws as well as government activities and policies must not treat people the same.” (Mason & Butler 2021, p. ii) Instead, the effect that a law has on different groups must be considered. Since R. v. Kapp (2008) and more recently *Fraser v. Canada* (2020), the section 15 test now determines whether the law has created distinctions that either reinforce, perpetuate, or exacerbate disadvantages using the following questions: 1) Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground? And 2) Does it impose burdens or deny benefits in a way that has the effect of reinforcing, perpetuating or exacerbating disadvantage? (ibid, p. ii). Application of the section 15 test suggests that discrimination arises when a person is arbitrarily disadvantaged or denied opportunities available to other Canadians. Moreover, court decisions over the years have found that historical disadvantage, evidence about the claimant group situation, and the results of the law are all factors to consider. In some situations, it is also possible that an adverse effect discrimination has arisen due to the absence of accommodation (ibid, p. 17). Section 15 permits for laws and/or programs that can improve the conditions of disadvantaged individuals or groups – e.g., employment opportunities for EE group members and others with disabilities, including Indigenous Peoples and/or other accommodation/special measures for members of protected groups (ibid, p. 17). Human rights laws can also enrich the interpretation of section 15 of the Charter and vice-versa as it concerns substantive equality (Gaspard 2022, p. 5). [↑](#endnote-ref-36)
63. Persaud (2022) maintains there is a rational connection between the idea of multiculturalism and section 15 of the Charter. Section 27, for example, was factored into the *Oakes test in the Canada (Human Rights Commission) v Taylor* in which Justice Dickson stressed the promotion of equal opportunity unhindered by discrimination based on religion and race. He concluded that “sections 15 and 27 strengthen the "substantial weight" to be given to the objective of preventing the harmful effects associated with hate propaganda” (cited in Persaud 2022, p. 19). This is because the grounds are generally associated with ethnic minority groups and are seen as characteristics of a multicultural society. (ibid, p. 26) [↑](#footnote-ref-27)
64. In the Supreme Court Videoflicks decision, Justice Tarnopolsky (1984) articulated the relevancy of the historical context of section 27 in interpreting section 27 more purposively in legal reasoning. He stated: “This context includes the provision’s historical foundation in Canada. Examining this foundation reveals how fundamental the concept of multiculturalism was to Canada’s identity.” (R v Videoflicks, (1984) 5 OAC 1 [Videoflicks] cited in Persaud 2022, p. 58). This viewpoint supports a purposive interpretation role for section 27 and reinforces the voices of the “waves of immigrants who demanded recognition and protection for their cultural survival” (Persaud 2022 at p. 63) at the time of developing the Charter’s provisions. Although not an ethnic minority, Indigenous Peoples, including Indigenous federal employees can benefit from the interpretation of s.27 of the Charter in relation to s. 15 in court decisions (e.g., *Ayangma v Prince Edward Island*, a visible minority candidate complained that the committee was not made up of any member of a visible minority; and *Chief Ominayak and the Lubicon Lake Band v Canada*, protection of traditional rights to fish and hunt amidst the exploitation of resource development) (cited in Persaud 2022, p. 35 & 53). As the court found in *Ayangma v Prince Edward Island* (2000), s. 27 has the potential to play a larger role in countering discrimination:

[S]ection 27 of the Charter supports the prohibition of indirect or systemic discrimination, as well as cultural discrimination. Even if the role of Section 27 is limited to an internal, constitutional canon of interpretation or [sic] the substantive sections of the Charter, its effect on section 15 is to read it into the fourfold equality rights, and the protection against discrimination in subsection 15(1). It would be inconsistent with enhancement of the multicultural heritage of Canadians to uphold a law or practice whose effect on individuals of specified ethnic origins was arbitrary denial of the prospect to advancement. If section 27 is to have even the interpretive effect described above, it must operate to apply sub-Section 15(1) to cultural discrimination, in which the very evil being addressed is the failure of public institutions (such as the media and educational systems) to recognize ethnic diversity. To permit cultural discrimination under sub-Section 15(1) would be the antithesis of “preservation and enhancement” of Canada’s multicultural heritage. (Ayangma v Prince Edward Island, [2000] PEIJ No. 97 (QL) cited in Persaud 2022, p. 35). [↑](#endnote-ref-37)
65. For Persaud (2022), section 27 deals more broadly with culture instead of the individual components that make up culture. If this is the case, then an alignment between section 27 and intersectionality would require a “fulsome examination of all aspects of a culture, not discrete elements, and ensure more robust protection which better recognizes the intersecting elements of culture and how they can be undermined” (p. 94). Whereas Bains argues in favour of full engagement with Charter objects, rights language, conceptual analysis, and its associated provisions in a purposive manner. Her argument is about the necessity of creating an intersectional understanding of section 27 with the ultimate intention of better comprehending “complex multiculturalism paradigms” (Bains 2005, p. 62-63 cited in Persaud 2022, p. 72). For Bakht (2009), an expanded use of section 27 would/could add “meaning to other Charter rights” (Bakht 2009, p. 136; cited in Persaud 2022, p. 75) while also bringing an intersectional lens to any analysis. Ontario lawyer Omar Har-Redeye supports this line of thinking and argues that intersectionality is a necessary framework for analyzing section 27 because of its focus on the networks of relationships and its nuanced approach to multiculturalism. He states:

…all members of society, both within discriminated groups and throughout society at large, have a joint and shared responsibility to ameliorate systemic barriers. This involves a high degree of cooperation, but also a recognition of shared advocacy towards these goals between all participants in society, irrespective of their individual identities. To achieve that goal, a process of learning, understanding, and developing of empathy towards others is a prerequisite (Omar Ha-Redeye, “Understanding Intersectionality Could Help Judicial Decisions” (12 March 2019) CanLii Connects, online: CanLii Connects cited in Persaud 2022, p. 8 & 9). [↑](#footnote-ref-28)
66. There is a distinction between reconciliation, employment equity, and equity, diversity, and inclusion. Indigenous scholars argue that Indigenous rights-holders should not be part of equity, diversity, and inclusion efforts for Indigenous rights reasons and because they are the Original People of Canada. From this viewpoint, reconciliation trumps an equity, diversity, and inclusion category because of the treaties, the *UN Declaration Act*, Section 35 of the *Constitution Act,* 1982, and other legal and political reasons (FNUC & NIULSA 2022). [↑](#footnote-ref-29)
67. The Joint Management and Union Task Force’s report (2017) defines diversity and inclusion as follows: “A **diverse workforce** in the public service is made up of individuals who have an array of identities, abilities, backgrounds, cultures, skills, perspectives and experiences that are representative of Canada’s current and evolving population”. Within the report, an**inclusive workplace is** defined as “fair, equitable, supportive, welcoming and respectful” in addition to recognizing values and leveraging differences in “identities, abilities, backgrounds, cultures, skills, experiences and perspectives that support and reinforce Canada’s evolving human rights framework” (p.11). [↑](#endnote-ref-38)
68. The Clerk’s Call to Action and the Treasury Board Directive on diversity and inclusion are a direct call to increase diversity in the public service. They also act as a requirement for deputy heads to identify, remove, and prevent barriers to inclusion; advance measurable change; address systemic racism; change the workplace culture to be respectful of mental health problems or issues that may prevent racialized employees from thriving; and increase employment equity group representation. These directives necessitate the establishment of organizational mechanisms (e.g., networks/committees, Champions, etc.) and the measurement of progress and reporting on this front. [↑](#endnote-ref-39)
69. Canada's two official languages are anchored in the Constitution and that the OLA is of a quasi-constitutional nature. The legal framework affirms that English- and French-speakers, regardless of any ethnic or other affiliation, have rights to obtain services from their government and that as the federal public service its employees have both rights and obligations. These rights and obligations must co-exist with other rights and obligations, but they are considered fundamental. [↑](#endnote-ref-40)
70. Task Force members bring a variety of equity related perspectives and experiences to this exercise, for example: accessibility, gender equality, Indigenous employment, official languages, and anti-racism. [↑](#endnote-ref-41)
71. The new provision comes into effect on June 20, 2025, in the regions that are designated bilingual for language of work purposes. The right to be supervised in the official language of one's choice is now applied independently of the designation of the position. It could mean that employees whose official language of preference is different than the language requirements of their position may now be able to claim this right. [↑](#footnote-ref-30)
72. The current requirement for supervisors to be able to operate in both official languages is limited to supervisory activities. This means that a manager that does not supervise any staff could be in a unilingual position. [↑](#footnote-ref-31)
73. There were 28,384 bilingual supervisory positions and 4,355 unilingual supervisory positions in bilingual regions. And employment equity group members in bilingual regions occupied 63% (10,721) of the bilingual supervisory positions which had a CBC profile or higher; and 37% (6,317) had a profile below the CBC level (TBS 2022 (d)). Of which, 36% (2283) had SLE results below CBC compared to 64% (4034) with SLE results at a CBC-level or higher. The numbers were quite similar for non-employment equity incumbents at 37% (1,245) for SLE results below CBC versus 63% (2,076) with SLE results CBC or higher (TBS 2022(d)). [↑](#footnote-ref-32)
74. These salary ranges expired on June 20, 2021; however, the Public Service Alliance of Canada recently re-negotiated the PA group collective agreement and so these salary rates are subject to change. [↑](#footnote-ref-33)
75. The breakdown of the 12,336 self-identified Indigenous employees is as follows: Inuit 2.9% (361), Metis 42.6% (5,260), First Nation 41.6% (5,128) & Other 12.9% (1587) (TBS 2023). [↑](#footnote-ref-34)
76. A further breakdown shows that 7,636 (6.5%) of Indigenous employees were in English positions compared to 226 (2.7%) in French positions (TBS 2023). Whereas data from the 2021-2022 Official Languages Annual Report varies slightly from that of TBS; however, it reveals a similar story in which 32.7% of Indigenous employees (3,841 of 11,737) occupied bilingual positions, 3,733 (97.2%) met the language requirements, 72 were exempted (medical grounds or immediate annuity) and 2 were required to undertake language training (Canadian Heritage 2022a). These numbers, however, do not tell us if there are employees occupying positions with a requirement for Level B that have SLE results indicating they achieved Level C. [↑](#endnote-ref-42)
77. From a distinction-based lens, the 4,000 Indigenous employees are represented, as follows: Inuit 54 (0.1%), Métis 1986 (2%), First Nation 1219 (1.2%) and Other 741 (0.8%). Note: The Indigenous Peoples subgroup “Other” refers to individuals who have self-declared or self-identified as Indigenous but did not provide a self-declaration or self-identification for one of the three designated subgroups (Inuit, North American Indian/First Nation, Métis) (PSC 2022b). [↑](#footnote-ref-35)
78. The Official Language Annual Report reveal that of the 3,841 employees: 3,733 (97.2%) meet the language requirements; 72 are exempted (medical grounds or immediate annuity); and 2 must meet (undertake language training). The above numbers do not tell us if there are employees occupying positions with a requirement for Level B that have SLE results indicating they have achieved Level C. Additionally, there is a need to consider the rate of the comparison group having level B or C to understand whether there is a difference there that could be driving corresponding differences in SLE testing. The OL deck provides this level of information. [↑](#endnote-ref-43)
79. It is important to point out that this data includes all test takers, which makes it difficult to ascertain employee levels. [↑](#footnote-ref-36)
80. The PSC suggests that pass rates can be influenced by a range of factors, for example: “changes in employer policies or practices; changes in candidate demographics, differences in ability across groups in the sample, changes in the purpose of testing (i.e., training versus staffing); and bias in testing materials)” (PSC 2021 b). [↑](#endnote-ref-44)
81. In 2020-21, 74.7% (8,770) of Indigenous employees were anglophones and 25.3% (2,967) were francophones (TBS 2022e). [↑](#footnote-ref-37)
82. #  The [Employment Equity Promotion Rate Study – Three Year Update](https://www.canada.ca/en/public-service-commission/services/publications/open-info/ee-promotion-rate-study-3-year-update.html) published in 2022 expands the analysis of the original PSC’s 2019 [Employment Equity Promotion Rate Study](https://www.canada.ca/en/public-service-commission/services/publications/employment-equity-promotion-rate-study.html) to include employment equity visible minority subgroups. This analysis was conducted over 4 time periods to monitor if the relative promotion rates improved (or not) throughout the examined period. Those 4 periods are 2005 to 2018, 2006 to 2019, 2007 to 2020, and 2008 to 2021.

 [↑](#endnote-ref-45)
83. The study suggests that relative promotion rates are dependent upon how successful employment equity group members are in the staffing process and the likelihood of them applying for federal positions. That said, individual employment equity group or sub-groups may be under-promoted if they encounter barriers at the application stage, during the staffing process, or both (PSC 2022 b). For example, the results of the 2021 PSC audit suggest that although Indigenous Peoples were 3.5% of job applications, they only made up 2.9% of appointees (PSC 2021 (b), p. 13). Indigenous candidate representation decreased (from 4% to 2.9%) primarily at the interview stage (ibid, p.15). Due to the wide range of departmental practices, it was difficult for the audit to determine whether the drop-in Indigenous representation rates was due to the method, or the qualifications being assessed (ibid, p. 22). [↑](#footnote-ref-38)
84. It is important to note that the relative promotion rate of Indigenous employees compared to their counterparts by occupational category is as follows: 1) Administrative Support: -14.7%; 2) Administrative and Foreign Service: -7.0%; 3) Operational: 5.2%; 4) Scientific and Professional: -9.6%; and 5) Technical: -0.9% (PSC 2022b). [↑](#endnote-ref-46)
85. Indigenous employees face many unique barriers when it comes to being promoted and/or opting to participate in the promotion process. Often systemic barriers such as discrimination, and bias play a role in an Indigenous employees’ decision to apply for a promotion. Additionally, Indigenous Peoples and Indigenous federal employees can and do perceive the public service staffing process as non-transparent, unfair, and not based on merit (KCII 2017; Mason & van den Berg 2020). Other factors that come into play include, but are not limited to the following: 1) employers and co-workers not understanding or respecting the cultural differences of Indigenous employees, which can create disrespect, resentment or distrust in the workplace; 2) lack of organizational readiness to deal with Indigenous hiring and the cultural bias of hiring managers; **3) micro-aggressions and the use of insensitive language and behaviours; 4) geographic job requirements; 5) education requirements; 6) qualification standards; and 7) experiences of racism, discrimination, and stereotypes in the workplace are significant** barriers to the recruitment and retention of Indigenous Peoples (KCII 2017). [↑](#endnote-ref-47)
86. Several MVOM Action Plan items have yet to be implemented – e.g., 1) design, develop and implement **deliberate and transparent approaches to identifying leadership potential; 2) develop Indigenous managers into leaders and** develop mid-career in addition to COOP and internship employment opportunities; and 3) implement a variety of Indigenous language opportunities in addition to culturally appropriate French language training and support in the federal system. The MVOM Action Plan focuses on increasing the hiring and retention of Indigenous Peoples at entry-level and mid-career to address future Public Service employment needs. This is relevant since the highest concentration of Indigenous employees is between 35 – 64 years of age (or 73.8%) with 32.7% falling into the 45 – 54-year grouping (TBS 2022). [↑](#endnote-ref-48)
87. Article 23 (Inuit employment in government) of the Nunavut Agreement does not apply in this context as it is specific to the region of Nunavut, which is unilingual for language-of-work purposes. [↑](#footnote-ref-39)
88. As it stands, a TBS review highlights several issues and findings concerning how departments are presently applying Section 91, for example: 1) work description use is not reflexive of the position’s duties; 2) justifications meet the TBS directive’s minimum standards and are often based on flawed reasoning or an incomplete evaluation; 3) no formal mechanisms to evaluate the language requirements of positions; 4) awareness about the purpose of language requirements is lacking; 5) institutional inconsistencies concerning policies, procedures, tools, and control mechanisms; 6) departmental training on section 91 is critical instead of solely relying on CSPS, and lastly, 7) centralization of leadership and oversight on guidelines, tools, and ensuring consultation with the PRLO arises, including implementation of any recommendations (TBS 2022b). [↑](#endnote-ref-49)
89. The 2022 – 2025 Action Plan pillars consist of strengthening policy mechanisms, consolidating capacity related language requirements, and providing tools to increase monitoring (TBS 2023(b)). [↑](#footnote-ref-40)
90. The Language Training Framework will provide practical guidance on prioritizing second official language learning for Indigenous, Black, and other racialized employees.  A tool will be launched in the summer/fall to guide institutions and help managers plan and prioritize access to language training. Additionally, the Official Languages Centre of Excellence is exploring best practices with Employment and Social Development Canada and Canada Border Services Agency for culturally adapted French training for Indigenous employees since they both conducted pilot tests using this type of approach. [↑](#footnote-ref-41)
91. The legislative proposals aim to increase the Treasury Board’s powers, create the necessary authority to enact policies, directives, and other policy instruments, and give TBS the necessary resources to ensure the compliance of federal institutions. Whereas the administrative proposals are designed to create an accountability and reporting framework to orient measurement of official languages, revise the official languages qualification standards and the standards for second language evaluations and minimum second language requirements for bilingual supervisory positions in designated bilingual regions and support a more inclusive application of official languages requirements for those positions requiring Indigenous cultural or linguistic competencies (Canadian Heritage 2021a). [↑](#endnote-ref-50)
92. The MVOM Action Plan has become increasingly overshadowed by departmental and agency work on the Clerk’s Call to Action. In fact, the 2020/21 MVOM Departmental Progress Scorecard found that only 34% of federal organizations had an MVOM strategy or action plan, of which 40% (of the 34%) admitted to not tracking and reporting on its progress. It is important to make horizontal linkages more strongly between the MVOM Action Plan and other federal policymaking initiatives such as OL Modernization, self-identification, and other policy matters impacting on Indigenous inclusion. [↑](#footnote-ref-42)
93. KCII compared departmental and agency responses (40 CPA organizations and 28 separate agencies) to the Clerk’s Call-to-Action against the Many Voices, One Mind (MVOM) Action Plan 5 pillars. The majority (33 CPA and 9 SA) identified all EE groups in their responses, while 7 CPAs and 19 SAs did not mention any EE groups. 8 organizations mentioned ‘language training’ in connection with equity-seeking groups, all employees, and/or they prioritized Indigenous and other equity-seeking groups access to training for career advancement. Five of the 8 organizations said they offered language training. Comparatively speaking, the low departmental response rate is in line with the MVOM scorecard findings. The 2020/21 MVOM scorecard found that less than 16% (7 out of 46) of CPA organizations had committed to offering language training to Indigenous employees in feeder groups for potential management positions and that less than 14% (6) of organizations could tell us how many Indigenous employees had made a request for language training (French or English). It also seems that little has changed since the 2018/19 and 2019/20 MVOM scorecards, which found the official languages proficiency requirement posed a significant barrier to promoting Indigenous talent, and that low Indigenous employee participation rates continued to thwart governmental efforts despite their being official languages training opportunities (Laude 2023). [↑](#endnote-ref-51)
94. The Federal Government has made very strong commitments to reconciliation with Indigenous Peoples, which includes Indigenous federal employees. It started with [*The Truth and Reconciliation Commissions Calls to Action*](https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525) and has since grown in strength with the coming into force of the *UN Declaration Act*, and the [10 Principles](https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html) respecting the Government of Canada's relationship with Indigenous Peoples. While often this focus has been external to government, it is imperative that it be understood in the context of the 10,000 plus Indigenous employees in the Federal Government as well. [↑](#footnote-ref-43)
95. The *Indigenous Languages Act*, s. 6 states: “The Government of Canada recognizes that the rights of Indigenous peoples recognized and affirmed by section 35 of the Constitution Act, 1982 include rights related to Indigenous languages”. Nonetheless, how this gets applied to Indigenous federal employees (those with treaty- and/or s. 35 rights) has yet to get sorted out within the federal system. [↑](#footnote-ref-44)
96. These articles should also be taken into consideration - e.g., 5b (iv) – support Indigenous language learning and cultural activities; 5 c – establish a framework to facilitate the effective exercise of the rights of Indigenous peoples that relate to Indigenous languages; 5 (e.1) – facilitate collaboration on policy development related to implementing the Act; etc. [↑](#footnote-ref-45)
97. Several UNDRIP articles are relevant and critical to the idea of Indigenous Peoples, including Indigenous federal employees, thriving in the federal workplace. For example, Article 5 states that Indigenous peoples retain the right to participate fully in the economic life of the State. Whereas Article 13 recognizes the right of Indigenous Peoples to revitalize, use, develop, and transmit their languages and cultures. Lastly, Article 22 recognizes the importance of addressing the historic injustices suffered by Indigenous Peoples, including the impacts of colonization and assimilation policies. [↑](#footnote-ref-46)
98. According to the Honourable Chief Justice Finch (2012), “Canada remains a multi-jural nation, in fact, if not in law.” (p. 1) He emphasizes the need to “make space” (p.1) for Indigenous legal orders within the context of Canadian law. This is particularly significant considering the government’s commitment in 2021 to achieve the objectives of the UNDRIP under the *UN Declaration Act*. For example, Article 3 is about the right to self-determination while Articles 33 and 9 in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), reinforce Indigenous Peoples right to “decide their own identities and procedures of belonging” (Justice Canada 2021) in addition to their right to belong to a community or nation. This is in keeping with Indigenous governments determining the criteria for who claims an Indigenous identity through Indigenous practices, laws, and legal traditions. Recognition of Indigenous citizenship laws highlights the importance of continuing this approach in other spheres of government business. [↑](#footnote-ref-47)
99. There were 105 respondent institutions out of 160. Unfortunately, the report does not indicate if Indigenous language speakers were considered part of the “cultural experts” who helped in the development of programs, policies, and services. The data is not disaggregated to show which languages are used by the cultural experts. [↑](#footnote-ref-48)
100. The report is a first inquiry into the scale and scope of Indigenous languages usage in 24 federal public service organizations for the Program and Administrative Services (PA) and Education and Library Services (EB) occupational groups and Parks Canada Bargaining Unit Members. 19 out of the 24 organizations that responded have employees who use Indigenous languages. Of which, 460 federal employees used Indigenous languages in a variety of different contexts such as “service delivery, program development and delivery, education, duty to consult, negotiations…legislation and policy development, and legal or contractual obligations…ceremonial and cultural events, Indigenous recruitment…” (PSAC & TBS 2023). A total of 44 job descriptions from among the 460 employees contained a reference to Indigenous languages. [↑](#footnote-ref-49)
101. A data capture tool is necessary to record the linguistic capacities of Indigenous employees. [↑](#endnote-ref-52)
102. This sentence specifically refers to the *UN Declaration Act* (implement UNDRIP principles), the *Multiculturalism Act* (preserve, enhance and embed cultural difference), and the principles and lessons learned embedded in Sections 27 (recognition of Indigenous Peoples, linguistic duality, and diversity) and 15 of the Charter (right to equality and fairness to all) and in human rights laws in relation to s. 2 of the *CHRA* (e.g., Jordan’s Principle and other decisions involving equality), and the promise Part VI of the modernized *OL Act* (a potential entry point to equity). This should also include a focus on bringing intersectionality into the policy work. [↑](#footnote-ref-50)
103. This claim supports the MVOM Action Plan action items with respect to enhancing the use of Indigenous languages and compensation for Indigenous language speakers in the Public Service. This is further supported by the recent findings of the Report on the *Use of Indigenous Languages in Canada’s Public Service*. [↑](#endnote-ref-53)
104. As part of the Senate proceeding on official languages, Senator Clement asked Minister Petitpas Taylor whether there was “room for something more assertive with respect to Indigenous languages and reconciliation within Bill C-13”? Her response highlighted Minister Joly’s engagement with Indigenous leaders on their comfort level with the approach of Bill C-13 and key messaging. Indigenous leaders signaled their general agreement with what was proposed; however, they emphasized the need for protecting and promoting Indigenous languages. A political commitment was made at that time to put in place the necessary resources to ensure that Indigenous languages were not lost (Lang Committee 2023b). While these steps and commitments are significant, a parallel engagement process was not undertaken with those Indigenous federal employees who are citizens falling under Indigenous laws to hear their perspectives on Indigenous languages in the federal workplace. TBS engagement on the access to official language training framework in isolation of a parallel discussion on enhancing and protecting Indigenous languages and their use in the federal workplace was a misstep. Had this happened, this could have led to the creation of stronger horizontal policy linkages between OL work requirements and Indigenous languages and culture. It would also have been an opportunity to revisit prior Indigenous employee recommendations in the MVOM Action Plan. In 2017, several action items were identified as follows: 1) greater inclusion of Indigenous languages use in the workplace, including the identification of positions wherein Indigenous language use is a recognized second required language at work; 2) creation of opportunities for staff to use and be valued for using their indigenous language; and 3) compensation for Indigenous language users in positions where Indigenous language use is required or an asset (KCII 2017). [↑](#footnote-ref-51)
105. Some Indigenous employees are treaty and/or rights-holders, others voluntarily self-identify based on self-perception identity formation, and there are those that have self-indigenized because of a distant Indigenous ancestral connection from hundreds of years ago. It is important to make this distinction because not all Indigenous Peoples have treaty rights and many section 35 constitutional rights-holders are not treaty peoples. Additionally, an inclusion/exclusion binary exists in which individuals who consider themselves Indigenous may not be considered community members under an Indigenous self-determination model. Indigenous scholar Taiaiake Alfred suggests this would no doubt exclude from “the nations’ circles many thousands of people who self-identify, or people with minimal blood connections who have been told by the state that they are indigenous” (cited in Moss 2003, p. 66 & 67; Alfred 2008). While Indigenous scholar Taiaiake Alfred critiques government for the Indigenous identity miscalculation, he also proposes a work-around wherein the first group would constitute “colonized peoples, and the second, oppressed racial or cultural minorities” (Moss 2003, p. 67) From his perspective, the problem is one of “decolonization and self-determination for the first, and human and civil rights for the second” (p. 67). While this position may seem flawed or controversial, it is intended to uphold Indigenous Peoples right to self-determination and the right of Indigenous communities to determine their membership in accordance with their customs and traditions. This suggests measures are needed to better align the federal OL Modernization framework with Articles 3, 9, and 33 in the UNDRIP in addition to Article 13. [↑](#footnote-ref-52)
106. For a more detailed accounting of what this could look like refer to the options for consideration section of the *Discussion Paper: Self-identification and Indigenous identity*. The Knowledge Circle for Indigenous Inclusion submitted the paper to the *Employment Equity Act* Review Task Force on June 3, 2022. [↑](#footnote-ref-53)
107. MNO recently signed a self-government agreement with the federal government that is expected to lead to a self-government treaty within the next two years (Schwientek 2023).  The Wabun Tribal Council and Huron-Robinson First Nations argue that use of their Anishnaabek and Cree family members as Métis root ancestors does not meet the Powley decision criteria - e.g., self-identification, ancestral connection, and community acceptance, to determine whether someone is entitled to exercise Métis rights – for the purpose of a self-government agreement (Leroux 2022; Adese et al 2023). Two research studies, the Historic Abitibi Inland Métis Community: Final Report and the Exploratory Study of the Métis Nation of Ontario’s “Historic Métis Communities in Robinson-Huron Treaty Territory, disprove the six Métis communities claim that they are historic with a distinct collective identity (Leroux 2022; Adese et al 2023). It is possible that the new Métis in Ontario might have mixed First Nations and European ancestry, but they are not necessarily connected to Métis culture, history, or the Métis homeland (Monkman 2021). [↑](#endnote-ref-54)
108. The Clerk recently released a [Forward Direction Call to Action](https://www.canada.ca/en/privy-council/corporate/clerk/call-to-action-anti-racism-equity-inclusion-federal-public-service/call-to-action-message-to-deputies.html) asking Deputy Heads to set goals, measure progress, and be more accountable for addressing anti-racism, equity and inclusion. Executive performance agreements are the primary mechanism to hold Deputies and their Executive Management Teams accountable for tackling barriers embedded in departmental processes and practices and mindsets and behaviours. The Direction pprioritizes official languages training for Indigenous employees and Black and other racialized employees who are ready for advancement. [↑](#footnote-ref-54)
109. The Secretariat is meeting with Privy Council Office officials on the next steps and a roll-out of the framework is expected in 2024. [↑](#footnote-ref-55)
110. Hughes (2020) maintains the “social, economic, and political systems of Canada and other countries are rooted in dominant norms, values, and ideologies”. This scenario sets the conditions for one lifeworld to dominate another. [↑](#footnote-ref-56)
111. In the September 2017 report Patrick Borbey and Matthew Mendelsohn prepared a report for the Clerk of the Privy Council in which they confirmed: 1) only 35 to 45% of employees pass the level C French tests of written and oral expression; 2) the number of bilingual positions had doubled in the last 40 years and now represented 43% of all federal positions; and 3) 96% of all employees met the language requirements of their positions and 97% of employees in executive positions met the language requirements. They recommended that “the Treasury Board Secretariat, in consultation with the Public Service Commission of Canada … take action to increase the linguistic profile for bilingual supervisory positions to a superior proficiency level (e.g., CBC or equivalent)”. Nevertheless, they stated that “we must ensure that Departments continue to exercise available flexibilities, as necessary, in order to achieve other important objectives, including enhancing the representation of Indigenous peoples and persons with disabilities.” [↑](#endnote-ref-55)
112. The Joint Union/Management Task Force on Diversity and Inclusion in the Public Service released a final report in December 2017. It identifies several barriers facing equity-seeking groups, including Indigenous employees, and makes recommendations to address them. Under Outreach, recruitment and onboarding, the Task Force recommended (#7) “that the Public Service Commission of Canada and the Office of the Chief Human Resources Officer of the Treasury Board of Canada Secretariat undertake further work to identify and resolve systemic barriers to recruitment into the public service, including at mid-career, and strengthen employment equity and diversity and inclusion. Noted barriers include: … meeting second official language requirements at the time of hire.”

Moreover, the Task Force noted issues under the retention, career progression and management thematic area, as follows: “stringent language requirements that disproportionately affect people in Canada whose first language is neither English nor French.” The Task Force Report also found “… second language requirements were cited by equity-seeking groups as a barrier to hiring and career advancement.” To address these concerns, the Task Force made the following recommendations: 1) #13 Reviewing the current approach and the allocation of resources to language training, with consideration of the public service’s commitment to bilingualism, to ensure a fair, transparent and equitable approach to accessing language training and development, based on the needs of employees, including those in unilingual positions; ensure that culturally sensitive language training options are provided; and increase language training opportunities that address the double disadvantage faced by individuals whose first language is neither English nor French; and 2) # 15: Introducing non-imperative staffing for equity-seeking groups to prepare them to achieve official bilingual proficiency in order to access leadership positions, commensurate with their talents and abilities. [↑](#endnote-ref-56)
113. The report states: “we must ensure that Departments continue to exercise available flexibilities, as necessary, in order to achieve other important objectives, including enhancing the representation of Indigenous peoples and persons with disabilities” (Borbey & Mendelsohn 2017). [↑](#endnote-ref-57)
114. ###  The duties and powers of the  [Commissioner of Official Languages](https://www.clo-ocol.gc.ca/en/aboutus/commissioner) ([sections 49 to 75of the Official Languages Act](http://laws-lois.justice.gc.ca/eng/acts/O-3.01/page-5.html#h-17)) are set out in the OLA. The Commissioner must take all actions and measures within their authority to ensure full recognition of both official languages as well as compliance with the OLA. Employees can lodge a complaint if they feel their language rights have been violated (Office of the Commissioner of Official Languages 2022).

 [↑](#endnote-ref-58)
115. Additional admissible complaints are broken down, as follows: 1) communications with and services to the public (Part IV), 810 complaints; 2) equitable participation (Part (VI), 10 complaints; and 3) advancement of English and French (Part VII), 44 complaints (Office of the Commissioner of Official Languages 2023, p. 16) [↑](#footnote-ref-57)
116. White normativity is the defining of cultural practices, attitudes, assumptions, and ideologies in the wider society and culture using the dominant culture as the standard, the norm from which to measure difference against (Morris 2016, p. 952; DiAngelo 2018, p. 25); Ferguson 2004; Munoz 1999 cited in Ward 2008, p. 564). The concept of whiteness not only refers to individuals who are coded white but also to the naturalization of dominant ways of thinking, knowing, and doing into social and institutional life (Frankenberg 2001, 2005; Gold 2004; Lipsitz 1998; McClaren 1997 cited in Ward 2008, p. 564). The outcome is the establishment of laws, policies, and processes that privilege and embed Western history, social experiences, and dominant ways of thinking and doing that are most familiar (Emers 2019, p. 14 & Murray 1998; Acker 2006 cited in Ward 2008, p. 565). White normativity operates in subtle ways while also being intertwined with discrimination and racism. It is very much a question of power and structural advantage that serves to facilitate and uphold practices and values and beliefs that sustain the dominant position (Morris 2016, p. 952; Diangelo 2018, p. 25). This can even occur despite well intentioned efforts, for example, to create legislation (e.g., *Employment Equity Act*, *Multiculturalism Act,* etc.) and/or policies (e.g., [TBS Directive on Employment Equity, Diversity and Inclusion](https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32635&section=html), [2020/2021 Deputy Minister Commitments on Diversity and Inclusion](https://www.ourcommons.ca/content/Committee/441/CIMM/WebDoc/WD11909604/11909604/46-AnnexA-DeputyMinisterCommitments-DiversityAndInclusion-2020-2021-e.pdf), etc.) and strategies (e.g., MVOM Action Plan, Clerk’s Call to Action on Anti-racism, Equity, and Inclusion, etc.) aimed at addressing barriers racialized federal employees may face on this front. [↑](#footnote-ref-58)
117. There is an exception. For instance, Imperative staffing is not mandatory in the case of external appointment processes ("open to the public") for indeterminate positions.  [↑](#footnote-ref-59)
118. APEX supports Executives through the delivery of advocacy, research, advisory services and sharing information to help them achieve their full potential. Executives work with APEX staff to navigate the myriad of management and leadership issues win an effort to build an EX-community of practice, and support leadership excellence and psychological safety in the federal workplace. [↑](#footnote-ref-60)
119. Indigenous employees schooled in their culture and language, for example, can have a different experience from those of mixed ancestry with English or French language experience. Any work going forward must take overlapping identity differences (e.g., Indigenous persons with disabilities with who experience non-verbal learning disabilities or speech disabilities or Indigenous sign language or speech/learning challenges preventing official language learning into account so that OL policies, practices, and other language of work requirements. [↑](#footnote-ref-61)
120. These articles should also be taken into consideration - e.g., 5b (iv) – support Indigenous language learning and cultural activities; 5 c – establish a framework to facilitate the effective exercise of the rights of Indigenous peoples that relate to Indigenous languages; 5 (e.1) – facilitate collaboration on policy development related to implementing the Act; etc. [↑](#footnote-ref-62)
121. It is possible to determine whether substantive equality has been violated by assessing three things: 1) the “full context of the claimant group’s situation,” (p.25); 2) the “actual impact of the law [or policy] on that situation,” (ibid); and 3) the “persistent disadvantages [that] have operated to limit the opportunities available.”( See Fraser v Canada, 2020 SCC 28 [Fraser] at para 42 cited in Sinha et al 2021, p. 25). [↑](#footnote-ref-63)
122. Exemptions already exist for those close to retirement and those with disabilities under non-imperative staffing. [↑](#footnote-ref-64)
123. (a) strengthening a central agency, (b) internal levers of accountability and coordination and (c) bilingualism in the public service [↑](#endnote-ref-59)
124. Section 3(2) e of the Act states: “It is further declared to be the policy of the Government of Canada that all federal institutions shall…make use, as appropriate, of the language skills and cultural understanding of individuals of all origins”.   [↑](#footnote-ref-65)
125. This section of the Act states: “Where the Commission decides that it is neither practicable nor in the best interests of the public service to apply this Act or any of its provisions to any position or person or class of positions or persons, the Commission may, with the approval of the Governor in Council, exclude that position, person or class from the application of this Act or those provisions.” [↑](#footnote-ref-66)
126. Canadian Heritage plays a role in these issues and will need to be involved. As it stands, the government has taken a position that while the use of Indigenous languages is a value to the public service and there are no plans to create a bilingualism bonus for speakers of Indigenous languages. [↑](#footnote-ref-67)
127. The proposed changes and policies were developed with involvement from individuals at Official Languages (OL), Public Service Commission (PSC), TBS and IFEN. Proposals included policies to amend the OLHRM, and in some instances to allow exemptions or lowering of language profiles for Indigenous public servants. All policies and frameworks that were developed have been discarded (IFEN & ARAN 2023).

 [↑](#endnote-ref-60)