

A Supreme Folly

By: Frances Woolley

Matter Commented On: [The Bilingual Requirement for Supreme Court of Canada Justices](#)

Last August, Prime Minister Justin Trudeau [announced](#) that, in future, only candidates who are “functionally bilingual” in French and English will be recommended for positions on the Supreme Court of Canada. With the information released subsequent to the nomination of Malcolm Rowe to the Court, we now have some sense of what this means. [At a minimum](#), a functionally bilingual candidate should be able to read and understand court materials in both English and French, as well as discuss legal matters with their colleagues, converse with counsel in court and understand oral submissions in both languages.

Realistically, it is hard to imagine anyone being able to understand complex legal reasoning in both official languages – and, furthermore, to *demonstrate convincingly* that they had the ability to do so – unless they already had some experience using both English and French in a work environment. Yet opportunities to function in both French and English are unevenly distributed across the country, raising the possibility that the new bilingualism requirements will significantly alter the pool of potential Supreme Court appointees.

To get some idea of how requiring functional bilingualism will change the face of the Supreme Court, I used the public use micro file (PUMF) of Canada's 2006 Census to estimate just how many people use both official languages at work on a regular basis, and thereby gauge the percentage of workers who are currently functionally bilingual. Table 1 shows my estimates, based on a sample of over four hundred thousand Canadian workers between the ages of 25 and 75, of the percentage of Canadians who regularly use both official languages at work.

Table 1: Percentage of Canadian residents who regularly use both French and English in the workplace, 2006, by region.			
	Estimated percentage	With 95% confidence, the true figure is	
		No lower than	No higher than
Atlantic provinces	9.4%	9.0%	9.7%
Quebec	30.1%	29.8%	30.4%
Ontario	4.6%	4.5%	4.7%
West and north	1.4%	1.3%	1.4%
Number of observations: 408,436. Calculated from 2006 Census PUMF using the province (PR) and language of work (LW) variables.			

The point of this table is that there are huge regional disparities in the use of Canada's two official languages in the workplace – and hence in the opportunities to acquire and maintain functional bilingualism. Fewer than two percent of people living west of Ontario or in

the territories use both English and French in the workplace on a regular basis, compared with 30 percent of people living in Quebec.

Now it could be objected that these numbers include all workers from truck drivers to taxidermists, hence are of limited relevance when thinking about the bilingualism of potential Supreme Court nominees. Unfortunately the Census public use micro file cannot be used to assess directly the language capabilities of lawyers, because it does not contain sufficiently finely-grained educational and occupational information. However, it is possible to identify a group of Census respondents who are, if not lawyers, at least “lawyerlike”, and find out how many of these are likely to be functionally bilingual.

“Lawyerlike” respondents to the 2006 Census are people who:

- are between 25 and 75 years old
- are employed or self-employed
- are Canadian citizens or landed immigrants
- if immigrants, moved to Canada before age 20 (while this restriction eliminates some lawyers, it eliminates more non-lawyers)
- have as their highest level of education a bachelor's degree, a master's degree, or a university certificate or diploma above the bachelor's level
- studied “Social and behavioural sciences and law” in their highest degree
- work in occupational category “E0: Judges, Lawyers, Psychologists, Social Workers, Ministers of Religion, and Policy and Program Officers” or “E2: Paralegals, Social Services Workers and Occupations in Education and Religion [excluding teachers and professors]”
- earned over \$40,000 a year in 2005 (broad definition), over \$80,000 a year (middle definition), or over \$100,000 a year (narrow definition).

Of the 530,231 respondents between the ages of 25 and 74 in the public use census microfile, just 2,488 are “lawyerlike” in that they meet all of the above criteria. If we restrict our group to those earning \$80,000 a year in 2005, just 1,228 are lawyerlike. So while the lawyerlike group encompasses other professionals, like social workers, it is selective enough that the language capabilities of this group should be broadly indicative of the functional bilingualism of the Canadian legal community.

So just how many of these lawyerlike respondents are demonstrably functionally bilingual? Table 2 gives some indication:

Table 2: Percentage of “lawyerlike” respondents who regularly use both French and English in the workplace, 2006, by region.			
	Estimated percentage	With 95% confidence, the true figure is	
		No lower than	No higher than
Atlantic provinces	15.6%	9.4%	21.7%
Quebec	43.1%	39.3%	47.0%
Ontario	13.7%	11.6%	15.8%
West and north	2.1%	1.0%	3.2%
Number of observations: 2,488. Calculated from 2006 Census PUMF using the province (PR) and language of work (LW) variables.			

Comparing Table 2 and Table 1, what is striking is that, when we narrow down our focus of analysis to more professional, lawyerlike workers, the number of people using both English and French in the workplace rises dramatically in Quebec, from 30 percent to 43 percent of workers. It also becomes non-trivial – around 14 to 16 percent – in the Atlantic provinces and in Ontario. Yet in the West and the North, there are still only around two percent of workers reporting using both French and English regularly in the workplace – an increase of just 1/2 of one percent over the number reported in Table 1.

It could be argued that the numbers in Table 2 over-estimate the extent of bilingualism within the east-of-Manitoba legal community. The “lawyerlike” group identified above includes, for example, federal government policy and program officers, who are much more likely than the typical Canadian to have a bilingual workplace.

One way to narrow the “lawyerlike” group down, and make it more representative of potential Supreme Court nominees, is to take advantage of the fact that top-ranking legal professionals typically have relatively high earnings. Table 3 attempts to eliminate some of the non-lawyers in the “lawyerlike” group by focusing on just the functional bilingualism of lawyerlike people with market incomes (i.e. earnings plus investment income) above \$80,000 a year in 2005.

Table 3: Percentage of “lawyerlike” respondents earning over \$80,000 annually who regularly use both French and English in the workplace, Canada, 2006, by region.			
	Estimated percentage	With 95% confidence, the true figure is	
		No lower than	No higher than
Atlantic provinces	15.7%	7.1%	24.3%
Quebec	57.6%	51.5%	63.7%
Ontario	14.6%	11.7%	17.5%
West and north	1.8%	0.4%	3.2%
Number of observations: 1,228. Calculated from 2006 Census PUMF using the province (PR) and language of work (LW) variables.			

With this narrower definition of “lawyerlike”, the regional differences in functional bilingualism become even more pronounced. Over half of the Quebec respondents in this more elite group of lawyerlike individuals used both French and English in the workplace regularly, compared to fewer than two percent of those in the West and the North.

An even more refined definition of “lawyerlike” individuals would include only those with market incomes above \$100,000 in 2005. When I repeated the analysis for this group – comprising just 938 respondents – I obtained very similar patterns of language use to those shown in Table 3. Over half of elite lawyerlike respondents living in Quebec use both French and English in the workplace, compared to fewer than 2 percent in the western and northern parts of the country.

When Prime Minister Justin Trudeau's government announced the new functional bilingualism requirement for Supreme Court justices, it also reiterated its commitment to nominating appointees who [reflect a diversity of backgrounds and experiences](#). Yet it will face hard trade-offs between diversity, excellence, and bilingualism. Even if the numbers reported in Table 3 seriously underestimate the extent of functional bilingualism in Western Canada – even if there are, say, five times as many functionally bilingual lawyers as these numbers suggest – the new bilingualism requirement will eliminate around 90 percent of potential Supreme Court nominees

from the West and the North. It is hard to believe that it is possible to reduce the size of the candidate pool so dramatically without compromising either excellence or diversity or both.

Achieving French-English bilingualism requires appropriate opportunities, as well as ability and effort. While linguistic abilities may be fairly evenly distributed across the country, opportunities to learn both French and English are not. A family in Trois-Rivières can provide their children with a 100 percent English-immersion experience by driving three hours to northern Vermont. For a Vancouver family, the nearest authentic French-immersion experience is a four-and-a-half-hour flight away. For people whose first language is either English or French, achieving bilingualism requires learning a second language. For the many Canadians who grew up speaking a “non-official” first language, achieving functional English-French bilingualism means mastering three languages, not two. Since visible minority, Aboriginal and immigrant Canadians are disproportionately likely to have a non-official first language, it is particularly challenging for them to achieve French-English bilingualism.

In Table 4 I show just how much external and cultural factors influence achievement of bilingualism. Because I want to widen the scope of the analysis to include issues relating to identity, I use a broader definition of bilingualism here, categorizing anyone as bilingual if they can “speak English or French well enough to conduct a conversation”. The best way of thinking about the numbers in Table 4 is as a measure of the pool of people who could, with sufficient effort, potentially become functionally bilingual. By way of contrast, the earlier tables were trying to get at the number of people who are currently functionally bilingual.

Table 4: Percentage of adults aged 25 to 74 able to speak both English and French well enough to have a conversation in that language, Canada, 2006				
	All	Quebec	Rest of Canada	Number of respondents
All	18.7%	45.0%	10.1%	525,933
Visible minority	9.6%	46.9%	4.3%	75,061
Immigrant	12.2%	52.5%	5.8%	127,942
Aboriginal	11.8%	38.9%	8.7%	16,136
“Lawyerlike”	37.6%	72.1%	25.8%	2,488

Source: Calculated by the author from the 2006 Census public use micro file.

Unsurprisingly, immigrant, visible minority and Aboriginal Canadians are significantly less likely than the rest of the Canadian population to be bilingual in both French and English. What is perhaps more interesting, however, is the interaction between region of residence, ethnic identity, and bilingualism. In Quebec, immigrant and visible minority Canadians are actually more likely than the rest of the population to be bilingual, whereas in the Rest of Canada, the reverse is true. Fewer than one in twenty visible minority Canadians outside Quebec is capable of holding a conversation in both English and French.

I presume that the idea of a having functionally bilingual Supreme Court is to promote better and fairer decision-making: any case could be heard by any judge, thereby eliminating any systematic disparities in judgments that could arise if only certain judges heard certain types of cases. Those appearing before the Court would be free to use their language of preference, either French or English, without worrying that their case could be compromised.

Yet while, as an ideal concept, a bilingual court promotes [inclusivity](#), the reality is elitist. Only certain people, who have had access to certain experiences throughout the course of their life, are ever likely to meet the bilingualism requirement. Yes, functional bilingualism will ideally mean that those appearing before the court have a genuine choice of language (as long as that choice is French or English). Personally I am more concerned about the choice of judges. It is cold comfort to a person appearing before a court without deep knowledge of western Canadian institutions or constraints, without visible minority or Aboriginal representation, without a single member who has a science or mathematics background, to know that their position can be imperfectly comprehended in either official language.

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