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THE INTERPRETATION OF BILINGUAL LEGISLATION

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Since 1867, section 133 of the *Constitution Act, 1867*¹ has provided that federal and Quebec legislation shall be printed and published in both English and French. A similar provision was enacted for Manitoba by s. 23 of the *Manitoba Act, 1870*,² and for New Brunswick by ss. 17(2) and 18(2) of the *Canadian Charter of Rights and Freedoms*.³ Thus, federally and in the provinces of Quebec, Manitoba, and New Brunswick, both versions of legislation have official status under the Constitution. As a result, a somewhat different approach has been taken when interpreting legislation in these jurisdictions. I shall also have occasion to refer to the various Official Languages Acts.

The purpose of this paper is to discuss the bilingual interpretation of legislation. More specifically, I will discuss the problems that arise in drafting bilingual legislation, the methods that have been used to interpret the legislation, and the *Constitution Act, 1982* as a bilingual instrument. Finally, I will focus briefly on the *Canadian Human Rights Act*. Throughout, I will attempt to show how English/French discrepancies have been resolved.

Drafting Bilingual Legislation

At the outset, some mention should be made of the process of drafting bilingual legislation. It is inevitable that statutes contain mistakes or anomalies. The complexities of bilingual drafting make it inevitable that greater skills and ability are required so as to ensure a good result. Even when the drafter is drafting in one language, (as is usually the case), problems arise. He or she is aware that upon translation a particular concept, phrase or matter will not be rendered with precisely the same nuances of meaning in both English and French. This is due to the fact that "not only are the words and

syntax different in the two languages, but so often is the approach and psychological perspective".⁴ As well, a drafter working in one language may have a different view as to what is to be achieved by the legislation. This also can lead to potential conflict.

To ensure greater compatibility between the English and French versions of an act, problems in translation must be anticipated. One of the more successful techniques for bilingual drafting is to have the French and English drafter work together as they develop the legislation. This gives them the opportunity to develop a common approach, a common style and affords them the chance to discuss the nuances and psychological perspectives that apply to each language. Close adherence should be paid to the elementary rule "that the language of legislation should be as simple and free from technical expressions as possible".⁵ Even with close adherence to the rules of drafting, mistakes and anomalies will continue to be evident in statutes. Thus, it is important to have some understanding of the bilingual approach to the interpretation of statutes. This approach is referred to either as "une interprétation croisée"⁶ or a bilingual cross construction.⁷

Interpretation of Bilingual Statutes

The starting point for interpreting bilingual legislation can be found in s. 11 of the *Interpretation Act*⁸ which provides that every enactment shall be deemed remedial and given a fair, large and liberal construction. As we shall see, this has had some impact on the interpretation of bilingual statutes.

More specific rules have been enacted by the Federal, Quebec and New Brunswick legislatures to help resolve the conflicts between the two versions of bilingual acts. Federally, s. 8 of the *Official Languages Act*⁹ is the relevant provision (see Appendix). Despite the enactment of this legislation, it is the view of many authorities that "the *Official Languages Act* does not constitute new law, but is at best the expression of the law as it stood before its enactment".¹⁰

The cornerstone principle when dealing with the bilingual interpretation of statutes was set down in *King v. Dubois*.¹¹ Here Chief Justice Duff held that when interpreting any federal legislation, each version of the statute must be considered and neither could be ignored.

Another principle that applies to the interpretation of bilingual legislation is that of internal coherence. What this means is that the various parts of the legislation must be construed so as to eliminate contradictions. This rule is particularly applicable when two versions of the same statute appear to be contradictory. As the two versions are both official, the authorities are of the view that they should be reconciled.¹² In effect, this means that in order to reconcile the two versions, a shared or common meaning must be found. Three potential situations may arise when there are contradictions between the two versions.¹³

Firstly, one version of the statute may be ambiguous while the other is plain and unambiguous. This was the case in *Cardinal v. The Queen*¹⁴ where there was an ambiguity in the English version but not in the French. Mahoney

J. held that as the French version is equally official, it is to be used in the resolution of any latent ambiguity in the English version.

The second situation that may arise is that one version may have a broader meaning than the other. Some cases would seem to indicate that when this is the case, the shared meaning of the two versions is the more narrow of the two.¹⁵ While this seems to be the accepted view, there are other cases indicating the opposite viewpoint. Mr. Justice Pratte expressed what he considered to be the proper approach in *R. v. Compagnie Immobilière, BCN Ltée* as follows:

In my view, therefore, the narrower meaning of one of the two versions should not be preferred where such meaning would clearly run contrary to the intent of the legislation and would consequently tend to defeat rather than assist the attainment of its objects.¹⁶

Once the shared meaning is found, this possible interpretation must be examined with reference to the statute's context as a whole. It is only when it can be determined conclusively that the shared meaning is compatible with the intention of the legislator that the interpretation process is completed.¹⁷

Thirdly, it may be found that there is no shared meaning between the two versions. They are irreconcilable. If this is the case, the problem should be resolved according to the ordinary rules of interpretation. The courts will use such techniques as giving preference to the version that best fulfills the objectives of the legislation, the version that meshes better with the statute's other provisions or the version that best reflects Parliament's intention. If the real intent cannot be determined, presumptions of legislative intent will also be

used. Also, the court may decide to follow one version because the other contains either obvious material errors or does not conform to the ordinary methods of legislative drafting. This is often the case as more often than not, one version of an act is no more than a translation of the other.¹⁸

After examining the principles pertaining to the bilingual interpretation of statutes, it is possible to conclude that many are "no more than a logical extension and extrapolation of the classic canons of construction acknowledged in all Canadian jurisdictions".¹⁹

Constitution Act, 1982

Some comment must be made about the *Constitution Act, 1982*.²⁰ It is, of course, a bilingual instrument and s. 57 provides:

The English and French versions are equally authoritative.²¹

As is the case with most bilingual texts, differences do exist between the English and the French versions. Section 24(2), which empowers a court to reject certain evidence obtained in a manner that infringes the *Charter of Rights and Freedoms*, is a good example. The French version appears to be broader than the English. It states that an individual is required only to demonstrate that the evidence "est susceptible" of bringing the administration of justice into disrepute. The English version, on the other hand, requires a person to show that the evidence *would* bring the administration of justice into disrepute.

Until recently, the courts had given little guidance as to how the *Constitution Act, 1982* should be interpreted as a bilingual instrument. J.P. McEvoy in his article, "The Charter As A Bilingual Instrument" felt that "the initial Charter appeals by the Supreme Court of Canada betray an apparent failure to give full recognition to the bilingual nature of the Constitution".²² Secondly, from looking at those cases considering the two versions, he expressed the view that the courts have only seen fit to consider both versions when *Charter* language rights are in issue or where a Francophone party is involved.²³ Thirdly, he felt that if it is accepted that a judgment is prepared only in the judge's first language, then the judgment is a consideration of only one version. He backs up this proposition by demonstrating that in many of the cases, the two versions are not expressly compared even though obvious discrepancies exist between the two versions.²⁴

Another commentator, A. Gautron, has suggested that some direction may be obtained from statements made by the Judicial Council of the Privy Council concerning the interpretation of constitutional documents.²⁵ Thus in *Minister of Home Affairs v. Fisher*, one of these cases, Lord Wilberforce stated that constitutional documents

... call for a generous interpretation avoiding what has been called the "austerity of tabulated legalism", suitable to give to individuals the full measure of fundamental rights and freedoms referred to.²⁶

Dale Gibson has noted that s. 57 seems to indicate that the courts should follow the approach that has been used with other bilingual legislation.²⁷ McEvoy is of the view that as an initial step, there must be a comparative

reading of both versions.²⁸ It is his belief that if this is not done, there may be a failure to properly ascertain the true meaning of the Constitution when discrepancies of language exist between the two versions.²⁹

Recently, the Supreme Court has begun to give guidance in this area. It suggests that the version that gives the most generous meaning to the right protected by the *Charter* should be adopted. In *R. v. Collins*,³⁰ it was influenced in coming to its decision by the more generous "est susceptible" rather than "would bring" the administration of justice into disrepute. Similarly, in *R. v. Rahey*,³¹ it gained assistance from the French version in holding that the right to trial within a reasonable time ("d'être jugé dans un délai raisonnable") extended until the end of the trial.

Discrepancies Between the English/French Versions of the Canadian Human Rights Act

The last area to be discussed in this paper is the bilingual interpretation of the *Canadian Human Rights Act*.³² There is very little jurisprudence on the bilingual interpretation of this statute. One of the sections that has been interpreted is one dealing with the extent of a prohibited ground of discrimination. Before the 1983 amendments, "marital status" was listed as a prohibited ground of discrimination in the English text. The French text contained instead the phrase "situation de famille".

*Arsenault et al v. International Longshoremen's Association Local 375 et al*³³ dealt with the meaning of the phrase "marital status". In this case, the Longshoremen's Union passed a resolution to the effect that membership in the union would be preferentially given to certain relatives of members in good

standing. In the course of its decision, the Canadian Labour Relations Board was required to decide whether the French version "la situation de la famille" should be preferred over the English "marital status" in determining what the meaning of this head of discrimination should be. The Board members looked at s. 11 of the federal *Interpretation Act*.³⁴ They then concluded:

In opting for the English version of the text, namely the expression "marital status", instead of the French version, we run the risk of unduly limiting the scope of the grounds of discrimination. Since in any event 'marital status' is included in the term "situation de famille", it seems more appropriate and consistent with the above-quoted rule of interpretation (s. 11 *Interpretation Act*) to adopt the French version.³⁵

The opposite conclusion was reached in *Canadian Human Rights Commission v. Canadian Pacific Airlines*.³⁶ Here an independent tribunal dismissed a complaint which alleged that there was a violation of s. 10 of the *Canadian Human Rights Act*. More specifically, C.P. Air was found not to be within the prohibited grounds of the *Canadian Human Rights Act* when it gave preference for summer employment to the children of employees. After examining s. 8(2)(d) of the *Official Languages Act*, the tribunal concluded that,

Since "marital status" and "situation de famille" means the same thing when "situation de famille" is given its restrictive meaning and different things when it is not, I should favour in this case, the restrictive meaning that "la situation de famille" (marital status) would not include children.³⁷

In the cases above, therefore, both tribunals made use of the rules that have been developed for interpreting bilingual legislation. However, as can be noted, despite this, a different result was achieved in each case. This seems

to indicate that there is a risk that courts may achieve different results depending on the particular rule they apply.

In this paper, some attempt has been made to examine some of the more salient aspects of the bilingual interpretation of legislation. The problems begin at the initial drafting stage. I suggest this can be an opportunity as well as a source of confusion if it is well done. For in attempting to render an idea in another language, an additional nuance may helpfully be added. Bilingual statutes can also be helpful at the interpretative stage. One version may not be entirely clear, but reference to the other can make it so. This can help to round out the purposes of a statute. As we saw, for example, this has been achieved by some of the recent *Charter* decisions of the Supreme Court of Canada.

Footnotes

1. 30 & 31 Vict., c. 3 (U.K.).
2. 1870, 33 Vict., c. 3 (Can.).
3. 1982, c. 11 (U.K.).
4. Jean Jacques Bertrand, in Quebec General Assembly on May 8, 1963.
5. J.D. Honsberger, "Bilingualism in Canadian Statutes" (1965), 43 Can. Bar Rev. 314, at p. 323.
6. Reynald Boulton, "Le bilinguisme des lois dans la jurisprudence de la Cour suprême du Canada" (1968), 3 Ott. L.R. 323.
7. Rémi Michael Beaupré, *Construing Bilingual Legislation in Canada*, Toronto; Butterworths, 1981 at p. 3.
8. R.S.C. 1970, c. I-23, section 11.
9. R.S.C. 1970, c. O-2.
10. Elmer A. Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983 p. 180. Pierre-André Côté, *The Interpretation of Legislation in Canada*, Les Éditions Yvon Blais Inc., 1984 at p. 253 feels that these comments do not apply to paragraph 8(2)(c). He feels that this paragraph which serves to resolve problems of statutory drafting and interpreting relating to two distinct legal systems (civil and common law) is an innovation that goes beyond principles already recognized by the courts.
11. [1935] S.C.R. 378.
12. Pierre André Côté, *ibid*, at p. 255, *Canadian Pacific Railway Co. v. Robinson* (1891) 19 S.C.R. 292, 325, reversed [1892] A.C. 481.
13. Pierre André Côté, *supra*, f.n. 8 at p. 255.
14. [1980] 1 F.C. 141.
15. *Toronto Railway Co. v. The Queen* (1895), 25 S.C.R. 24, reversed [1896] A.C. 551; *R. v. Dubois*, [1935] S.C.R. 378; *Pollack Ltée v. Comité paritaire du commerce de détail*, [1946] 2 D.L.R. 801 (S.C.C.); *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, 669.
16. [1979] 1 S.C.R. 865 at 871.
17. Pierre André Côté, *supra*, f.n. 8 at p. 256.
18. Pierre André Côté, *supra* f.n. 8 at pp. 258-9.

19. Rémi-Michael Beaupré, *supra*, f.n. 5 at p. 4.
20. *Constitution Act, 1982*, enacted by *Canada Act, 1982*, (U.K.) 1982 c. 11, Schedule B.
21. *Ibid.*
22. J.P. McEvoy, "The Charter As A Bilingual Instrument" (1986), 64 Can. Bar Rev. 155 at p. 157.
23. *Ibid.*, at p. 168.
24. J.P. McEvoy, *supra*, f.n. 20 at p. 158.
25. A. Gautron, "French-English Discrepancies in the Canadian Charter of Rights and Freedoms" (1982), 12 Man. L.J. Issue No. 2.
26. [1979] 3 All E.R. 21 (P.C.).
27. W.S. Tarnopolsky & Gerald A. Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms*, Toronto: The Carswell Co. Ltd., 1982, p. 33.
28. J.P. McEvoy, *supra*, f.n. 20 at p. 170.
29. J.P. McEvoy, *supra* f.n. 20 at p. 157.
30. *R. v. Collins*, April 9, 1987, as yet unreported.
31. *R. v. Rahey*, May 14, 1987, as yet unreported.
32. R.S.C. 1976-77. c. 33.
33. (1982), C.L.L.R., p. 17018.
34. R.S.S. 1979, c. I-23.
35. *Supra* f.n. 27 at p. 17019.
36. 4 C.H.R.R. D/1392.
37. *Ibid.*, s. D/1399, It should be noted that as a result of the 1983 amendments, "family status" and "marital status" are now both prohibited grounds of discrimination.

Appendix

Official Languages Act, R.S.C. 1970, c. O-2

- Section 8. (1) In construing an enactment, both its versions in the official languages are equally authentic.
- (2) In applying subsection (1) to the construction of an enactment,
- (a) where it is alleged or appears that the two versions of the enactment differ in their meaning, regard shall be had to both its versions so that, subject to paragraph (c), the like effect is given to the enactment in every part of Canada in which the enactment is intended to apply, unless a contrary intent is explicitly or implicitly evident;
 - (b) subject to paragraph (c), where in the enactment there is a reference to a concept, matter or thing the reference shall, in its expression in each version of the enactment, be construed as a reference to the concept, matter or thing to which in its expression in both versions of the enactment the reference is apt;
 - (c) where a concept, matter or thing in its expression in one version of the enactment is incompatible with the legal system or institutions of a part of Canada in which the enactment is intended to apply but in its expression in the other version of the enactment is compatible therewith, a reference in the enactment to the concept, matter or thing shall, as the enactment applies to that part of Canada, be construed as a reference to the concept, matter or thing in its expression in that version of the enactment that is compatible therewith; and
 - (d) if the two versions of the enactment differ in a manner not coming within paragraph (c), preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.

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