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BILINGUAL DRAFTING

THE GOVERNMENT OF CANADA SYSTEM - PART I

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THE GOVERNMENT OF CANADA SYSTEM - PART I

For many years now in Canada, legislation has been drafted in the federal and provincial jurisdictions by legal counsel who are specialized in such work. In the federal jurisdiction there are legislative counsel employed directly as counsel to the Senate and House of Commons and who, among their other duties, draft legislation for introduction by private members. But with one exception, all legislation for introduction by the Government of Canada is prepared by the Legislation Section of the Department of Justice -- the exception being bills that appropriate moneys. Although it is a part of the Department of Justice, the Legislation Section receives its instructions to draft bills and its drafting priorities directly from the Cabinet, not from the Minister of Justice. The official channel of communications to the Section is through the Secretariat of the Cabinet Committee on Legislation and House Planning, Privy Council Office. The Chairman of the Committee is the President of the Privy Council and the Leader of the Government in the House.

Organization of the Legislation Section

In order to understand how the drafting work is carried out by the Legislation Section, it is useful to know a little bit about how it is organized.

The Section consists of a Chief Legislative Counsel and an equal number of francophone and anglophone drafters. At present, in addition to

the Chief Legislative Counsel, there are nine francophone drafters and nine anglophone drafters, a French language specialist and secretarial support staff. Associated with the Legislation Section and the Privy Council Section (which is responsible for regulation examination under the Statutory Instruments Act) is a staff of legislative editors -- again francophone and anglophone, which does editorial work on all bills, regulations and proclamations and also looks after the publication of statutes and material for Part III of the Canada Gazette.

Generally speaking, the drafters in the Legislation Section do not specialize in any particular type of legislative subject-matter as is felt that experience in a broad range of legislative subject-matter is preferable for the drafters as a matter of their interest and the development of their overall knowledge of the statutes. One exception is the drafting of tax legislation. As part of the Legislation Section, but not situated physically with it, four drafters (two anglophones and two francophones) look after the drafting of all amendments to the Income Tax Act and the regulations thereunder. These lawyers carry out their work as part of the Tax Counsel Unit of the Department of Finance but unlike the Legislation Section, their drafting is not done on the basis of Cabinet directives but rather relates to budget proposals and tax initiatives of the Minister of Finance and the government.

In recent years, the main source of drafters to the Legislation Section has been the Legislative Drafting Program operated under the law school of the University of Ottawa. The English program was started in the early 1970's by the late Elmer Driedger who achieved an international reputation in legislative drafting and interpretation. The French counterpart was started at the University more recently by the late Mr. Justice Pigeon. The

Department of Justice supports the drafting program financially with fellowships to students and grants to the law schools and it has proven to be an excellent source of training not only for drafters coming to work for the federal government but also for many of the provinces and for some countries overseas.

Bilingual Drafting Procedure

As previously mentioned, drafting by the Legislation Section is initiated by Cabinet decision. In 1981 the Cabinet directed that no bills, other than those arising out of the budget, those arising out of emergency situations or those dealing with the organization of the government are to be drafted by the Legislation Section unless the sponsoring Minister has submitted a memorandum to Cabinet seeking authority for the Section to proceed with the drafting. A record of each Cabinet decision that recommends legislative action is sent to the Chief Legislative Counsel. Actually the Chief Legislative Counsel gets a copy of every submission to Cabinet requesting legislative action so there is usually forewarning that drafting will be required. Occasionally drafters will be assigned before the Cabinet decision is received where it is evident that the legislation will be urgently required or the matter is complex and the drafters may need advance consultations in order to become familiar with the subject-matter.

Each submission to Cabinet requesting legislation and each Cabinet decision resulting therefrom is in a bilingual format and describes in narrative form, usually without detail, the nature of the legislation required and the departments or agencies to be consulted in the preparation of the legislation. The submissions do not contain drafts

of the legislation required. When the decision is received in the Legislation Section, the Chief Legislative Counsel decides, on the basis of the complexity of the subject-matter, existing workloads, the urgency of the required legislation and other similar factors, who will be assigned to draft the bill. Generally, only two drafters, one anglophone and one francophone are assigned. On very large legislative projects there will sometimes be more than two drafters assigned in which case one of them will be designated to coordinate the project as a whole. If the Chief Legislative Counsel is an anglophone, he will, in deciding who the francophone drafter will be, consult with the senior francophone drafter in the Section. If, on the other hand, the Chief Legislative Counsel is a francophone, he will consult on the matter of who the anglophone drafter will be, with the senior anglophone drafter in the Section. This procedure has been developed recognizing that a senior anglophone and a senior francophone must take the ultimate responsibility for the quality of the two versions of the legislation that will be produced. The Legislation Section is a unique branch of the Department of Justice in that the legal product is always bilingual. The quality of each version is of equal importance in every bill.

One of the two drafters assigned will be designated as the primary or first drafter on the bill. The decision in this regard is usually made on the basis of the experience of the two drafters and also sometimes on the basis of the language in which instructions can be given to the drafters. The Cabinet documents are then sent to the drafters usually with the name of the instructing department's contact person.

The instructions in the Cabinet decision requesting legislative drafting are seldom adequate for the drafting of a bill and verbal

instructions are almost always required to be given to the drafters in order that the bill can be properly put together. The instructing officials are the contact people from the department or agency whose Minister will sponsor the bill and usually at least one of them is a lawyer.

The first drafter assumes the lead role in the drafting of the bill. In consultation with the second drafter, the first drafter organizes the meetings with the instructing officers and sets the legislative scheme or outline of the bill that will be followed by both drafters in the drafting exercise. Wherever possible, the second drafter takes part in the meetings held with the instructing officials.

When the drafters meet with the instructing officials they raise various questions which provide the drafters with the necessary detail to enable them to draft the Bill. The drafters make notes for future reference and except in the cases of extremely short bills, they do not attempt any drafting in the presence of the instructors. As all the drafters are bilingual, the meetings take place in one or other of the officials languages and often in both. The object of the meetings is to enable the drafters to fully understand the policy of the legislation being proposed. In the case of meetings held to discuss prepared drafts, the object is to enable the instructing officials to bring their concerns and observations about the draft to the attention of the drafters. Obviously there is a distinct advantage of having two drafters involved at the meetings. What one drafter may not see as a problem, the other may see and the result of course will be a better bill.

In the case of the drafting of a completely new and lengthy Act, after the draft has been prepared

by the first drafter, the second drafter prepares the other language version using the Cabinet documents, the information given by the instructing officials and the first drafter's structure of the bill as the guidelines for his version. In preparing his version, the second drafter reads the first drafter's version for legal intent and then produces his draft in the other language. If the second drafter finds the concept expressed in the first drafter's work ambiguous, difficult to understand or difficult to express in the second drafter's version, he will suggest changes in wording or structuring in order to alleviate the problem.

In the case of shorter bills or bills that contain only amendments to existing Acts, often both the French and English versions will be prepared simultaneously after the drafters have received their instructions. The second drafter knows what changes must be made to the Act in his version and can proceed immediately without waiting for the first drafter's version.

The intent is that each language version will say the same thing in law as the other version. Neither version is a word-for-word following of the other version and in no way is either version regarded as a "translation" of the other version. The French and English texts have parallel headings, sections and subsections but not always paragraphing. Parallel paragraphing is however required in both versions of certain penal provisions and in provisions such as taxing, provisions where precision of reference in charges for non-compliance makes it necessary that the paragraphing be the same. One version may also have fewer definitions than the other because of different formulations used in the different versions. Usually, several meetings are held between the drafters and the instructing officials before the bill is completed and usually a copy of

each draft prepared by the drafters is sent to the instructing officials. At times, when it is apparent that the policy is unclear or many problems are still unresolved in the way the bill is to be structured, only the first drafter's version will be sent to the instructing officials and the second drafter will await the outcome before preparing his version. It must be remembered that the second drafter of one bill is usually also the first drafter on another and his time would be wasted if he immediately prepared his version of a bill as second drafter in such a case.

The drafts prepared by each drafter are in a unilingual format and the information is stored on computers. When the drafters and the instructing officials are satisfied that the drafts are in final form, the Queen's Printer is advised and the stored data is then used to print the bill in the side-by-side format. This is usually the first time that the French and English versions are put together on one document although at times the instructing officials, because of consultations with other government bodies or outsiders, ask that drafts be prepared in the side-by-side format. The policy of the Section is that, if possible, the English draft and the French draft are sent together to the instructing officials for comment although because of time constraints and work-loads this is not always possible.

The first drafter is also responsible for reading the second drafter's work to ensure that the substance is the same in law in both versions. The editors, who are responsible for reading the bills and making comments or suggestions to the drafters concerning style, punctuation, consistency of language, numbering, referencing and clarity of expression, also bring to the attention of the drafters any discrepancies they see between the two versions. The instructing

officials are also expected to examine both versions to ensure that they are satisfied that they convey the same meaning in law.

Before a bill is introduced in Parliament, it must be approved by the Cabinet Committee on Legislation and House Planning. The Government House Leader is the Chairman of this Committee. The Minister who is sponsoring the bill attends the Committee and explains the bill to members of the Committee and answers any questions they may have. The drafters are also in attendance to answer questions concerning their versions of the bill and any changes required by the Committee are noted by the drafters for the final printing of the bill before it is tabled.

It is recognized that the system of bilingual drafting is not a perfect method of preparing legislation. In some bills, usually those drafted in haste, discrepancies between the English and French versions do occur from time to time. On the other hand, the system recognizes the unique characteristics of the expression of the law in the two official languages. The Section no longer uses translators in the preparation of bills and the quality of the French version has improved immensely and is continuing to improve. The possibilities now exist for francophones to develop drafting expertise and to make a career in legislative drafting and a major contribution to the drafting process in their own language.

It is also felt that bilingual drafting, as opposed to translation, produces a better overall legal product because both versions are closely scrutinized during the drafting process rather than just the first version. Moreover, the second version is produced by a lawyer who, by reason of his participation from the start, has first hand knowledge of the policy and terminology involved

and an understanding of the significance of all other matters pertaining to the bill.

Another advantage of bilingual drafting is that it provides a means of training for younger drafters by teaming them up with those who have more experience.

The federal Government's legislation is unique in being bilingually drafted as a collaboration of two drafters and, as far as we know, other bilingual or multilingual jurisdictions are only translating which of course does not usually produce very good quality language in the secondary versions.