

# If the supreme court's not broken ...

Karen Selick, National Post

If ever Canada's Senate needed an opportunity to demonstrate its value by imparting "sober second thought" to the legislative process, that moment arrived on April 13, 2010, when Bill C-232 landed on Senators' desks.

A private member's bill promulgated in the House of Commons by New Brunswick NDP member Yvon Godin, C-232 would require that all future judges appointed to the Supreme Court of Canada (SCC) be able to understand both French and English "without the assistance of an interpreter."

The bill whizzed through the Commons in less than a month. It passed by 140 votes to 137, supported by the NDP, the Bloc Quebecois and the Liberals, with 31 members of the 308-member house unaccounted for. What little debate occurred indicated that some MPs are shockingly ill-informed about Canadian law and court procedures.

The case was already made in a National Post editorial published April 20 ("How to ruin the Supreme Court") that superior legal reasoning, rather than superior linguistic skills, should be the definitive criterion for appointment to the court. The editorial also pointed out that the bill would ensure the future domination of the SCC by judges from Quebec, thereby diminishing the court's credibility for many in the rest of Canada.

But the bill raises additional questions. One is whether it would even be constitutional. The Canadian Charter of Rights and Freedoms requires laws to be non-discriminatory on the basis of characteristics such as ethnic origin. Case precedents say that even neutrally worded laws can be discriminatory if in practice they have what's called the "adverse effect" of excluding large swaths of the population belonging to a particular group. This law would in practice discriminate against those of anglophone or immigrant origin, since statistically they are far less likely to be fully bilingual.

While the Constitution does permit affirmative action programs to override the equality guarantee in order to benefit disadvantaged individuals, it is hard to imagine bilingual appellate court judges or bilingual lawyers with 10 years' experience -- the two groups who would benefit by this bill -- being characterized as disadvantaged.

Discrimination is sometimes a tolerated evil when job criteria are bona fide occupational requirements.

However, none of the bill's proponents produced even a single example of an SCC decision that appeared to have been wrongly decided because of faulty translations. If it were true that judges cannot genuinely understand a case unless they have read

it in its original language, the court's 143-year history should be riddled with instances of judicial misunderstanding. Instead, MPs who spoke in favour of the bill mentioned problems such as long waiting times for French language trials in lower courts, or inaccurate amateur translations of election campaign literature -- both utterly irrelevant to what goes on in the SCC.

One MP argued that there may be nuances of language that cannot be conveyed in a translation no matter how proficient the translator. But would such extreme subtleties necessarily be understood even by all native speakers of the original language? How fully do any two people ever really understand each other? Every human being brings to each communication his own unique experience and knowledge. The need for explanation and clarification due to these differences among individuals is probably more common than the occasional instance when a nuance cannot be translated into another language, yet we don't conclude that justice therefore cannot be done.

In any event, Supreme Court judges aren't locked away in isolation chambers with nothing but their own brains to rely upon. The court's practice is actually to convene en masse and discuss the cases before writing their decisions. If it appears during these meetings that the anglophone justices are missing some poorly translated nuance of French, no doubt the francophones -- there are three positions reserved on the SCC for justices from Quebec -- will let them know.

If we concede to the fallacious argument that those who interpret our laws must be able to understand them in both languages, surely the next demand will be that those who make the laws -- all MPs and Senators -- should be similarly capable. Otherwise, how would they really know what laws they are enacting? If court translations are inadequate, parliamentary translations must be equally suspect.

This of course is nonsense, just as the premise behind Bill C-232 is nonsense. One cannot help but suspect that this attempt to pack the court with francophones has ideological roots rather than any genuine concern about comprehension.

The law wasn't broken, so let's hope the Senate has the good sense not to capitulate to this spurious attempt to fix it.