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SEMIOTICS: DOES MODERN FRENCH LANGUAGE THEORY HAVE LESSONS
FOR THE DRAFTSPERSON?

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Semiotics: Does Modern French Language Theory
Have Lessons For the Draftsperson?*

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I have been asked to talk for a few minutes concerning the question of whether modern French language theory has lessons for the contemporary draftsperson. I wish to begin with this preface. To be asked to talk on the above subject is similar to being asked to talk about whether modern legal theory has lessons for constitutional arguments or, for that matter, whether property law during the past century has lessons for the way English is taught in primary school classrooms. I have been asked to talk about a subject for which there is a great deal that has been written. And what has been written is extraordinarily insightful indeed. In addition, I have been asked to try to bridge two languages, as it were: the language of the draftsperson and the language of modern French theory.

In this endeavour, I shall identify four themes of four French writers: Ferdinand de Saussure, Jacques Derrida, Michel Foucault and Jean-François Lyotard. Only if one has a preliminary grasp of modern French language theory can one even approach the subject of its lessons for the draftsperson. Accordingly, the thrust of my remarks will be to attempt to explain some common themes of French language theory and it will be left primarily to the audience to work out some of the ramifications of the theory for the draftsman. I shall initiate the latter endeavour by questioning three fundamental assumptions which the draftsperson has assumed during the past half century or so, assumptions which modern language theory brings into question.

1. The System of Signs

The most important figure in French language theory is that of Ferdinand de Saussure whose Course in General Linguistics began as a series of lectures at the turn of the century. De Saussure makes the important distinction between the sound or mark on a page on the one hand and the sign as an abstract unit on the other. A sign combines what he calls "a signifier or sound image with a signified or concept". I shall use the phrases 'image' and 'concept' to signify signifier and signified respectively.

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A ramification of Saussure's course would be that the individual lawyer would passively assimilate language. His or her choice of a sound image would be unmotivated and unmodified by the opposing speaker in the sense of being immune from the speaker. That is to say, language, rather than parliament or a lawyer, chooses the sound image. The lawyer as a speaker or thinker does not create or arrange language by his concepts. Rather, speaking is a product outside of the lawyer's creation.

At the same time that language is external to the lawyer and not of his creation, a sound does not represent an essence in itself. Language predates ideas in that signs aid the lawyer in distinguishing one idea from the next. The signs are arbitrary because they are unnatural or culturally created. Together, they fit into an internally cohesive, self-contained system of signs. This system, again, predates or pre-exists the lawyer's appeal to parliaments enunciation of sound images and the lawyer's arguments for a court.

The important point in all this is that for the originator of modern French language theory, the legal sign system is entirely cut off from social/cultural practice. D'Saussure talks about a "grammatical organism" rather than a biological organism. People do not really exist except in terms of an association between the signifier image on the one hand and the signified concept on the other. By implication, no idea or sound exists prior to the system of signs.

Further, de Saussure describes the system as a machine. Each isolated sign has no meaning. We communicate meaning only when the parts play in the web of the system. The mechanism of signs brings order and regularity to the otherwise arbitrary character of language.

Further, the history of the sign system is abstracted from the evolution of a society in its economic, political or social context. That is, because the legal sign system is itself a system, it is abstracted from the economic, political and social context in which it evolves. Its history is a non-human history outside of human action itself. Laws rather than human beings are said to rule the system.

Finally, the legal sign system is independent of individual creative acts whether they be of a parliament or of a cabinet or of a minister. Being prior to each of the latter, the sign system presents an impenetrable barrier of opposition, if not repression, to a speaker's/listener's creative act. Indeed, the speaker possesses no direct entry point to the system except indirectly through the verbal image of the signifier.

2. The Relation of Expression to Indication

De Saussure provides the background to contemporary French social theorists. The most important, at least, the most prominent these days is that of Jacques Derrida. Derrida distinguishes between the expression of a human being and the objective things represented by indication. Indication supplements or is added on to expression. So, for example, we supplement our expression by writing it down on paper. The marks are an indication of what we express. Contemporary texts on legal drafting and statutory interpretation adopt this understanding of writing. Again and again, writers such as Frederick Bowers, Pierre Coté, and Elmer Driedger, emphasize that words in a statute express the intent of an author. That author is parliament. The words simply indicate the intent. And, therefore, the fundamental role of a lawyer is to flesh out the meaning of the indication by going to its root in the parliamentary expression. Further, the writers on drafting emphasize that the original writer intended particular concepts or signifieds by expressing their intent in the marks on the page of a statute book. That is, meaning is caught up in the concepts of the original author, the latter being parliament.

Now, Derrida questions all this. Instead of meaning inhering in the concepts of an original author, meaning is inevitably caught up in the indicative system of signs. Each time an expression is produced, it communicates. That is, indication is the "physical incarnation of the meaning, the body of speech". Thus, in addition to actual words on a page, one has facial expressions, bodily gestures, and the whole visible body from an expression which constitutes the indication.

Derrida argues that the concepts or signifieds are invisible. We start off as draftspersons in trying to reach the concepts of the original authors. But we never can reach them because they are invisible. In a sense, the Toronto Transit Commission hit the nail on the head when the TTC put above each door of a subway car "mind the gap". There is a fundamental gap between the marks on a statute book and the invisible concepts which the marks indicate. Thus, whenever a parliament puts a concept into writing or whenever a lawyer argues for a certain direction in reaching the concept, the actual reaching of the concept is deferred, postponed, and lost in the pre-existing play of signifier-images. The closest which the part draftspersons can ever get to the signified-concept is her/his image or, if s/he prefers, the parliament's image of the signified. Thus, law is caught up in images which begin and end with images. Derrida argues that what starts off as a concept ends by collapsing into the pre-existing system of signifiers-images. As a result, the lawyer's continual search for the intent of parliament and the draftsperson's desire to re-enact the parliamentary intent in the form of statutory words, is misdirected. All that we do as

lawyers is play with language which pre-exists our intentions and out of which we, as lawyers, are constructed.

3. The Character of the Sign System as Power

The third important figure in modern French language theory is that of Michel Foucault, the teacher of Derrida. Michel Foucault's writings are more accessible to lawyers who, in various articles, have attempted to relate his writings to the common law legal system. I used Michel Foucault's works in order to emphasize the relationship between the legal sign system on the one hand and social-cultural practice on the other.

The crux of legal discourse, for Foucault, is what he calls the Statement. A Statement is an event, not an idea or an image. Whereas a sign is suppose to represent an object out there beyond the gap and independent of the sign, a Statement, over time, creates its own sign. A Statement is not just what is written on the page of a statute book. A Statement includes what is excluded: the silences, the gaps, the voids and the absences.

What are those gaps? They are of two types. First, there are the external procedures which exclude what is said. For example, a taboo might exclude some topics from discussion and a ritual might legitimize other topics. Similarly, during the Middle Ages for example, a mad man's words were considered null and void before the courts, without truth, and unworthy as evidence in legal and religious proceedings.

The second type of silence or void or absence, is internal to a discourse. Such is the effect of a founding intent in a written text such as a constitution, or a statute. Such is also the effect of a mythical author such as of a scripture. Even the original author, let alone a commentator, excludes some themes from the expressed discourse. Indeed, that is part of the project of the draftsman: namely, to find out what the original author wishes to exclude. In addition, the discipline--the legal discipline--in which the discourse is embedded presupposes certain criteria of truth, meanings and techniques of expression which accept or exclude certain utterances/meanings from the expressed discourse.

Finally, a ritualized profession such as the contemporary legal profession, privileges its members or even certain of its members as having a monopolistic authority to use the language. The contemporary educational system which builds upon three years of intensive learning of the legal language reinforces this.

Michel Foucault, exemplifies this phenomenon which he calls the Statement by reference to the law reform movement of the Enlightenment. Rather than really being concerned with the humanity of the condemned, the law reform discourse aimed at "a

finely tuned justice, towards a closer penal mapping of the social body". Penal reformers criticized the "bad economy of power". They aspired to redistribute power in such a way that power emanated from several competing authorities rather than a single monarch. Legally trained personnel, not unlike today, monopolized the initiation of reforms. Not surprisingly, law reform meant the redistribution of illegalities: legal rights for the bourgeoisie; property rights for the lower classes; ordinary courts for the property illegalities; and special institutions for rights illegalities (fraud, tax evasion, irregular commercial transactions).

Law reform discourse redistributed illegalities through codes, through tacit non-observance of delinquent conduct, by letting laws fall into abeyance, and by neglect in enforcement. The discourse thereby created space for the less fortunate to live.

Statutory codes particularly redefined reality. They regularized, redefined and universalized the art of punishment. They defined what constituted a criminal intent, a criminal act, excuses, non-cupability, extenuating circumstances, social harm and harm to oneself. The discourse calculated the prescribed penalties and techniques of punishment according to economic rationality. Within the prison, rules distributed living bodies, classified them, allotted them space, trained them, coded their behaviours, observed them, registered them and recoded them. "Complete and austere institutions" performed these functions. Legal discourse was a "technical project", a rationality, a technology, a machine. The moralist has to become a lawyer in order to gain access to the discourse. Law reform concerned the working within an autonomous network of signs.

In the spirit of de Saussure, Foucault argues that the law reform discourse during the Enlightenment era actually had absolutely no room for a human subject independent of the legal discourse. Because the legal discourse was complete within itself much like a self-sustaining machine, the discourse constructed the human being. Foucault demonstrates this phenomenon in detail in Volume One of the History of Sexuality. Precisely by proscribing certain sexual talk, the Victorian bourgeoisie imported sex into its discourse. Silence repressed. Gaps and voids were created. Reformers encouraged citizens to talk about sex in the confessional or on the therapist's couch. At the same time that they believed themselves subversive of the social order with respect to sex, reformers simply incorporated sex into discourse. Sexuality did not exist outside of that discourse. Nineteenth century bourgeoisie put into operation "an entire machinery for producing true discourse about it [sex]." And this, in turn, elevated privileged professions as exclusively authorised to listen to sex talk. The will to sexual knowledge generated conditions of power.

The message we receive from Michel Foucault is that a legal discourse disciplines, surveils, administers, codifies and constructs human beings. What was a human being becomes a person who is entitled to rights. The person is a fiction, in a sense. It is empty. The human passion and intellect of the biological organism is lost in the codification of persons. Society and the living organism are constructed out of the legal discourse. So, for example, Foucault shows how during the classical era of visibility, towards the end of the eighteenth century, living beings became just one category in an objective perceptible world. The living being was coded in a taxonomy. Towards the end of the eighteenth century, a new episteme emancipated language whereby scientists delved into the hidden architecture within an organism. But even this hidden life of an organism was a metaphysics which began and ended in discourse, according to Foucault. Indeed, what we take to be the autonomous individual acquired an autonomy only through language. And that language created the autonomous individual by positing abstract rights as boundary lines around the fictitious person.

To the question whether there is anything outside of language, this reader's interpretation of Foucault is that there is none. There are no social-cultural practices outside of the all-enveloping totality of language.

4. The Narratives of Legal Language

A fourth and final theme which is relevant to legal draftspersons is that of the narratology embedded within the legal process. When one reads the works of Jean-François Lyotard, Julia Kristeva and others who are presently writing in France, one is struck by the narrative character of each stage of a legal proceeding.

This series of writers emphasizes that there is something more to language than a system of signs. An activity of meaning creation does take place by individual human beings who live independent of the legal sign system. But what is emphasized is that the meaning creation takes place at each stage of the trial process from an initial incident to the pre-trial proceedings to the trial judge's writing of his or her story and to the appellant judge's writing of his or her story. Whereas we lawyers have been trained to treat the judge's story as itself a product--as something out there to be used, amended or denied all for the purposes external to the original story telling by the judge, these modern writers emphasize how the legal process is a narrative which is being told by different people in different versions. This narrative is told ex post facto to the lawyer and by the lawyer to his fellow lawyers, and by the fellow lawyers to the judges. Whereas the lawyer has assumed a unitary and

uniformed language, which the draftsman has aspired to master, the reality is the obverse in that this uniform language which statutes play their part in inculcating, is a product abstracted from the ordinary living experiences of the judge who told a story or of a politician who heard a grievance.

Instead of a uniform language which the draftsman inspires to recreate, the legal process is embedded with many languages and many stories. The French writers describe this as 'heteroglossia'. Lived experiences do take place during a trial but these lived experiences are re-interpreted in the light of pre-existing experiences of lawyers and judges as well as of their pre-existing language which they have mastered or attempted to master. As a result, a legal reality is superimposed upon a concrete context where an original dialogue takes place. The lawyer-analyst represents or re-represents the stories of the other, making that representation their actual story. But it is with representations that lawyers deal, not the many competing stories from which the representation is drawn.

This theme has been taken up by feminist lawyers and legal scholars during the past decade. The latter have made a case that legal discourse has hidden different voices. These voices bring in experiences which the traditional male draftsman and male lawyer did not share. Using the frame of reference of Foucault, voices were excluded from the statutes and the assumed meta-codes and the interpretation of the codes. This was necessarily so, according to these writers, because of the important relationship between human experience on the one hand and legal interpretation on the other.

I have tried to show in a forthcoming essay that this exclusionary process takes place with respect to the ordinary lived experience more than once during a trial process.¹ Each witness and litigant has his/her story of the experience. Their lawyers then re-interpret parcels of each story in terms of the existing sign system. In pre-trial and trial proceedings, even the witnesses and clients have their stories re-written into the legal discourse through affidavits, advice, briefings and the like. The lawyers re-present the stories of the witnesses and clients in terms of their own Umwelten. The trial judge then does the same. And so too, the appellate judge. Indeed, the judges and lawyers re-interpret the ordinary lived experiences long removed in time in that their hearing of the stories may take place ten to fifteen years after the experience. And then, his/her version may be re-interpreted one hundred or even several hundred years later by judges and lawyers. These re-interpretations manifest each judge's Umwelt. But a judge's or

¹See Conklin, "A Contract" in Richard Devlin, Essays in Canadian Legal Theory (Tor: Emond/Montgomery, 1990).

lawyer's Umwelt dwells within a pre-existing sign system which years of training has induced within him/her, beginning with the important ideologically induced meanings inculcated in the lawyer in the modern law school. A lawyer lives law, we are told again and again. But that law is embedded in a discourse far estranged from the dialogic relationship of a lived experience.

5. Lessons for the Draftsperson

It is at this point that lessons might be drawn from French language theory for the draftsperson. The lessons would assume the strength of the complicated arguments and evidence put forward by the theorists over recent decades. But, assuming there is something to what they have to say about the role and nature of language, then there must be serious questions asked by the draftsperson.

In particular, there seem to several assumptions which textual writers of legal drafting and which Elmer Driedger in particular assumed as I think back to my association with him over fifteen years ago.

One assumption which the draftsperson has taken without question is that his project or her project is aimed to express the intent of parliament. This assumes that there is an author and that the author has an intent. As Frederick Bowers puts it "the process whereby parliament expresses its legislative intent in a written document addressed to all citizens within a jurisdiction, and whereby courts are obliged to provide interpretation in cases where the intent is apparently contravened or disputed is one of explicit intention-to-expression-to-interpretation that is not to be found in other writing activities" (page 3). Bowers emphasizes that the intent of the original author of a text is fundamental to deriving the meaning of the marks on a page. Authority lies in the author's expression. What begins as a thought is translated into written language. That written language should be as univocal as possible (page 71). Similarly, Pierre-Andre Coté states that the interpretive process must begin and end with the author of the marks on a statutory page. A crucial meaning is not that of a lawyer's or the judge's but that of the author's, even though the author is itself a fiction (pages 1-4). Under the traditional heading of "sources of law" textual writers identify the authors as the sources of law and Coté emphasizes that when examining the grammatical or literal method of interpretation the fundamental focus should be towards the expression of the author.

Now, modern French language theory would seem to put this focus upon the author into question. For one thing, we are found in the midst of a pre-existing system of signs. And the author is not excluded from this pre-existing system. Further, what the

author intended--in terms of a signified or concept--collapses into the pre-existing system. In a sense, the legal language takes over.

I believe that this can be exemplified with respect to the drafting of the Canadian Charter of Rights and Freedoms and with respect to the interpretation of the marks called the Charter during the first five years after their inscription. The word/marks provided that the signifieds in the document - the rights and freedoms - could only be restricted if there were reasonable limits which were "demonstrably justified" in a "free and democratic society". The most important marks in the text seem to be these very words 'freedom' and 'democracy' because other signifieds were to be read in the light of freedom and democracy as set out in section one.

A search of the legislative proceedings over the prior 15 years leading up to the Charter's enactment would reveal that very little, if any, meaning had been projected into the marks "f-r-e-e a-n-d d-e-m-o-c-r-a-t-i-c s-t-a-t-e". In a sense, the previous legislative history was silent with respect to the meaning of the marks. Given the background of a fictitious author - the crown in parliament - which rarely spoke as to the meaning of the words "free and democratic society", it is not surprising that the institutional role of giving content to the marks would be diverted to another institution. It is even less surprising that the other institution - the lawyers in courts - would not resist the magnetism of the pre-existing signifiers and signifieds with which lawyers were familiar prior to the enactment of the text called The Charter of Rights and Freedoms. Very few judges - or presumably lawyers - during the first five years of the inscription of the marks of the Charter made an effort to project content into the marks "f-r-e-e a-n-d d-e-m-o-c-r-a-t-i-c s-t-a-t-e". The few efforts have been identified and discussed elsewhere.² Similarly, although Dickson went some distance to give content to the marks, nowhere did he explicitly do so himself. Nor, for that matter, did Wilson or any other member of the Supreme Court.³ The original signifieds remained empty, unreachable, forgotten and lost in the sea of lawyers' signifiers and signifieds which constituted an implicit meta language code.

In contrast, new signifieds were attached to the marks "reasonable limits" and "demonstrable evidence". In a sense, the new signifieds were actually old signifieds with which lawyers were already familiar: "objective tests of validity",

²See Conklin, *Images of a Constitution*, (Toronto: Univ. of Tor. Pr., 1989), pp. 252-262.

³*Ibid.*, ch. VII.

"comparative legislation of other acknowledged free and democratic societies", "fair minded member of the public", "reasonable member of the public", the "balancing of values" which includes such signifieds as "permissible limits of a government" and "legislative means which are carefully designed to achieve legislative purposes", "values", "a living tree", "teleological", "goals", "the interests", "interest balancing", "significant interests", "governmental interests", "substantial interests", "reasonable limits" and the like. These signifieds were already part of the common law language. The (re-)creation of these new/old marks/sounds as well as their associated signifieds were superimposed upon the ordinary marks in the Charter of Rights. Intricate legal tests evolved over time. Precedents were created. And the name of a precedent, such as Oakes, itself became a signified with its own marks/sounds. The legal language of the ordinary marks called The Canadian Charter of Rights and Freedoms became increasingly intricate, specialized and complex. There ensued a dependency upon personnel who had an intricate knowledge of the word/marks as well as the signifieds which the marks were supposed to represent. Further, such a personnel learned how to apply or at least incorporate social phenomenon in terms of the signifieds and the word/marks. The signifieds "freedom" and "democracy", which initially had seemed to be the most important signifieds in the document, collapsed into the never ending chain of legal language of which lawyers alone possess knowledge.

The lawyer became indispensable. Lawyers alone were given the privileged position of projecting meaning (signifieds) into the marks on the page. Their own signifieds became so complex and "foreign" to the non-lawyer in oh so short a time. In order for a non-lawyer to bring meaning into the marks, one had to incur extraordinary financial and psychic costs. Charter law, as a language, has become the language of the rich. And it must be such, the more scientized and the more refined that the interrelationships between signifiers/signifieds become.

A second fundamental assumption of the legal draftsperson as I recall my experiences with Driedger and the texts on statutory interpretation is that the latter assume that there are concepts out there which are fundamental to meaning.⁴ The whole project of the draftsperson is to try to put into words--that is, marks on a page--the ideas or concepts of the original author, however fictitious the author may be because of the complexity of interest group politics, the complexity of government bureaucracy, the secrecy of caucus, and all the many other complex political factors which lie behind the instructions given to a draftsperson.

⁴See generally, Conklin, "Invisibles" in (1991) 10 Windsor Yearbook of Access to Justice.

But concepts can only be understood in terms of competing concepts. The French theorists call this the binary opposition which characterizes every concept. For example, there is a sense in which one could not speak of a court without a parliament because the one is defined in terms of the other. Similarly, the concept of a man is defined in terms of the concept of a woman, the concept of a rule in terms of the concept of a policy, and on it goes. Indeed, the whole process of legal education is in a sense training one to distinguish between one concept and another concept and to distinguish how facts are related to one concept as opposed to another.

But the result of all this is to live in a world which doesn't exist, according to many of the French theorists. It presupposes that there are invisible concepts out there which we must try to reach, to grasp a hold of, to touch, to nurture, and to implement and apply. But those concepts are beyond the gap. Remember the TTC: "mind the gap". The concepts are invisibles and as soon as we try to define them we fall into the pre-existing sign system which we have been trained to learn from the first day of law school. The important message which Michel Foucault, Jacques Derrida, Lyotard and de Saussure bring to the draftsman is that the draftsman finds himself or herself within a pre-existing language of signs and from which one cannot escape however how much the draftsman wishes to believe that s/he is expressing some original idea--original, in the sense, that it has not been expressed before in statutory form. That originality collapses into the language system which we have inherited. I believe that my reference to the experience with respect to Section One of the Charter of Rights reflects this.

The final lesson which modern French language theory brings to the draftsman is the multi-voiced character of language. Whereas we have been trained to speak a common language as lawyers, the French writers make us aware that that very language conceals living human experiences. It covers over the latter. It reconstructs the latter. It restates the latter in the light of the experiences of lawyers--experiences which are caught up in the never-ending system of legal signs which predate them. A statute, then, is not just about the actual words which the draftsman puts upon a page. It is about human experiences which are excluded, silenced, and left out of the picture. In a sense, a statutory code has built within it a metacode or a hidden code of which we are not that conscious. The metacode is implicit in any explicit statutory code. The metacode is about the people that have been left out, the categories that have been excluded, and the categories which have been written down but which, by their very nature, must exclude in order to include. These exclusions and silences cannot be appreciated by looking for applications of such rules as noscitur a sociis, exclusio unius est exclusio alterius or other rules of interpretation (or

construction, if you will). Rather, one can become conscious of the exclusions and silences only by studying social history and social thought. That is, only by going beyond the traditional text of legal language which occupy our traditional law library.

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