

The folly of putting language above law

Lorne Gunter, The Edmonton Journal

There is almost no chance of stopping Bill C-232. It passed the House of Commons late last month with all three opposition caucuses voting for it. Only the Tories voted against, but even they didn't kick up much of a fuss, so most Canadians were unaware the bill was even being discussed.

If the Senate does not defeat it, Bill C-232 will amend the Supreme Court Act to insist that all future appointees to our highest court be fluently bilingual, and not just fluent in conversational French and English, but in both official legalistic languages. It will make it a prerequisite for justices to be able to hear all cases without the aid of translation.

In practical terms, the bill will restrict appointment to a very small number of bilingual legal scholars and lower-court judges. It will make it difficult for Canadians outside a narrow strip from Ottawa, through Montreal and Quebec City, and into Moncton, to ever be appointed to the court that has the final say over how the Charter will be interpreted and what rights we may have.

It will make it difficult for English-speaking Canadians to sit on the Supreme Court and almost impossible for western Canadians.

Century-old conventions that call for one justice from British Columbia and another from the Prairies will be swamped by the Liberal, New Democratic and Bloc desire to impose a symbolic, but unnecessary level of bilingualism on future justices.

The bill will place linguistic competence above legal knowledge.

Just 10 per cent of English Canadians claim to be bilingual, and that number is likely high. It comes from the latest census, but is self-declared. To be counted as bilingual, one merely needs to tell Statistics Canada that one considers himself -- or herself -- to be fluent in both official languages. No vocabulary test is required.

What's more, that 10 per cent claim is for conversational fluency, not for the much higher legal standard presumed by Bill C-232. It's one thing to be able to order a non-fat, no- whip, half-sweet, fair-trade mocha in the other official language, it's quite another to be able to listen to complex legal arguments, often containing arcane terminology, in one's second language.

The number of English Canadians who possess the language skills necessary for selection to the highest court would be a tiny fraction of one per cent.

Conversely, about 42 per cent of French Canadians claim fluency. This number, while also undoubtedly inflated, is likely closer to the truth because French Canadians are surrounded by English culture and live in parts of the country where they are able to use both official languages often enough in their daily lives to develop and maintain functional fluency.

It is commendable that so many French Canadians can speak both official languages reasonably well. But this, too, is limited by geography. The further one moves outside Montreal and Quebec City (and particularly Montreal), the more unilingual francophones one encounters. So even among Quebecers, those with the language ability demanded by C-232 are confined mostly to a single city or two.

It's true that on the basis of legal expertise alone, there are even now only a few thousand or perhaps even just a few hundred Canadians qualified to be Supreme Court justices at any one time. The applicant pool is currently not all that broad, and it never has been.

Still, making it necessary to possess fluency in both official legal languages first, before one's legal resume can even be considered, would reduce the number further to a few dozen inside Quebec and perhaps just a dozen or two outside.

Graham Fraser, Canada's official languages commissioner, has said C-232 is necessary because the Supreme Court is "the only federal court not required to be able to hear cases in either English or French without simultaneous interpretation." This is an apples-and-oranges comparison, though.

In no other federal court -- not Queen's Bench or provincial courts of appeal or the Federal Court -- are all the justices required to sit as one body. Where competence to hear cases in either French or English is required, a single fluent judge can always be found. In a provincial appeal court with 20 or more justices, it is never a problem to convene a panel of three judges who can hear a case in either language.

It is the same at the Federal Court, the court just below the Supreme Court. There, it is never necessary to bring all the justices together to listen to a case as a single bench, so it is always easy to find a small subset of the court that can hear in French or English.

In none of the other federal courts Fraser mentions is it necessary for all the justices to be fluent in both official languages.

Bill C-232 may be intended as nothing more than a seemingly meaningless attempt to make the Supreme Court look as bilingual as the rest of the federal bench, but its real-world impact will be to exclude great swaths of the country from having representation on our highest court as it increasingly makes society-altering rulings.

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