Bilingualism and Bijuralism at the Supreme Court of Canada

Matthew Shoemaker

Section 5 of the Supreme Court Act states "Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province." Other than a legislated requirement for three judges to be members of the Québec Bar, there are no other qualifications. In June 2008, Bill C-559 was introduced by Yvon Godin, MP for Acadie-Bathurst. It required that candidates for the Supreme Court may be appointed only if he or she understands French and English without the assistance of an interpreter. Although the Bill did not become law, this article shows that bilingualism for the Court is a highly controversial topic. It also argues that a more important issue, bijuralism, was largely ignored in the recent debate. The author believes that Canada would be better off if the debate about bilingualism included a debate about bijuralism.

Ask most people in Canada about bilingualism, and chances are you will elicit an opinion, whether positive or negative. Ask people about bijuralism and chances are you will elicit a confused look. Bilingualism is covered in the media, debated regularly in Parliament and taught in schools. Few in Canada, outside the legal field, would even know Canada is a bijural country with nine common law provinces and one civil law province, Québec.

Historical Context

The Supreme Court bilingualism debate, which only dates back to the introduction of Bill C-559 in 2008 is much more recent than the issue of bijuralism which finds its roots in the *Québec Act* of 1774. The Act was passed shortly after the French were defeated by the British in the Seven Years War. The British granted the Québecois the right to use their traditional system of civil law while imposing common law in fields in which they wished for the law to be uniform, such as criminal law. Thus, Québec and the rest of Canada have had different legal systems for well over 200 years.

Upon Confederation in 1867, the provinces maintained the right to legislate in the areas of "Administration of Justice in the Province." Parliament meanwhile maintained the right to govern the criminal law and the right to establish a "General Court of Appeal for Canada".

In 1875, the Supreme Court was established under Prime Minister Alexander Mackenzie. Initially proposed by Prime Minister MacDonald, it was Mackenzie's bill that eventually engrained Québec's unique legal system. This was achieved by mandating that two of the six Supreme Court judges be from the Québec bar.

Since 1949, when leave to appeal to the Judicial Committee of the Privy Council was abolished, the court increased to nine judges with the required number from the Québec bar increasing to three.

Arguments over Bill C-559

Mr. Godin justified his bill by recounting a story of a lawyer he knew from New Brunswick. The lawyer had argued a case in front of the Supreme Court and later watched the arguments on CPAC. The arguments seemed incomprehensible when translated. This, Mr. Godin argued, presented a situation where, had the court split on a 5-4 decision, the lawyer would have been left wondering whether any judge decided the issue based on a misunderstanding in the translation. Godin argues that the only way to potentially eliminate this problem is to ensure that judges are fully bilingual, allowing them to catch legal nuances that may be otherwise lost in translation.

Retired Justice John Major makes the counter-point that the pool of candidates eligible to be appointed to

Matthew Shoemaker graduated from the Faculty of Law at the University of Ottawa in 2012.

the bench, specifically from Western Canada, would be reduced to an unacceptable level.

In a linguistically divided country you'll get someone who may be bilingual, but not the most competent. This is a misplacing of priorities; there is no substitute for competence. People's lives depend frequently on what the Supreme Court says.[1]

Mr. Godin's response to this argument has been that there are "33 million people in Canada, you can't say that you won't find 9 bilingual people"[2].

While it is certainly true that there are bilingual lawyers from each province, it does not take into account the fact that they may not possess the other skills required to be Supreme Court judges. However, Mr. Godin's argument has received a boost from former Supreme Court Justice Claire L'Heureux-Dubé who argues this is a matter of justice. Justice L'Heureux-Dubé believes that there is a double standard in appointments since no unilingual francophone has ever been appointed to the bench.

The Chief Justice, who generally refuses to comment on any issue which could potentially come before the court, stated in an interview with the *Australian Broadcasting Corporation* that it is a decision best left to legislators. She refused to comment on the proposed legislation but added that "whatever the decision may ultimately be… our court will continue to offer services and function in both languages, as is, of course, required."[3] She has made it clear though in other interviews, that she believes the court currently functions "fully bilingually".

Bijuralism does not form part of the present debate, but when questioned about having bijural judges rather than bilingual judges, former Justice Minister and Liberal MP Irwin Cotler stated that the Court presently has a good enough civil law presence. He stated that the legislated requirement for three Québec judges ensures that there is "mandatory expertise on the Court"[4]. Additionally, requiring judges to be bijural, when civil law cases make up "a small amount of cases" would unduly limit the court.[5] Apparently Mr. Cotler did not believe that requiring judges to be bilingual would have the same effect.

Practical Qualifications

While there are very few legislated qualifications for Supreme Court justices, the practical qualifications are numerous. Precedent dictates that, in addition to the mandatory three Québec judges, three also come from Ontario, one from British Columbia, one from the Prairies and one from Atlantic Canada. Mr. Cotler, upon nominating justices Abella and Charron to the court in 2004 gave some insight as to what qualifications he looked for in potential judges.

"How did the consultations proceed? In my initial discussions, I made a point of specifying the merit-based criteria on which my recommendation was going to be based…They were and are:

Professional Capacity

- Highest level of proficiency in the law, superior intellectual ability and analytical and written skills;
- Proven ability to listen and to maintain an open mind while hearing all sides of an argument; decisiveness and soundness of judgement;
- Capacity to manage and share consistently heavy workload in a collaborative context;
- Capacity to manage stress and the pressures of the isolation of the judicial role;
- Strong cooperative interpersonal skills;
- Awareness of social context;
- Bilingual capacity; and
- Specific expertise required for the Supreme Court.

Personal Characteristics

- Highest level of personal and professional ethics: honesty; integrity; candour;
- Respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance; and
- Personal sense of responsibility: common sense; punctuality; reliability.

Diversity on the Court"[6]

What is also noteworthy about this list is that it was not considered an important factor to know both the common law and civil law. When asked about this particular omission, Mr. Cotler stated that judges are not expected to be experts in every field of law. He went on to explain that what was more important than knowledge of both systems was their proficiency in the law and their ability to understand legal issues in various fields. This, he argued, would help judges come to the right decision even when they were hearing cases in the opposite legal tradition.

The Civil Law Issue

What is more worrisome is that judges who have only ever studied or practiced the common law are required to hear and rule on civil law matters. As Chief Justice McLachlin made clear in her interview with Steve Paikin on TVO, the court most often sits as a bench of nine, with some cases sitting as a bench of seven, and "very few" cases sitting as a bench of five. This means that in the majority of cases heard, and the majority of cases heard in matters of civil law, the civilian lawyers are in the minority. In fact, in 2011, of the 70 cases heard by the Supreme Court, only 2 cases

were before a panel of five judges; neither of those cases were civil law cases.

In cases where common law judges pen civil law decision, the judgments always draw intense criticism. *Bruker v. Marcovitz*[7], drafted by Justice Abella, a common law-trained judge, was one such case. Such criticism would not exist if the Supreme Court used the civil law expertise available to it when drafting the most important legal decisions in the country.

Justice Bastarache addressed the issue of common law judges deciding civil law matters in comments he made to the Justice Department in 2000.

> The suitability of judges educated in the common law tradition hearing cases involving civil law issues has been the subject of some debate in Quebec and has even led to some opinion favouring a distinct Supreme Court for Quebec or a separate civil law division within the existing Supreme Court.[8]

Indeed, in *Bruker v. Markovitz*, Justice Deschamps, a civil law-trained judge, wrote a dissenting opinion which stated that the civil law had been misapplied by the majority. While Justices Lebel and Justice Fish were in the majority in this decision, it is a clear illustration of the problem of having a formal process in place for translation but no formal process in place to help judges understand a completely different legal system.

Justice Bastarache finds the notion of bilingualism and bijuralism are inherently intertwined, with common law being difficult to understand in French, and civil law being difficult to understand in English.

> The sources of the common law were established in the English language. Translation often results in some very significant problems for the practice of the common law in French. The same holds true for the practice of civil law in English. Some concepts are quite hard to translate.[9]

However, he seems to advocate for bilingualism as a way of resolving the problems which can arise from not knowing the system of law.

> It is hard to avoid confusion when civil law terminology must be relied on. It is also hard for lawyers to present their arguments in French in courts where the judges are not fluent in that language. Fortunately, this situation has improved significantly, especially in the Supreme Court of Canada… Nonetheless, to attain a high level of interaction between Canada's two legal systems, a high degree of individual bilingualism must be attained within the legal profession.[10]

Acknowledging that arguing in our current bijural system would be easier if a greater number of lawyers knew both languages, Justice Bastarache goes on to concede that the traditions of both legal systems are not inseparably linked to the language in which they developed.

> I cannot emphasize enough that my experience has taught me that French is not the exclusive linguistic vehicle for the expression of the civil law tradition nor is English the exclusive vehicle for the expression of the common law. I highly doubt that there is any mystical connection between the French language and the civil law tradition and the English language and the common law tradition.[11]

Linguistic Rights or Legal Rights?

The issue really being raised in Mr. Godin's bill was linguistic rights, not legal rights. It seems that the problem of access to justice for linguistic communities was enough of a concern in the modern era that, when Prime Minister Trudeau set out to codify the *Canadian Charter of Rights and Freedoms* in the Constitution, a provision was specifically included to give everyone a fair understanding of their hearing.

Section 14 of the *Charter* states that "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." This is the current practice, if a litigator chooses to argue in French, or in English, the opposite language will be translated for others at the trial, including the judges.

Section 19 also gives parties the right to use French or English in "any pleading in or process issuing from, any court established by Parliament". Nothing in Mr. Godin's bill will change the process for parties before the court. As it stands now, parties can use French, English or both in their pleadings before the court.

What Mr. Godin does not discuss is the possibility that, even if they understood the language of the arguments, there could be legal concepts that are difficult to understand not because of a language barrier, but because of the legal training of the particular judge. In the common law tradition, the concept of *stare decisis* defines the legal system, which ensures that precedent rules.

However, Justice Michel Bastarache, who along with Justice Martland are the only two judges in the history of the Supreme Court to have both a common law and a civil law degree, described the most important legal issue in civil law as that of "primacy of written laws."[12]

> Rather than proceeding from the *ratio decidendi* of previous judicial decisions, the emphasis in the civil law tradition is on the written, or codified

law, which is the primary source of law.[13]

This concept could be interpreted as strict interpretation, but in the common law, that is simply one of several methods of interpreting legislation, not the entire purpose of the legal system.

The difference in interpretation is one of several differences in the two systems of law. It is also an illustration of the difficulty judges would have in understanding a system in which they have not been trained. Further, a failure to understand the aspects of the particular legal system seems more problematic than not understanding the language in which almost perfect translation is available.

A Fully Bilingual Court

The Supreme Court has a system in place to ensure that decisions are translated as perfectly as possible by people and not computers. There are both Francophone and Anglophone jurilinguists — some even have degrees both in law and translation.[14]

It is the role of these trained linguists to revise the translation of the decisions of judges. If there is difficulty in translating any particular word or phrase, the jurilinguist can consult with the judge to clarify the meaning. When an error is found in the translation of a judgment, the wording can be changed, after consulting with the judge who drafted the decision, to reflect the true meaning of the decision.

Real-time translation of oral arguments is done by professional federal government interpreters. These translators are qualified and experienced and have access beforehand to the material filed by the parties. The fact that they are qualified and have access to the material beforehand leads one to believe that they, at minimum, understand legal arguments and can translate those arguments into the other language effectively. As Andrew Coyne made clear in a *Maclean's* article, this is the system that is used in the House of Commons, a system which Mr. Godin uses, but a system which is apparently insufficient for the Supreme Court.

While this process is not fail-safe, it is very thorough and arguably almost perfect. Furthermore, a judge, after listening to a decision, would discuss it with the other judges and their clerks who could correct any misunderstanding the judge had. Additionally, the judge who had the duty of drafting decisions, or a dissent, could have any mistake they make in understanding the translation of oral arguments caught by translation services when the reasons are being translated. It would require a total failure of several layers of court services for a judge to decide a case incorrectly based on a misunderstanding of language.

The Law

Mr. Godin has also argued that being bilingual would allow judges to read the legislation that forms the issue in the legal matter before them in both languages. His argument is based on the fact that when legislation is drafted, it is drafted simultaneously in both languages by Justice Department drafters who work in pairs, one Anglophone and one Francophone. As Justice Bastarache stated "Neither version has the status of a copy or translation—and neither has paramountcy over the other."[15] This has been the rule accepted by the Supreme Court as far back as 1891 in *Canadian Pacific Railway v. Robinson*.

> In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law… It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is.[16]

Mr. Godin argues that being able to read the legislation in both languages would help resolve ambiguities and get to the true meaning of the law. However, after the Québec provincial government did a massive overhaul of the *Civil Code* in the early 1990s, the federal government took steps to harmonize their laws with civilian law principles. Justice Bastarache takes it one step further in his comments, arguing that the law must meet four intermingled criteria.

> Canada is blessed with four different legal languages and federal legislation must not only be bilingual but bijural. Indeed, federal legislation must simultaneously address four different groups of persons:
>
> - anglophone common law lawyers;
> - francophone common law lawyers;
> - anglophone Quebec civilian lawyers; and
> - francophone Quebec civilian lawyers.[17]

In light of Justice Bastarache's comments, it is clear, taking it from someone who knows the inside process of actually reading and interpreting legislation, that simply knowing both languages is not enough. The four criteria that federal legislation must meet, if Mr. Godin was truly seeking a bill that would eliminate possible misapplications of the law, would require judges to be both bilingual and bijural.

Recent Appointments

There are passionate proponents and opponents on both sides of the bilingual debate. The recent appointments of Justices Moldaver and Karakatsanis

to the bench highlighted these divisions. Justice Karakatsanis is trilingual (English, French and Greek) whereas Justice Moldaver is unilingual. Both were appointments from Ontario. The two justices they replaced were both bilingual. When the NDP became Canada's official opposition in May 2011, it assured that the issue of bilingualism at the Supreme Court would hold a central place in national debates. That debate was hastened when Justices Binnie and Charron announced their retirements on May 13, 2011, barely 10 days after the federal election.

The Barreau du Québec was the first party to draw a line in the sand with the retirement announcements. Claude Provencher, who is the executive director of the Barreau, said that parties "have the constitutional right to be heard by a judge in one of Canada's two official languages."[18] It is clear from the Charter that parties do have a right to be heard in the language of their choosing, but statements such as the one made by Mr. Provencher skew that right.

The right does not guarantee that a judge must be bilingual, but that the parties can make their case in any language the chose, as has been discussed above. Ultimately, the Barreau du Québec did oppose the appointment of Justice Moldaver and, in an open letter to the Prime Minister, requested that he reconsider his nomination.

The Canadian Bar Association, which has members in all the provinces, including Québec, has staked out a middle-ground position. James M. Bond, former president of the Canadian Bar Association (British Columbia division) wrote that the CBA does not have an official position on the private member's bill, but clarifies that the CBA's position is on bilingualism generally. Bond says that "Bilingual ability should be a factor in considering applicants for the Supreme Court of Canada."[19] However, if the position of the CBA was adopted, unilingualism would not disqualify someone from being appointed to the bench.

Much of the reporting on the Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices focused on the questions Justice Moldaver faced regarding his lack of French. Justice Moldaver, as was widely reported, promised to work on his French-language skills. However, arguably a more important statement was made by Justice Karakatsanis.

> Canada is a bilingual and bijuridical country. Consequently, it is a stronger country. Canada has two legal systems and two official languages… I did not do my university studies in the civil law. However, it is important to me to understand the Civil Code as well as the approach and principles of civil law. If I become a justice of the Supreme Court of Canada, I am going to work with diligence to learn the Civil Code by reading as much as possible and discussing matters with my colleagues on the bench.[20]

These comments, sadly, were the only comments on the civil law during the entire hearing. While MPs Cromartin and Boivin from the NDP grilled Justice Moldaver on his inability to speak French, asking more than five questions, not a single member from any party raised the matter of bijuralism. Indeed, had it not been for Justice Karakatsanis raising it on her own accord, the civil law would not have been mentioned whatsoever.

Conclusion

In an officially bilingual country, it is important to have a conversation about whether or not Supreme Court justices should be required to be bilingual. However, the conversation is misguided if it does not include a question more related to our system of law, whether or not Supreme Court judges should be bijural.

Ultimately, adding any legislated qualifications other than those that currently exist will likely diminish the pool of candidates too significantly. While the argument for fairness in the court does have valid points, the concerns are accommodated quite well within the current linguistic regime. It is the understanding of the civil law that is not well accommodated, with only counsel for the court and law clerks being at the disposal of judges.

The conversation regarding bilingualism is important to make clear that there will be, at some point in the future, a bilingualism requirement for the Court. This debate encouraged those who wish to become Supreme Court justices to learn French and helps foster a more diverse legal community. Mr. Cotler has stated that while he does not believe bilingualism should be a requirement quite yet, he believes it is time to put the country on notice. The same logic should apply for bijuralism.

Once that happens, perhaps the country will turn their minds to the real injustice that exists at the Supreme Court, the fact that common law judges are determining the rights of those who have legal problems in the civil law. Only when these two requirements are met will justice truly be delivered in Canada.

Notes

1 Interview of John Major and Yvon Godin by Tom Harrington (April 5, 2010) on *The Current*, CBC Radio, Toronto, online: http://www.cbc.ca/thecurrent/episode/2010/04/05/april-05-2010/.

2 *Ibid*.

3 Interview of Chief Justice Beverley McLachlin by Damien Carrick (September 3, 2011) on *Law Report*, Australian Broadcasting Corporation, Melbourne, AU, online: http://www.abc.net.au/radionational/programs/lawreport/the-chief-justice-of-canada-beverley-mclachlin/3590402.

4 Interview of Irwin Cotler by Matthew Shoemaker (December 10, 2011) at Justice Building, Ottawa.

5 *Ibid*.

6 Irwin Cotler, "Ad Hoc Committee On Supreme Court Of Canada Appointments", Remarks to committee, August 25, 2004, online: http://www.justice.gc.ca/eng/news-nouv/spe-disc/2004/doc_31212.html.

7 *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607.

8 Michel Bastarache, "Le Bidjuralisme au Canada", Remarks to the Justice Department, February 4, 2000, online: http://www.justice.gc.ca/fra/min-dept/pub/hlf-hfl/f1-b1/bf1g.html.

9 *Ibid*.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

14 Interview with a source familiar with legal translation by Matthew Shoemaker (November 28, 2011) via e-mail.

15 Bastarache, *op. cit.*

16 *Canadian Pacific Railway Company v. Robinson*, (1891) 19 S.C.R. 292.

17 Bastarache, *op. cit.*

18 *Legal Feeds, August 25, 2011,* http://www.canadianlawyermag.com/legalfeeds/tag/justice-ian-binnie.html.

19 Canadian Bar Association, *BarTalk*, "What Did You Just Say?" (June 2010) online: http://www.cba.org/bc/bartalk_06_10/06_10/president.aspx.

20 Madam Justice Karakatsanis, "Ad Hoc Committee on the Appointment of Supreme Court Of Canada Justices", Remarks to committee, October 19, 2011, online: http://www.justice.gc.ca/fra/nouv-news/nj-ja/2011/doc_32665.html.