Bilingual Drafting in a Common Law Jurisdiction in Canada

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The publication of Sir William Dale's book, *Legislative Drafting: A New Approach*, has stimulated a discussion in England on changing the English legislative drafting method to have more similarity to "continental" drafting as practised in European countries whose law is based on Roman law. In Canada, essentially the same question must be faced in the development of bilingual statutes in common law jurisdictions. In our case, French drafting is being introduced where a body of statutes is already complete in English and written in a way that was developed when the use of French was not contemplated. One of the problems is that the French language and the civil law and its drafting method are seen as intertwined and as integral to cultural ideals which all of us are committed to preserve. In the search for cultural ideals, there is a tendency for French drafting theory to distance or isolate itself from English drafting methods.

It is the purpose of this paper to propose that much can be done to bring the French and English drafting methods together. It is concerned with legislative drafting for the future. English language statutes that are already on the books must be translated as they are.

In Canada, the *Civil Code* is referred to as an example of the French ideal and is compared to English statutes to show fundamental cultural differences. The counterpart in Ontario to the *Civil Code* of Quebec or the *Napoleonic Code* of France is the common law. The principles expressed in the Civil Code as pure general principles are expressed in the common law, as generally stated flexible principles in decided cases. The statute law outside the *Civil Code* is the counterpart of English statute law. In practice in Canada, the attributes of the *Civil Code* are not found in French statute law. French statutes address the same procedural and administrative detail as the English statutes do in the same subject matter. On the other hand, common law concepts such as reasonableness, good faith and fault and negligence are commonly stated unadorned in English statutes and are troublesome to French translators who look for greater specificity. The quality of English drafting varies but, in the case of well drafted statutes in either language, the differences are not as great as is generally assumed.

One fundamental principle must be recognized and accepted: in a province, there is one body of law and one judicial system. It is not possible for either to be different for different cultures within the province (as perhaps can be done to some extent in Federal statutes which must recognize two system of law). From this principle certain results follow:

1. The degree of particularity in statutes is the same in both French and English.
2. To express the law of the province, some local adaptation is necessary in French terminology which is the medium for expressing the civil law.
3. The substance of the law should not be confused with drafting method or style, and substance comes first.

Current Ontario statutes were drafted over the past 100 years. In that time, the English drafting method and style has gone through continuous change. The most recent statutes are found by translators to be easier to translate into comfortable French than the older ones. Developments in English drafting can be speeded up. Many characteristics of English statutes are in the control of the draftsman. They exist only as habits, not essential to the law, and continue because, in English, they cause no problem. The characteristics of English drafting, often pointed to as a cultural difference, are not seen in that way by the English draftsman. He sees two principal governing factors: the expectation of the judicial system and his own drafting ability. His principal objective is clear communication. It is, therefore, entirely possible to change habits of expression only.

Awareness of certain improvements would be beneficial to both English and French expression. Among these I would suggest:

— *Reduce the use of internal references to a minimum.* In verbal communication, the use of words to represent a thing or act simultaneously conveys the thought. The use of an internal reference does not. This has become peculiar to statutes and can be eliminated by not departing from the ordinary means of communicating by words,

e.g. "an order under section 23" becomes "an order for adoption" etc.

— *Reduce the use of "subject to" and "notwithstanding" to a minimum.* These are sometimes used merely to remind the reader of another relevant provision. The draftsman can accept that a general statement in a statute is not self-contained and severable, and that a subsequent more particular qualification to a generalization is equally legislative without special reference. A genuine contradiction requir-

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During the administration of Premier William Davis a number of steps were taken to encourage the use of French in Ontario. (Ontario Archives).

ing paramountcy to be settled is probably a failure in organization.

— *Reduce the use of the case to a minimum.* e.g. "Where a person is over the age of sixteen years, he shall _____ etc." becomes "A person who is over the age of sixteen years shall etc.". It comes easily to a draftsman who is faced with characterizing an endless series of new thoughts to get into the habit of beginning with "where". Although the use of the case is often necessary for ultimate simplicity, it is useful to test each case to see if it can be eliminated.

— *Approach the subject directly.* Introduce each new step in a statute with a positively stated general principle describing it, followed by such qualifications or particulars as the law requires. Avoid long sentences, especially in a complicated matter.

— *Reduce the use of clauses.* Use clauses for clarity only and not as a device to put more in the sentence.

— *Avoid over-particularity.* The need for particularity is an aspect of the civil right to know the law before the event. The trend to more particularity is universal and is invading even *Civil Codes*. However, over-particularity can destroy its own objective. It can also deprive a court of the degree of flexibility a court must have to obtain justice in particular cases.

— *Reduce Definitions.* There is a tendency to overuse definitions in English. Overuse can be addressed by assuming there will not be any definitions and adding them on a clear balance of convenience basis. Definitions should not be used as a device to shape the application of the Act or to create qualifications respecting its subject matter if the object can be achieved in the substantive provisions.

These principles are already being observed in well-drafted English statutes, but the draftsman needs to be ever-vigilant as their abuse comes easily in English.

For bilingual drafting in a common law jurisdiction, the French draftsman should be a person trained and with practical experience in the law of the province and be an experienced working draftsman in the same jurisdiction. This ensures that both the English and French draftsman have a common perception of what is required to be covered. Such a person, if not available, should be trained and the process will take longer. Then, the English and French draftsmen should work together for the purpose, among other things, of identifying ways in which the English text may be modified for greater compatibility with the French in those matters that are within the discretion of the draftsman. And finally, a consistent English style arising out of the experience should be formalized.

English drafting in Canada has attained a good reputation for quality and has a reasonably uniform style. However, in almost 120 years as a bilingual state, English drafting has not profited sufficiently from the good characteristics of French drafting: purity of thought and conciseness of expression. The yearning in England for reform in English drafting has little chance of fulfillment by means of interplay with "continental" drafting. In Canada, mutual influence is destined to happen. The conditions are in place and the urgency increases. It will not be done by the French and English draftsmen working in solitudes. It will not be done if *civiliste* draftsmen are air-lifted into a common law province. It can be done by unifying the drafting process in a manner responsive to the judicial system of the province.

If bilingual drafting is approached positively, it can result in an improved, distinctly Canadian, method and style in English language drafting. ■