HOW MUCH FRENCH DO THEY SPEAK ANYWAY? A BILINGUALISM INDEX FOR SUPREME COURT JUSTICES, 1985-2013

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Mandatory bilingualism for Supreme Court judges tantalizes Canadian politics for at least ten years now. The advocates of judicial bilingualism have repeatedly tried (and failed) to enshrine into law the requirement for Supreme Court justices to be functionally bilingual, i.e. the ability to "read materials and understand oral argument without the need for translation or interpretation in French and English". For them, integrating mandatory bilingualism as a legislative requirement in the appointment process is a panacea. Their opponents argue that language proficiency in French should not be a sine qua non condition for Supreme Court justiceship and that requiring it would prevent excellent candidates from being appointed. However, despite the fact that empirical statements abound on both sides, there is very little empirical evidence regarding the actual impact of unilingualism and bilingualism on Canadian judicial institutions and simply no evidence whatsoever about its impact on individual judges' behavior. Building on our ongoing research on judicial bilingualism, in this paper we try to evaluate the level of bilingualism of individual justices. What our findings suggest is that the behavior of Francophone and Anglophone bilinguals is influenced by the linguistic competency of their colleagues. Our findings also suggest that some Anglophone justices that are deemed to be bilinguals do not behave very differently from their unilingual colleagues. In light of these results, we reassess the proposition of integrating mandatory bilingualism as a statutory prerequisite for future Supreme Court appointees and discuss some policy alternatives that could prove more efficient in moving the Court towards real institutional bilingualism.

Le bilinguisme individuel des juges de la Cour suprême du Canada hante la politique canadienne depuis une dizaine d'années maintenant. Ceux qui plaident en faveur du bilinguisme institutionnel à la Cour suprême ont essayé à de nombreuses reprises, et chaque fois échoué, d'enchâsser dans la loi l'exigence de « bilinguisme fonctionnel », entendu comme la capacité « être capable de lire des documents et de comprendre les plaidoiries, en français ou en anglais, sans avoir besoin d'une traduction ou d'une interprétation », pour toutes les

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futures nominations à la Cour Suprême du Canada. Pour ses défenseurs, faire du bilinguisme fonctionnel une exigence législative est vu presque comme une panacée. Leurs opposants plaident que les compétences en français ne devraient pas être une condition sine qua non pour être nommé à la Cour Suprême du Canada et qu'inclure cette exigence dans la loi empêcherait la nomination d'excellents candidats. Cependant, malgré que les déclarations de faits abondent de part et d'autre, il existe très peu d'études empiriques sur les effets réels de l'unilinguisme et du bilinguisme dans les institutions judiciaires canadiennes et tout simplement aucune étude empirique de ses effets sur le comportement individuel des juges. En s'appuyant sur nos travaux en cours sur le bilinguisme judiciaire, nous présentons dans cet article un index de bilinguisme. Nos résultats suggèrent que le comportement linguistique des juges est influencé par l'environnement linguistique dans lequel ils évoluent et par les compétences linguistiques de leurs collègues. Nos résultats suggèrent également que certains juges anglophones qui sont réputés être bilingues ne se comportent pas différemment de leurs collègues unilingues. À la lumière de ces résultats, nous réexaminons la proposition d'intégrer le bilinguisme fonctionnel comme condition préalable pour la nomination des juges à la Cour suprême et discutons quelques alternatives qui pourraient se révéler plus efficaces pour atteindre un réel bilinguisme institutionnel à la Cour suprême du Canada.

SUMMARY

I. INTRODUCTION

Mandatory bilingualism for all Supreme Court judges has been presented as a panacea by many advocates of judicial bilingualism. In the last ten years, political mobilization on this front has become recurrent. Both the Liberals and the NDP have introduced at one point or another since 2008 bills to impose mandatory bilingualism for Supreme Court judges by amending either the *Official Languages Act*[1] or the *Supreme Court Act*[2]. While amending the former would give litigants the right to be heard by a panel composed of judges functional in the official language of their choosing, amending the latter would simply require all future Supreme Court justices to be bilingual. During the 2015 federal electoral campaign, the Liberals promised to appoint only bilingual judges to the Supreme Court of Canada (Liberal Party of Canada 2015) but they have so far refused to enshrine this requirement into law. Regardless, they have up until now fulfilled their promise by appointing the bilingual judges Malcolm Rowe in 2016 and Sheilah L. Martin in 2017 through a new administrative process. The new selection procedure, which was first put in place for the replacement of Justice Thomas Cromwell in 2016, gives the mandate to "an independent [seven members] and non-partisan Advisory Board […] the task of identifying suitable candidates who are jurists of the highest caliber, *functionally bilingual*, and representative of the diversity of our great country" (emphasis added)[3]. Both Rowe and Martin self-identified as functionally bilingual in their application questionnaire[4] and Martin wrote that she had acquired a C level in French according to the "Public Service Commission of Canada and Language Training Canada" in 2013 and that she "[a]lso attended numerous French immersion sessions organized by the Commissioner of Judicial Affairs". They both underwent in addition an *ad hoc* French-language test designed by the Office of the Commissioner of Federal Judicial Affairs before being selected. Their test scores have not been made available[5] but they have generally been welcomed has good bilingual additions to the Court.

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[1] R.S.C., 1985, c. 31 (4th Supp.).

[2] R.S.C., 1985, c. S-26.

[3] Canada, Prime Minister, Canada, Prime Minister of Canada, "New process for judicial appointments to the Supreme Court of Canada", (Ottawa: 2 August 2016), online: <http://pm.gc.ca/eng/news/2016/08/02/prime-minister-announces-new-supreme-court-canada-judicial-appointments-process>

The Office of the Commissioner for Federal Judicial Affairs, on its website, to which the new procedures refers, has defined functional bilingualism thus: "The Government has committed to only appoint judges who are functionally bilingual.

The Supreme Court hears appeals in both English and French. Written materials may be submitted in either official language and counsel may present oral argument in the official language of their choice. Judges may ask questions in English or French. It is expected that a Supreme Court judge can read materials and understand oral argument without the need for translation or interpretation in French and English. Ideally, the judge can converse with counsel during oral argument and with other judges of the Court in French or English."

Canada, Office of the Commissioner for Federal Judicial Affairs Canada, "Qualifications and Assessment Criteria", online: <http://www.fja-cmf.gc.ca/scc-csc/qualifications-eng.html>

[4] http://www.fja.gc.ca/scc-csc/2016-MalcolmRowe/nominee-candidat-eng.html

[5] According to the *Lawyers' Daily*: "The first segment involved the reading of a legal text followed by comprehension questions put to the candidate in the second official language. This first part lasted 20 minutes. The second part of the assessment consisted of a legal pleading read to each candidate, followed by comprehension questions put to the candidate. This second part lasted 20 minutes. The third part of the assessment sought to determine whether each candidate was able to converse and interact fluently on diverse subjects, including legal issues, in the second language. A guided conversation using set criteria formed the basis of this segment which also lasted 20 minutes." (Schmitz, 2018).

Until 2006 and the implementation of public hearings for Supreme Court nominee, there was hardly any way for the public to assess the levels of bilingualism of future Supreme Court justices. As a consequence, media coverage was inconsistent and relied mostly on anecdotal evidence. Moreover, media coverage of Francophone and Anglophone newspapers differed in their assessment of bilingualism and also changed across time. For example, in 1977 the *Globe & Mail* wrote that "all members of the Court now understand or speak some French" (Canadian Press, 1977), a somewhat surprising conclusion given that only 8 years earlier Peter H. Russell concluded in a thorough study on the place of French and English in the work of the Court that "by any reasonable measure of bilingualism, the Court has failed" (Russell, 1969, 213) and that, eight years later, Gerald La Forest was reported has being only the sixth bilingual judge to join the Court (Presse Canadienne, 1985). Likewise, *La Presse* published in 1984 that Brian Dickson was "by far the most bilingual of Anglophone judges" (Presse Canadienne, 1984) and, a couple of weeks later in the same newspaper, that he was "perfectly bilingual" (Auger, 1984). His biographers are much more skeptical about his "modest proficiency in French" that "never quite matched his genuine enthusiasm for bilingualism" (Sharpe & Roach, 2003 413) and, in recent years, opponents of mandatory bilingualism have used him as an example to show that requiring it would prevent excellent justices from being appointed (e.g. Gardner, 2010; Vancouver Sun, 2010; Heuser, 2016). Even when opponents of mandatory bilingualism argue that judges could learn while sitting on the highest court, the empirical evidence is almost non-existent. It is generally acknowledged that Marsahll Rothstein, who promised to learn French when he was appointed to the Supreme Court in 2006, failed in his endeavour (McCharles 2015). However, according to self-reported qualitative assessments, other justices managed to improve during their time on the Supreme Court. For example, in 2010, the office of the Chief Justice told reporter that "[a]t the time of her appointment to the Supreme Court of Canada [Chief Justice McLachlin] had good reading French, and moderate oral French" (Slayton, 2012 150). Even among fellow justices, Francophone justices have accused Anglophone justices of not being really bilingual (Slayton, 2011, 130) while Anglophone justices have argued that real bilingualism on the Court was rare and that Francophone justices would fail to meet in English the threshold that they set in French for them (Tibbets, 2010).

These discrepancies are probably a consequence of the fact that mandatory bilingualism is seldom discussed in depth and that difficult questions are sometimes overlooked. What is exactly mandatory bilingualism? What should we require of judges in general and of Supreme Court justices in particular? How are we to evaluate whether or not judges fulfill these criteria? Some statutory provisions actually provide guidance to establish such standards. The *Official Languages Act*, for example, requires that judges sitting on a case, except the Supreme Court of Canada, can understand the official language used by any party without the assistance of an interpreter. It is unclear however including the Supreme court in the scope of this provision would be sufficient to assuage the concerns of the advocates of mandatory bilingualism. This being said, experts seem to agree that we are in dire need of uniform language tests (House of Commons, 2017). Panels are set by chief judges relying on the self-evaluation of judges of their level of French. According to Karine McLaren, director of the Centre de traduction et de terminologie juridiques of the University of Moncton, this has led "a judge appointed to the Provincial Court who said he was bilingual gave a decision when he was not capable of hearing the case in French (sic)" (House of Commons, 2017 19).

The debate on mandatory bilingualism thus proceeds on murky foundations. It is sometimes unclear what advocates of mandatory bilingualism want to achieve and, even more so, whether the means that they choose are likely to produce the outcome that they want. In these circumstances, since we lack both conceptual clarity as well as valid and reliable empirical evidence, the purpose of our study is to fill this gap by trying to provide an objective assessment of the justices of the Supreme Court of Canada between 1985 and 2013 and to create an index of bilingualism.

We have had the opportunity to discuss the impact of unilingualism on judicial behavior in a previous study (Bédard-Rubin & Rubin, forthcoming). Our findings showed that in areas of federal law, unilingual judges sit less frequently on Francophone cases and that Francophone cases are thus heard by significantly smaller panels. Even when they sit on federal French cases, unilingual Anglophone judges are less likely to write an opinion than their bilingual colleagues. In consequence, the composition of the federal law workload of unilingual Anglophone judges is composed of much fewer French cases than their bilingual colleagues. However, unilingual Anglophone judges do not seem to pay less deference to Francophone lower courts decisions than their bilingual colleagues. Given the scope of our research, we were unable to assess whether unilingual Anglophone judges vote differently than their colleagues because of their linguistic limitations.

In line with our previous research on judicial bilingualism at the Supreme Court of Canada, in this paper, we construct an index of bilingualism. The article proceeds as follows. In the second section (**II**) we review the main arguments in favour of mandatory bilingualism in Canada and we evaluate what kind of threshold or test should be imposed on future Supreme Court appointees to achieve this purpose. In the third section (**III**), we assess the level of bilingualism in the behavior of judges with four different indicators: their likelihood to sit in a French case, their likelihood to write in a French case on which they have sat, the ratio of French to English citations of doctrinal work and the proportion of citations that come from Quebec lower courts. In the fourth and final section (**IV**), we discuss our findings, their limitations and put them to bear on the current the debate. We evaluate whether different reforms are apposite to foster bilingualism at the Supreme Court and focus on alternative routes that might prove more successful in light of our empirical findings.

II. WHAT BILINGUALISM DO YOU WISH FOR?

Debates about bilingualism often stumble while proponents and opponents talk past each other (Charbonneau, 2015). Advocates of mandatory bilingualism argue that mastery of French and English is essential for judges for a variety of reasons, both instrumental and principled (St-Hilaire et al, 2017; Grammond & Power, 2011). Meanwhile, most opponents of mandatory bilingualism reply that, despite it being an important value, bilingualism should not be mandatory especially because it would trump other important considerations such as diversity and regional representation. While the proponents of mandatory bilingualism try painstakingly to address the concerns of their opponents, they generally put much less effort in engaging in reasoned discussion about the underlying reasons for their own position and the different concrete implications that their various positions entail. As the 2017 Report on Access to Justice in both official languages of the House of Commons Committee of Official

Languages shows, the question of the appropriate level of fluency in both official languages and its evaluation is complex. Unless we have a clear view of what we expect of Supreme Court judges, it is hard to provide a clear threshold that is acceptable to all (House of Commons, 2017). The Report, however, recommended "[t]hat the Office of the Commissioner for Federal Judicial Affairs explore existing Canadian resources, such as KortoJura, to develop a language proficiency test and a scale to evaluate the language skills of candidates for appointment to the federal judiciary and the Supreme Court." It is thus possible that there will be a standardized test rather than the current *ad hoc* test for future Supreme Court nominees.

Regardless of the test used, the problem is that advocates of mandatory bilingualism have different reasons for defending their position and the actual level of fluency deemed necessary for Supreme Court justices. As a consequence, the ways in which this could be monitored are generally left out of the picture. The various rationales underlying mandatory judicial bilingualism point towards different levels of fluency in both languages. The most salient arguments are the following.

Michel Doucet, professor of constitutional law at the University of Moncton and long time advocate of minority language rights, has offered a sustained critique of unilingualism of Supreme Court justices. He argued, for example, that simultaneous interpretation did not convey the meaning of what Francophone litigants are saying and that this can lead to distortions if not outright wrong decisions (Comité permanent des langues officielles, 2008). According to Doucet, the fact that not all Supreme Court judges can understand French and that they must rely on simultaneous translation could lead judges to misunderstand important nuances, misinterpret legal arguments and, ultimately, issue wrong judicial decisions.

But critics of this position have argued that advocates of mandatory bilingualism have not proved their point. Political scientist Dennis Baker, for example, argued that "there is no evidence […] that [judicial unilingualism] led to substantial injustice to the litigants" or "problematic judicial results coming from these mistranslations or missteps in the translations" (TVO, 2010). This argument rests on dubious grounds because it presupposes that it is possible to know, in advance, what a good decision is and it fails to acknowledge that law is something that even competent people disagree about (Dworkin, 1986; Waldron, 1999).

But Doucet's critique itself only begs the question: what would an appropriate level of French be? For that matter, what would an appropriate mastery of a judge's *mother tongue* be? Standardized tests such as the GRE do measure one's "verbal capacities". Both Doucet's argument and Baker's critic fall in the same trap in that they presuppose that one can identify what a right decision is, in advance, and then measure actual decisions against this standard. This does not mean that the concerns raised by Doucet are pointless, it simply means that they fail to provide us with a way to determine what exactly would be an adequate level of fluency in a given language to be eligible to judicial office.

A second kind of argument has been put forth by the former dean of the Faculty of Law at the University of Ottawa and now Federal court judge Sebastien Grammond and well-know litigator for linguistic minorities Mark Power (Grammond & Power, 2011). They have argued that lower proficiency in French reduces the capacity of a judge to understand all the legal

work that is being written in that language, both in terms of precedents and doctrinal writings. After reviewing a number of empirical studies, they come to the conclusion that:

> [U]nilingual judges […] are unable to draw upon the rich body of Canadian literature written in French. […] The general picture that emerges from those studies is one where English-language books and articles overwhelmingly dominate, and French-language texts are mostly cited in judgments dealing with civil law or other issues peculiar to Quebec. (Grammond & Power, 2011 9)

Even if their argument goes beyond the simple preoccupation with the degree of penetration of francophone academic and judicial ideas in Supreme Court decision-making processes, this specific concern points towards a different threshold for competence in French: understanding *written* arguments in French would probably be sufficient.

A third argument closely related to the previous one is the capacity to interpret bilingual legislation. Since the laws of Quebec, Ontario, New Brunswick, Manitoba and all federal laws are adopted in both French and English and that both versions have equal status, being able to read the law directly in its original untranslated version is necessary to compare and contrast the two versions to get access to the best interpretation possible (Bastarache *et al.* 2008; Bastarache, 2012). A good example in this respect is the *Nadon Reference* in which case an ambiguity in the French version of the text was resolved in part by having recourse to the English version. If judges, in order to have access to the other version, had to get it translated for them, this would defeat the whole purpose of the principle of bilingual interpretation. This being said, the level of fluency that is required of judges interpreting a specific legal provision in a given language would probably not be as high as it is for understanding complex oral arguments, conducting a trial or understanding a complex and lengthy written argument. One could understand a provision of a law in French or, at least, have recourse to it as assistance when a version in English is ambiguous, even if one cannot read complex factum of many pages in French. Whether bilingual interpretation is seen as remedial – i.e. as helping simply the interpreter when a text is ambiguous – or as essential – i.e. as creating a bilingual meaning with the conjunction of both versions (MacDonald, 1997) – brings many question that we cannot address here. However, as long as we take a more modest and remedial understanding of bilingual interpretation, the degree of fluency in French required of Supreme Court judges might be quite modest. Moreover, when we consider that Supreme Court judges also *create* the law, shouldn't they be also able to write in both official languages or, at least, to make sure that both the French and English versions of their decision convey the same meaning? For example, Justice Lebel explained that he often had to devote many hours to insuring that both the French and English versions of his decisions conveyed the same meaning (Grammond & Power, 2011 6). Moreover, Lebel said that he used to write decisions in the language used by the parties themselves (Slayton, 2011). Viewed from the perspective of the capacity to "create" the law, the level of each individual judge in both official languages should probably be much higher than is actually understood when we think of simply "interpreting" the law.

A final argument put forth by, among others, former Official Languages Commissioner Graham Fraser (Commissionner of Official languages, 2011; Fraser, 2016) and former Supreme Court Justices Louis Lebel (Slayton, 2011) and Claire L'Heureux-Dubé (Buzzetti, 2010) is that judicial unilingualism puts an extra burden on francophone justices. Since

English is the *lingua franca* of the Court, Francophone judges might be forced to work in English. Graham Fraser has argued that this infringes their right to work in a bilingual environment. Leaving aside this legal question, the truth of the matter is that judges probably spend most of their time working with court staff other than their fellow judges. But, in addition, Justice L'heureux-Dubé said that she often had to write her judgements in English in order to circulate them to other justices because she knew that writing them in French and having them translated in English would be too long. Fraser's, L'heureux-Dubé's and Lebel's argument arguably points to a more modest understanding of French (provided that we do not require of all judges the linguistic ability displayed by Lebel in being able *to write decisions* in both official languages). For example, it seems that there is no need for requiring that Supreme Court judges can *ask questions* and discuss with counsels or with each other in the language of their choosing. As long as they could understand what their colleagues say or write this would be sufficient to allow everybody to express himself or herself in any language. On its own, however, it seems that this argument does not capture the whole story.

But the insider's perspectives provided by Lebel and L'Heureux-Dubé point to an interesting dimension that is generally unexplored and that goes beyond the simple recrimination towards English being the *lingua franca* of the Court; the institutional dimension of language and its impact on individual behavior because of "panel effects" (Sunstein et al. 2006). The Supreme Court is an institution with its own internal patterns and pressures that can have as much influence on judicial behavior as ideological proclivities or simply what the law is (e.g. Posner, 2008; Epstein, Landes & Posner, 2013; Alarie & Green, 2017). As we will see, our data suggest that panel effects are indeed important and that the behavior of Francophone judges is at least partly determined by the linguistic capacities of their colleagues. In a previous article we pointed towards this collective dimension even if we did not flesh it out completely. We called this the "linguistic separation of labour" argument (Bédard-Rubin & Rubin, forthcoming). In this previous article, we hypothesized that Anglophone unilingualism could potentially marginalize francophone judges by forcing them to devote most of their time to French cases. Likewise, Anglophone judges might be silenced because they are left aside and generally do not write in French cases. We now turn to the index of unilingualism and show that the "linguistic separation of labour" captures an important part of the story.

III. DATA, METHODOLOGY AND VARIABLES

To measure the actual level of bilingualism at the Supreme Court of Canada, we use the data set compiled by professors Benjamin Alarie and Andrew Green of all Supreme Court decisions between 1954 and 2013 (Alarie & Green, 2017). To limit the impact of regional specialization in any given area of law, we limit our focus to areas of federal law: aboriginal law, administrative law, citizenship, immigration and refugee law, civil rights and liberties and human rights, criminal law and procedure, division of powers, intellectual property law and international law. Even if their degree of specialization might differ, all justices of the Supreme Court are supposed to have had somewhat equivalent training and some knowledge of the law in these areas.

Moreover, for the purpose of our analysis, we limit our research to the period 1985-2013. The reason is twofold. First, citations of academic journals only emerged in the late 1970s at the

Supreme Court of Canada and became more widespread with the adoption of the *Canadian Charter of Rights and Freedoms* in 1982 (McCormick, 2004). Thus, since we look at citations of Francophone doctrinal sources as one of the indicators of the level of fluency in French of individual justices, the data before the first Charter cases were decided (1984) provide little information. Second, until Gerald Le Dain was appointed in 1984, there seem to have been an implicit linguistic divide on the Court. The three Quebec judges were bilingual and the judges from the other provinces were, most of the time, close to unilingual. Since we want to evaluate the variance between the behavior of those judges that are deemed "bilingual" but not from Quebec, there were few of them before 1984. It is only from 1984 onward that bilingual appointments to the Supreme Court became more common. Finally, the format of Supreme Court decisions became standardized in 1985. From then onward, the cases that are cited in the decision are being clearly indicated in the heading. It was thus much easier to identify them from this period onward.

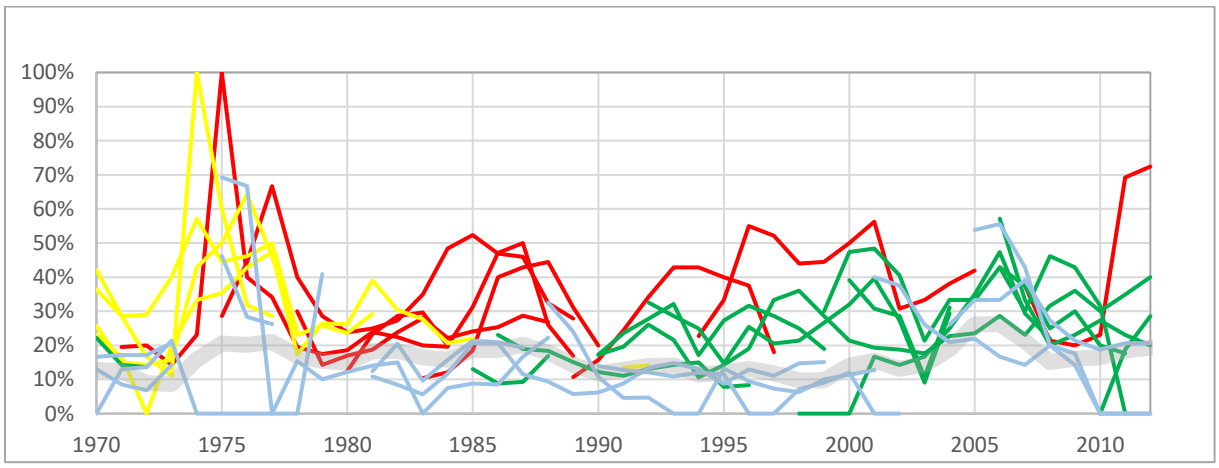
In order to identify cases likely to have been argued in French, we have used the decisions from the Quebec Court of Appeal as a proxy for French cases. This decision entails two obvious limitations. First, this obscures the fact that other cases from the rest of Canada can bring into play institutional bilingualism. However, we assume that these are rather marginal since the proportion of Francophone outside Quebec has always been significantly smaller than the proportion of Anglophone in Quebec. Thus, there was a higher probability, *ceteris paribus*, that cases in our sample were argued in English in Quebec than that cases were argued in French in the rest of Canada. Even if our categorization ranks Francophone cases from Canada in our "English" category and Anglophone cases from Quebec in our "French" category, by doing so we erred on the side of caution and potentially even down-played the actual impact of language on judicial behavior. Second, we are aware that some cases from the Federal Court of Appeal might have been argued in French. Because it is harder, in terms of coding, to assess the language used by the Federal Court of Appeal we decided to leave them aside and to include them in our Anglophone category. Again, if we were able to disentangle Federal Court of Appeal cases that were argued in French from those that were argued in English, the differences might be starker. We erred on the side of caution.

We created an index composed of four indicators: the linguistic distribution of cases skipped, the probability of writing an opinion when sitting on a case argued in French, the citation of Francophone lower court decisions and the citation of official reports and academic writings in French. Let us examine these indicators in turn. The detail of the calculation of each individual indicator and their combination to create our index can be found in Appendix A.

First, we use an indicator that we call the "linguistic distribution of skipped cases" each year for every individual judge. The results are reported in Figure 1 below. This indicator measures simply the proportion of Francophone federal law cases in the total number of federal law cases on which a Supreme Court Justice did not sit in a given year. The underlying assumption that we explored in our previous study is that Anglophone judges are more likely to be exempted from sitting on Francophone cases than their bilingual colleagues. By using a proportion instead of an absolute number, we capture the increase of the average panel size of the court since 1985 and the fact that some judges tend to hear fewer cases toward the end of their careers.

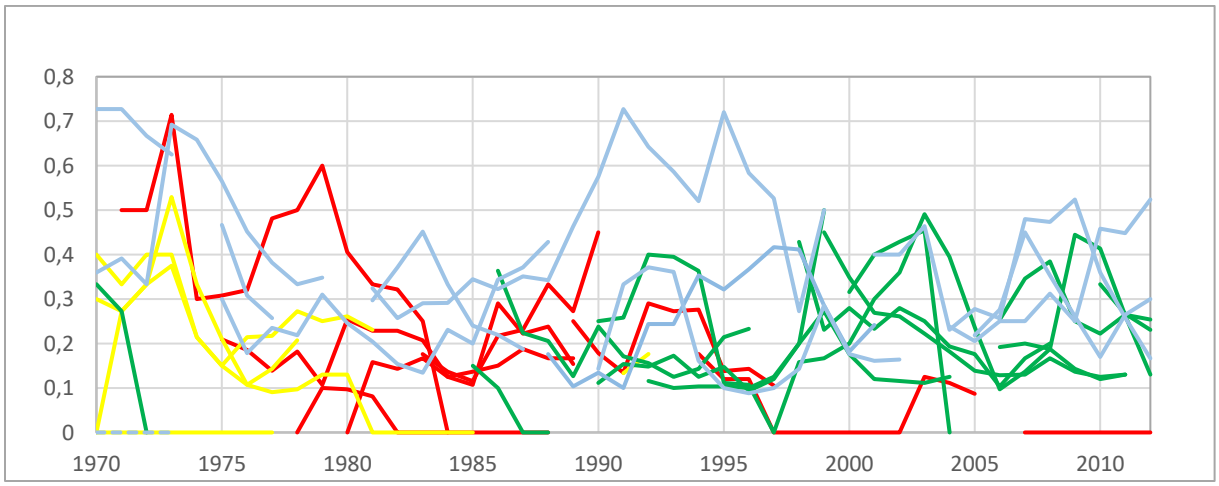
Justices from Quebec are represented in blue. The other justices are represented in green when there is biographical evidence of them studying or working in both a French and an English environment and when they were described by the press or their biographers as bilingual. The justices that were described by the press as unilingual are represented in red. Those for which there was not enough information coming from subjective assessments were ranked as "unknown" (yellow) (see Bédard-Rubin & Rubin, forthcoming).

Figure 1: Proportion of absence to federal law cases from Quebec on overall absence to federal law cases, 3 years average, 1970-2013



The second indicator that that we used to construct the index is what we call "linguistic assertiveness" for each year for every individual judge. The results are reported in Figure 2. This indicator captures the likelihood that a judge will write an opinion for every Francophone case that he or she hears in a given year. The higher the linguistic assertiveness, the more likely the judge is to write an opinion when he or she hears a case argued in French.

Figure 2: Proportion of federal law cases heard from Quebec that resulted in a solo opinion, 3 years average, 1985-2013

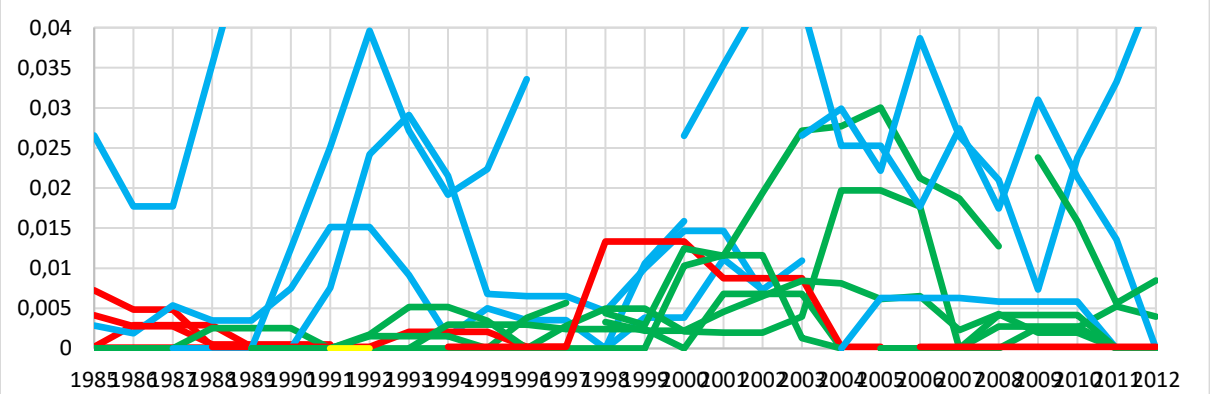


One limitation of this variable is that some judges might be used parsimoniously for specific cases by the Chief Justice when they have a specific specialization in a given area of the law. For example, a unilingual judge that is an expert in aboriginal law might sit very infrequently on Francophone cases overall but, given his or her specialization, he or she will sit on Aboriginal law cases even when they are argued in French. Thus, the proportion of cases heard in French that resulted in an opinion might be very high for this specific judge because he or she sits very infrequently on those cases despite this specific judge not being especially fluent in French.

If the first two elements are influenced by panel effects, the next two variables are related to citation practices and are thus not supposed to be affected by the behavior of one's fellow justices. By combining two variables related to personal attributes (citation practices) and two variables related to group behavior (linguistic distribution of leisure and linguistic affinity), we temper the impact of endogeneity in the construction of our index.

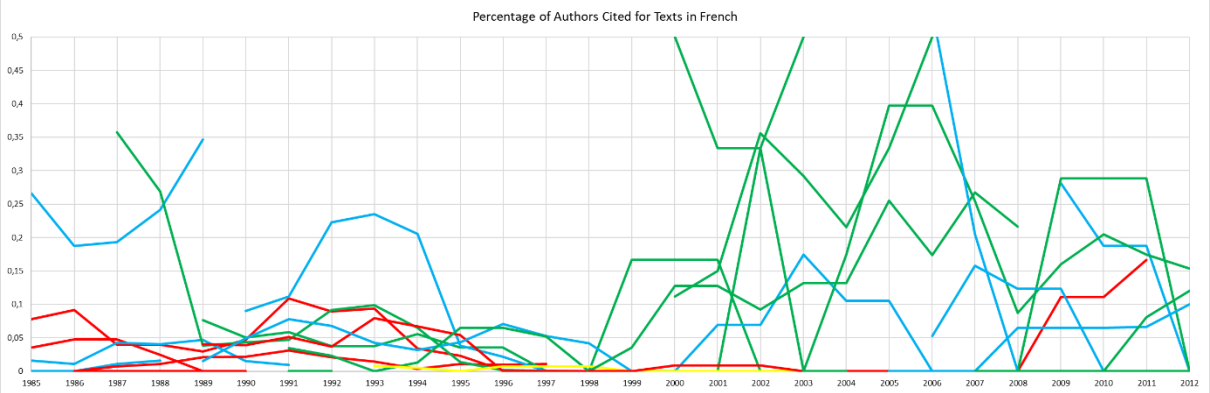
The third variable that we include in our index is the linguistic composition of the academic citations in federal law cases. To create this variable we used the English version of Supreme Court decisions as they were published by Lexum. We then identified the texts that were cited in French. This does not reflect exactly the language used by the judges since many official documents (e.g. official reports, Hansards, etc.) as well as some academic texts (e.g. Pierre-André Côté's *Interprétation des lois*) are published in both official languages. However, when the work was cited in French *in the English version of the decision*, we can assume that the given judge used the French version himself or herself. Thus, this variable reflects the proportion of unequivocally Francophone texts as compared to other texts (virtually all English texts) cited by individual justices. Like for the previous variables, we used only federal law cases, i.e. cases for which Francophone citations can be expected even for a case argued in English coming from British Columbia or Manitoba. This variable also tempers one limitation of our other variables, namely the fact that we associate French with the province of Quebec even though there are Francophone cases coming from the other provinces and English cases coming from Quebec. By coding directly the language of the citation instead of using the proxy of regional origin for language, we have tempered the effect of this regional-linguistic simplification proxy.

Figure 3: Percentage of cases cited in federal law cases coming from Quebec courts, 1985-2013



In a similar spirit, the fourth and final variable that we include in the index is the proportion of citations to francophone lower court decisions for every federal law opinion written. Since Supreme Court decisions are systematically translated since 1969, we classified them as English for the same reason that we did for official documents that are published in both French and English. Thus, like for the citation of academic or official sources, the numbers given here do not reflect the actual French or English version used by each judge but only the decisions that we know for sure were used in French.

Figure 4: Percentage of academic citation of French texts, 1985-2013



We then combined the z scores of each variable to create an index. The details about how we constructed the index are found in Appendix A. The average lifetime bilingualism index for each Supreme Court justice for the period 1985-2013 are presented in Table 1 below.

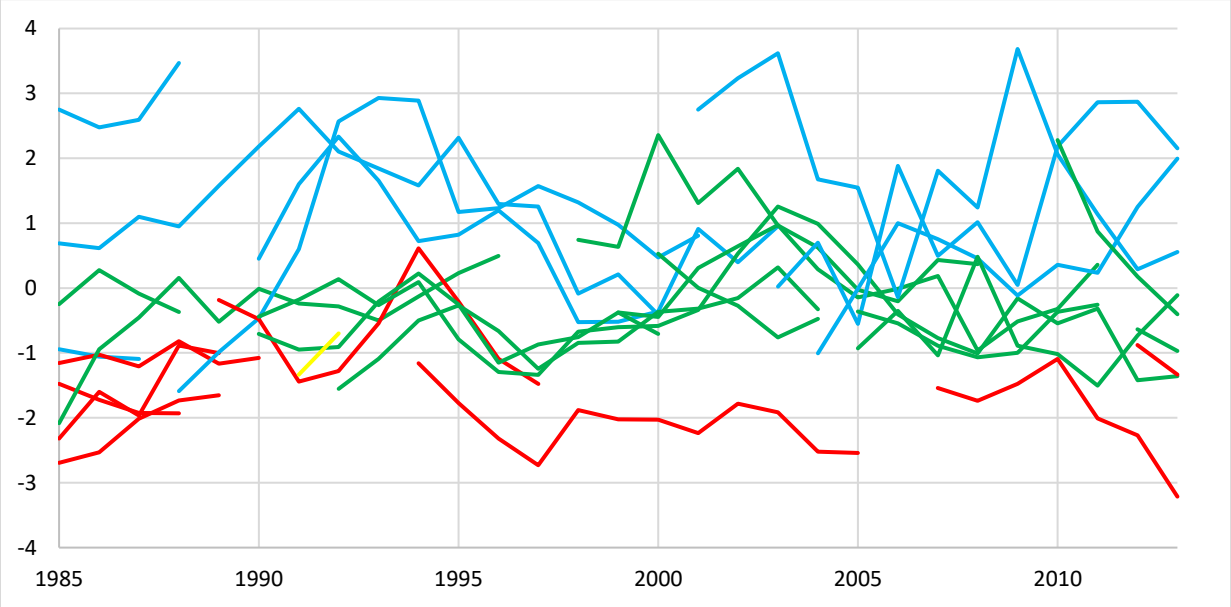
Table 1: Average Lifetime Bilingualism Index, Supreme Court Justices, 1985-2013

JUSTICE	INDEX
JBeetz	2,62316273
LLeBel	1,85766663
ALamer	1,26203179
RWagner	1,23661723
TACromwell	1,20689092
MDeschamps	1,20569003
CLHDube	0,81670667
CDGonthier	0,6790316
MBastarache	0,65226315
GELDain	0,57904799
MJFish	0,39098923
LArbour	-0,01338634
WICBinnie	-0,09617075
JChouinard	-0,20404895
GLForest	-0,28006303
BMcLachlin	-0,41409516

PCCory	-0,56109999
LCharron	-0,56238709
RSAbella	-0,58851384
FIacobucci	-0,66188196
JSopinka	-0,68779865
MJMoldaver	-0,87813341
BWilson	-1,02131153
AKarakatsanis	-1,14084237
WRMcIntyre	-1,20771858
WStevenson	-1,24197984
MRothstein	-1,79159296
WZEstey	-1,99950621
JCMajor	-2,03672714
RGBDickson	-2,32153132

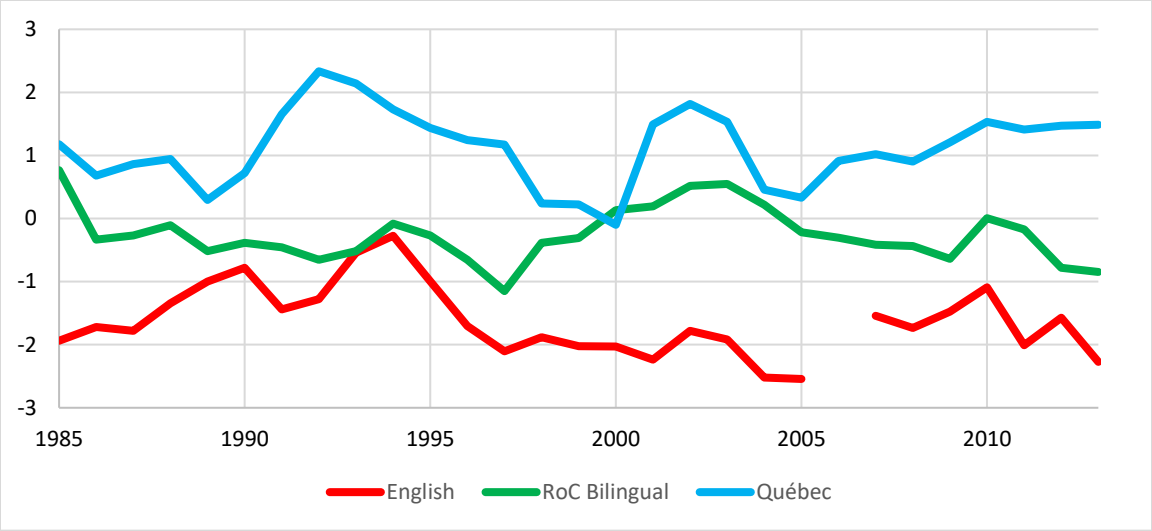
The intuitive guiding idea is that a judge that almost never sits on French cases, even when he or she sits, never writes opinions in French cases, never cites academic publications in French and never cites lower courts' decisions in French is much more likely to be unilingual than a judge that sits equally on French and English cases, writes as much when hearing a case in French or in English, cites, given their respective proportion in Canada, as much Francophone and Anglophone academic publications and as much lower court decisions from Quebec and the rest of Canada.

Figure 5: Bilingualism Index, Value per Justice, 3 years average, 1985-2013



For interpretive purposes, we present here the average index value of each linguistic group for every year.

Figure 6: Average Bilingual Index Value for 3 Linguistic Groups, 1985-2013



In terms of external validation of our index, there seems to be a correlation between the results that we obtained here and the inferences that we drew regarding the bilingualism of individual judges in Bédard-Rubin & Rubin (forthcoming) based on objective biographical elements and subjective assessments by mainstream newspapers, academic authors and biographers.

IV. DISCUSSION

One of the first conclusions that we can draw from the index is that there seems to be decreasing marginal benefit in having bilingual judges on the Court. For example, when it comes to hearing French cases as it is presented in Table 1, Le Dain and La Forest were the first fully bilingual judges to be appointed from outside Quebec and their behavior looked pretty much like those of their Quebec colleagues. As time passed, however, it seems as if the institutional pressure decreased. For example, during the period from 1999 to 2003, when the Court was composed of five Francophone judges (Arbour, Bastarache, Gonthier, L'Heureux-Dubé/Deschamps, Lamer/Lebel) three bilingual Anglophone judges (Binnie, Iacobucci, McLachlin) and only one unilingual Anglophone judge (Major), the behavior of bilingual judges from the RoC and from Quebbec was not ostensibly different. As the linguistic capital of the whole court increased, the linguistic costs of individual judges decreased. In fact, in 2000, the index of bilingualism of bilingual judges from the RoC and from Quebec was the same. The sharp increase in the index of Quebec judges in the early 2000s is only attributable to Justice Lebel who used to cite many decisions of the Quebec Court of Appeal on which he had sat for fifteen years when he joined the Supreme Court.

In fact, when we look at the average bilingualism index presented in Figure 5, it seems as if an increase in the level of bilingualism of the judges from the RoC is correlated with a decrease in the level of bilingualism for Quebec judges and vice versa. This can be caused by the "panel effect" discussed above. When judges have little knowledge of French, it puts

some pressure on Francophone judges in French cases. As the level of French increases overall on the bench, the linguistic pressure on Francophone judges diminishes and their behavior can reflect more their actual legal competences instead of their linguistic capacities.

Moreover, our index suggests that some judges that seem bilingual might be less so than expected. For example, when Michael Moldaver and Andromache Karakatsanis were appointed to the Supreme Court, he was described as a unilingual Anglophone while she was described as trilingual (Engish, Greek and French). However, their behavior does not reflect this assessment since Moldaver's bilingualism score (- 0,878) is higher than Karakatsanis' (- 1,141). Was Moldaver more careful after having been criticized for his lack of knowledge of French? Did he hire more Francophone or bilingual clerks to alleviate his linguistic limitations? Future study should try to understand the different institutional mechanisms that are used to counter-balance the linguistic limitations of some judges and that partake in the overall linguistic capital of the Court.

There at least two limitations with our index. First, it seems to overrepresent the level of bilingualism of Quebec judges. This is understandable given that we used cases coming from Quebec as a proxy for cases argued in French. Future research should try to have a finer categorization of cases argued in French and cases argued in English. This being said, given the increase in the number of interveners since the mid-1980s, almost every case is argued, at least to some extent, in both English and French. It is thus increasingly hard to know what language was predominantly used in each individual case. Second, it combines two variables that are group-dependent (linguistic distribution of skipped cases and linguistic assertiveness) and two variables that are not (citation of academic sources and citation of lower court decisions). For now, it is difficult to see how this problem could be avoided short of actually testing individual justices. Even then, we could not gather information regarding those that are deceased. A further possibility would be to use archives and other documents written in both languages by each justice. These documents could then be analyzed and compared by using specific software for text-analysis. By comparing the complexity and breadth of their vocabulary in both language (e.g. number of different words used) we could then probably approximate their level of fluency in both official languages. Future research should probe these other avenues.

Considering our findings, it seems that the present goal of enshrining that judges should be able to "hear cases without the assistance of an interpreter" does not guarantee that the Court will be more bilingual. As discussed in the first section, there might be other factors that should be taken into consideration when selecting Supreme Court justices, such as the balance between Francophones and Anglophones on the Court, the familiarity of individual justices with the academic literature in both French and English and their capacity to write decisions in both official languages to create a genuinely "bilingual legal culture" (MacDonald, 1997). We suggest three different policy proposals that could be taken into consideration.

The first idea would be to require a certain level of French as part of the legal program required for accreditation by the National Committee on Accreditation. Even if this would be an admittedly radical change, the idea is not completely foreign. For example, all Quebec law schools require that their student achieve a certain level of fluency in English. Law students have to show that they can master a certain level of English or otherwise take English courses

in order to graduate. The opposite is also true for Anglophone students who must show that they have achieved a certain level of French before they can graduate.

The second would be to reserve some seats to Francophone and Anglophone judges on the Court. While this might sound strange to contemporary ears, it was actually the way in which the Court dealt with the question of bilingualism for most of its history. It is only during the late 1980s and early 1990s that the Court became a more bilingual institution. Before that, it was expected that Quebec judges would be Francophone and that the other judges would be Anglophone and, in all likelihood, more or less unilingual (Cf. Russell, 1969; Snell & Vaughan, 1985). It would be possible, for example, to expand the number of seats on the Court to 11, 13 or 15, as suggested by the Pépin-Robarts Commission (Task Force on Canadian Unity, 1979). We could then insure that enough sitting judges are Francophone. Thus, it would be possible for the Court to hear cases argued in French with all its Francophone members. Admittedly, this option could be constitutionally problematic short of a constitutional amendment. A more modest change would be to guarantee that there are at least four Francophones on the Court. As our results show, it seems that the level of bilingualism was the highest during the period when the Court was composed of 5 Francophones and 4 Anglophones. However, the level bilingualism slowly decreased as the Court went from having 5 to 4 (in 2008) to 3 (in 2011) Francophone justices.

The third would be to select Supreme Court justices longer in advance and make sure that they reach a given level of French before appointing them. Many judges have tried to learn French while they were sitting on the highest Court (Rothstein, McLachlin, Dickson). Despite the sincerity of their efforts, we should dispel "the illusion that a unilingual Canadian can always go to night school and learn the other language in a few months" (Slayton, 2011, 252) it is without a doubt very difficult to learn a new language when one is already holding one of the most difficult positions in the country. Since there is a mandatory retirement age at 75, it would be easy to appoint judges with a modicum of French a year or even two years in advance and require them to spend some time learning French. In all likelihood, no one will become perfectly bilingual and fluent in French after two weeks of training. However, it is possible to think that spending a full year dedicated to learning French and then taking a language test would be a good way to assess the willingness of future candidates to becoming Supreme Court justices.

V. CONCLUSION

Empirical studies of the impact of language on judicial behavior are still rare. Given that multilingualism plays an increasingly important role both domestically and in international jurisdictions, understanding the multi-faceted impact of individual and institutional multilingualism is crucial. In order to understand the impact of linguistic diversity, however, we need empirical evidence that can be used in other contexts. This was our goal in this study. By providing an index of bilingualism, we hope to enrich the empirical literature on the impact of unilingualism and bilingualism at the Supreme Court of Canada. We still need to understand how language creates different "panel effects" and how language influences judicial behavior more generally.

APPENDIX A

Absence Indicator

The *Absence indicator* measures, for each justice, the fraction of skipped Supreme Court cases that are cases originating from Quebec. When a case is heard at the Supreme Court, justices are either present and take part in the decision or are absent and do not take part in the decision. Usually, justices sit on most cases, but skip a handful of cases each year.

The *Absence Indicator* is computed using the annual number of skipped cases from Quebec by a justice and dividing it by the total number of cases he skipped.

For justice *j* and year *y*, the formula is :

$$Absence\ Indicator_y^j = \frac{(Skipped\ Cases\ from\ Quebec)_y^j}{(Skipped\ Cases)_y^j}$$

Writing Indicator

The *Writing indicator* measures, for each justice, the fraction of Supreme Court cases heard originating from Quebec that resulted in a written opinion. After hearing a case, justices either write an opinion for the majority, concur with someone else's written opinion or dissent. Each decision usually has at least one justice writing the majority opinion, but often have several concurring or dissenting opinions. Judgments delivered "by The Court" where ignored.

The Writing indicator is computed using the annual number of written opinion for cases from Quebec by a justice and dividing it by the total number of cases from Quebec he heard.

For justice *j* and year *y*, the formula is :

$$Writing\ Indicator_y^j = \frac{(Writing\ for\ Cases\ from\ Quebec)_y^j}{(Heard\ Cases\ from\ Quebec)_y^j}$$

Cases Cited Indicator

The *Cases Cited indicator* measures, for each justice, the fraction of cited cases that are from Quebec lower courts. It is constructed using the "Cases Cited" section in the heading of every Supreme Court decision in Federal law cases.

When writing an opinion for a Supreme court judgment, justices will often cite precedents. While the referred jurisprudence is often about past Supreme Court decisions, some cases cited are from lower courts. Out of 28570 cases cited, 264 are of Quebec lower courts.

The *Cases Cited indicator* is computed using the annual number of cases cited of Quebec lower courts by a justice and dividing it by the total number of cases he cited.

For justice *j* and year *y*, the formula is :

$$Case\ Cited\ Indicator_y^j = \frac{(Cases\ Cited\ of\ Quebec)\ _y^j}{(Cases\ Cited)_y^j}$$

Authors Cited indicator

The *Authors Cited indicator* measures, for each justice, the fraction of cited articles, documents and books that are only in French. It is constructed using the "Authors Cited" section of every Supreme Court decision on Federal law cases. In the published English decisions, out of 2507 texts cited, 152 where listed in French.

In decisions where different opinions are expressed (e.g. a majority, a concurrence and a dissent), all referred texts are listed together. Because the "Authors Cited" section of Supreme Court decisions is aggregating all cited texts without identifying the justice citing them, an attribution rule was used.

The *Authors Cited indicator* is computed using the annual number of French texts cited by a justice and dividing it by the total number of texts he cited. Because the "Authors Cited" section of Supreme Court decisions is aggregated for all concurring and dissenting opinions, attribution of French texts often

For justice *j* and year *y*, the annual indicator is obtained by iterating over each decision *d*:

$$Authors\ Cited\ Indicator_y^j = \sum_d Likelihood^{j,d} \frac{(French\ Texts\ Cited)\ _y^{j,d}}{(Texts\ Cited)_y^{j,d}}$$

When many justices write opinions for a decision, we tried to infer who cited the French texts. The attribution rule was inferred by first calculating an intermediary *French Solo indicator* using only the unanimous decision with a single writer. Comparing the *French Solo indicators* of writers then allowed us to attribute French texts cited in decision with many writers. The *likelihood* ^{j,d} attribution factor is the fraction of the different *French Solo indicators* attributable to each writing justice.

$$Likelihood^{j,d} = \frac{French\ Solo\ Indicator^j}{\sum_i French\ Solo\ Indicator^i}$$

For example, when justice Lamer is the only writer, 9% of texts cited are in French; McLachlin, 3%. Their ratio is 3 to 1. If a decision cites 4 French texts and both Lamer and

McLachlin wrote an opinion, he gets 3 texts, she gets 1. These numbers are then applied to their *Authors Cited Indicators*.

The Index

The final index was obtained by combining the z-score of the previously mentioned indicators, and stabilized by using a 3-year moving average.

Using the z-score helped in combining 4 indices or different scale. The z-scores ensured that all variables had the same mean (0) and standard deviation (1).

$$Z(x_i) = \frac{x_i - average_x}{standard\ deviation_x}$$

A floor and ceiling value was placed at -2 and +2 for the z-scores.

The annual index showed is a simple combination of the z-scores.

$$\begin{aligned} Index_y^j = {} & Z(Cases\ Cited\ Indicator_y^j) + Z(Writing\ Indicator_y^j) \\ & + Z(Authors\ Cited\ Indicator_y^j) \\ & - Z(Absence\ Indicator_y^j) \end{aligned}$$

In order to aggregate more information into each data-point, the annual sample size of the index was constructed using a 3-year moving average. For instance, the index for 2005 is composed of values for 2004, 2005 and 2006.

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