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**LA THÈSE A ÉTÉ
MICROFILMÉE TELLE QUE
NOUS L'AVONS REÇUE**

ON CONSTRUING BILINGUAL LEGISLATION
IN CANADA

SUMMARY

The following paper, entitled "On Construing Bilingual Legislation in Canada", analyzes the development of the rule of legal equality between French and English versions in the interpretation of Canadian legislation, and details its practical application in the jurisprudence.

The paper concludes that there is indeed such a thing as a "bilingual approach" to the interpretation of legislation, whether one calls it "une interprétation croisée" or bilingual cross-construction. The difference between the bilingual approach and the approach followed in unilingual common law jurisdictions is partially explained by the complexity that is sometimes presented by two not-so-compatible versions of the same law. The substantial difference, however, arises as a factual problem created by the availability of a context not simply twice as large as the unilingual context, but one that is dynamic and complex because of the necessary interrelationship of the two versions, however much they may each purport to be an independent expression of the same law.

The technique evolved in the Québec courts and adopted by the Supreme Court of Canada for interpreting bilingual Canadian legislation is frequently no more than a logical extension and extrapolation of the classic canons of construction

acknowledged in all Canadian jurisdictions. Some of these, however, have ^{proved themselves} to be not particularly apt for the construction of a bilingual statute at odds with itself. Choosing between two constructions that may reasonably be placed on a single set of words in a manner compatible with a single legal system cannot be said to be a problem of the same magnitude as that presented by two equally authentic linguistic versions of a statute that must be applied uniformly within the context of two legal systems.

The common law canons, of course, do not foresee the case of inconsistency or out-and-out conflict between two authentic versions of the same law. Nevertheless, solving internal inconsistency within the general theory of the context approach is already well known to the legal world and has its logical extension in cases of bilingual difficulties. As the paper attempts to demonstrate, most existing canons, so-called, are applicable to the bilingual universe, but must always be reconsidered or reassessed in the light of the peremptory rule of dual authenticity applicable to federal statutes, among others. Indeed, as some cases have indicated, the traditional canons, which as dogma are at times meaningless, have taken on original glosses under bilingual exigencies and sometimes attain an unexpected dimension of meaningfulness.

Nevertheless, as an approach to construing bilingual legislation, wholesale reliance on presumptions and rules of interpretation verges on the irresponsible when often all that is required is a simple reading of a few words in the other official version appearing on the same page of the statute books. In the context of a bilingual statute, the Maxwellian or Ilbertian rules cannot be determinative of the result, which is reliable only when based on a reading of the one version in the light of the other. The paper amply demonstrates that a clear version of the law will normally resolve any doubt residing in an ambiguous one, and that the context of a provision will resolve any difference between its two versions.

As a rule of thumb, a formula* is suggested for this approach to the interpretation of bilingual legislation; it was tested against several decisions and refined in the course of the thesis to read as follows:

$$(1) A^e + B^e + A^f \Rightarrow A$$

and its corollary:

$$(2) A^e_o + B^e + A^f_o \Rightarrow B$$

The one construction common to both versions (A) will normally prevail, so long as it is not subject to objection when the provision is so read within its total context.

P R E F A C E

Every so often in most areas of scholarship, an original work emerges that provokes its audience to rethink past wisdom or at least to place it in a more meaningful perspective. Elmer Driedger's The Construction of Statutes¹ is such a work, recommending itself to the legal profession for its disciplined analysis and fresh perspective. The major contribution of Driedger's text is to demystify the art of statutory interpretation.² In it, he explains with admirable clarity how Maxwell confused us all to the point that the interpretation of statutes had become an arcane science and an intimidating matter. Driedger's book has been important to the writer in another way, however. Any specialized piece of writing, such as the present thesis, normally requires a solid point of departure, a foundation upon which there can be little discussion. The writer in this instance points to Driedger's classic as his principal benchmark, in that it sets out all that is reasonable and "solid" in the area of the construction of statutes.

✓

As a recent text, however, Driedger's The Construction of Statutes is interesting for its silence on a very intriguing and most relevant aspect of the construction of statutes in Canada -- how to approach the normal rules of interpretation when construing a bilingual Canadian statute. This is an eminently proper question since the passage of the Official Languages Act in 1969, which in section 8 seems to require as a first step in the interpretative process a comparison of the two official versions of the law. If this is so, then the question as to the ambiguity of the text may very possibly be resolved differently. The "context" approach of Elmer Driedger's text is perhaps subject to some preliminary comparative analysis of the two language versions before the initial determination of legislative ambiguity can be properly made. Such analysis may well be crucial, since the process of construction that one follows, as has been amply proved by Dr. Driedger, is often determinative of the result.

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In the body of jurisprudence examined, there are apparently many cases that would not,

in all likelihood, have reached the courts had the parties compared the two versions of the law in the first place. On numerous occasions, an ambiguity in one version has been resolved by simply applying its clearer counterpart in the other language. There was frequently no need to go through a sometimes painful process of contextualizing the problematic words in order to obtain an objective and unassailable result. This is a matter of considerable significance in a country that boasts an apparently growing number of bilingual legislators, one of which must also be "bijural"⁴ or legislate in a manner compatible with two legal systems.. A few authors have written articles in this general area,⁵ but none has confronted the issue squarely and in a systematically analytical way. It is the present writer's aim to fill that void in the thesis that follows.

ON CONSTRUING BILINGUAL LEGISLATION
IN CANADA

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I N T R O D U C T I O N

The Supreme Court of Canada has since the early part of this century drawn certain conclusions from a reading of section 133 of the B.N.A. Act that might be characterized as creative.⁶ Creative, because the conclusions it reached over the years do not follow necessarily from the literal prescriptions of that section; so far as the language of federal legislation is concerned, section 133 relates precisely to the publication of federal statutes in two languages, but is silent on the norms of drafting and interpreting them. That section's grant of a personal right to use either or both of two languages in parliamentary debate and its imposition of an institutional obligation to keep records and journals and to publish every law in both languages, without hint of preference for either of them, do not in themselves compel the conclusions reached by the Court, namely, that

1. both language versions of the law, when adopted, are equally authentic;
2. the grammatical prescriptions and "genius" of the language in which each version is expressed dictate the principles according to which each is construed;
3. a language version of a law must be construed in light of the jurisprudence attaching to the legal system that has its principal expression in the language of the version being construed; and
4. both versions of the law pass through the legislative process at the same time and according to the same procedure, thereby receiving equal attention and scrutiny.

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It will be seen that conclusion number 4 has been held out as a fact⁸ that is said to serve as an indicator of the only possible conclusions to be drawn (numbers 1 to 3) for the practical problem of construing a bilingual statute. That such a legal indicator has never been judicially examined

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at any factual level should be self-evident. That three legal prescriptions of bilingual construction could have been derived from this indicator and applied in the absence of further examination suggests an act of judicial creativity rather than a strictly jurisdictional decision on the part of the Court.

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Such a view, however, should not be taken as disparaging to the Court. In the socio-political climate of the day,^{10.1} it was inevitable for men in high judicial office to be drawn into a decision of high public policy that went to the very heart of their interpretative function.^{10.2} Without getting into a discussion of the role of the judiciary and its limitations to supplying the "interstices" of the law rather than its substance, there can be little doubt in this case that the Supreme Court, led by the personality of Duff, C.J., long ago made an independent rational decision, in line with public policy, that was consistent with its constitution as a national court charged with supervising the evolution of two highly developed legal systems in a country that published its federal Acts, as well as those of a province, in the two national languages.

The policy, however, has been a flexible one. While legislative drafting at the federal level has traditionally been performed mainly in English, the judicial interpretative process within the federal courts and the Supreme Court of Canada has, by a rule formally adopted in 1935, been bilingual or polydimensional. It should be underlined that this judicial rule was not a necessary conclusion, but a rational choice between alternatives that offered various advantages and disadvantages. It is only one thing to stipulate that a law must be bilingual -- this refers to its presentation, its format, and is in no way conclusive of a rule governing the interpretation of such a law.¹¹

Nevertheless, Canada pursues a policy, first enunciated by the Supreme Court, that not only are her national laws bilingual but so also is their interpretation. Such an affirmation, however, does not of itself define adequately the rule of interpretation applicable. The process involved has been referred to as "une interprétation croisée",¹² and we might compare it to a problem of English grammar: analyzing the compound-complex sentence.

With bilingual statutes, we are faced with a compound-complex process of interpretation. Compound, in the sense that two linguistic versions of equal validity are joined to present two expressions of the same law. Complex, in that at some point, one version may be called upon to define or clarify the meaning of the other version. Necessarily, a hierarchy will at some point be established between the versions. One will be found wanting in some way, and subordinated to the other.

While the interpretation, or rather the construction of a statute may be characterized merely as the obverse of drafting, or drafting in reverse,¹³ the process of interpreting bilingual legislation in Canada has followed a regime of linguistic equality between versions (leading to certain peremptory rules of construction) that, classically, has not been reflected or had its source in any comprehensively bilingual drafting or legislative process. The official and equally authentic French version of Canadian federal law

has the status of a translation right up to royal assent; thereafter, by a rule of public policy, first sanctioned by the Supreme Court of Canada, it commands equal respect in the interpretative process.

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This paper will analyze the development of the rule of dual linguistic authenticity in the interpretation of Canadian legislation, along with that of its corollaries. In the process, some tentative conclusions, discussed in Part IV, have surfaced on the general question as to the wisdom of Parliament's attempt to legislate rules to interpret bilingual legislation, thereby encroaching upon the classic domain of the judiciary, and on the more particular question as to the wisdom of Parliament's incorporation into legislation and possible aborting of the evolution of judicial thinking on the matter after only thirty-five years.

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PART I

FEDERAL LAW JURISPRUDENCE PRIOR TO SEPTEMBER 7, 1969

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FEDERAL LAW JURISPRUDENCE PRIOR TO SEPTEMBER 7, 1969

A. Introduction

Before the Official Languages Act became law in 1969,¹⁶ the courts and specifically the Supreme Court of Canada had evolved a number of general principles to be applied in the process of construing bilingual legislation in Canada. Much of this jurisprudence remains valid today, as it served to lay the groundwork that the legislator has tried to reflect in section 8 of the Official Languages Act. It was not necessary for the Official Languages Act to be enacted before the courts were to realize that there are interpretative problems inherent in the nature of a bilingual statute. Whether Parliament has provided, or is even capable of providing, adequate solutions to these problems is the major question that we shall attempt to answer after studying the relevant jurisprudence that has developed before and after the enactment of rules for interpreting bilingual statutes.

B. Interpretation by Reconciliation

1. The King v. Dubois

The Supreme Court case of The King v. Dubois was the first to affirm authoritatively the equal or dual authenticity of the French with the English version of federal statutes.¹⁷ And on this initial affirmation has been founded in countless subsequent decisions¹⁸ the principle that may be represented by the following formula:¹⁹

$$A_e + B_e + A_f \Rightarrow A$$

In words, the formula means that a provision of a statute found to be ambiguous must be construed in light of both its versions. An ambiguous version must be interpreted by the other version and reconciled with it wherever possible. Thus, where one version is ambiguous while the other is clear, the clear version is preferred as the objectively ascertained intention of Parliament whenever it coincides with one reasonable construction of the ambiguous version. Another way of putting it: an ambiguity in one version may be solved by choosing the construction that is compatible with the clear language of the other version.

As Chief Justice Duff put it in Dubois:

" ... [I]t is right to mention, first of all, that the statutes of the Parliament of Canada in their French version pass through the two Houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are. ... [T]he statute in its French version cannot be ignored.

The phrase "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. ...

"Chantier," in this connection, implies defined area and locality and is incapable of application in such a way as to include public services, as such.

The statute, in the French version, plainly does not envisage a vessel, as such, although it does envisage a shipyard. Nor does it contemplate an automobile as such, although it may very well be held to contemplate an automobile factory.

The statute, in the French version, must, of course, be read with the statute in the English version."

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Such reasoning apparently has its source in a
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19th century decision of the same Court in relation
to a section of the Québec civil code:

" ... the code itself gives an unmistakable clue to the interpretation of the words as used in this article. When the English version says "bodily injuries," there is no room left for controversy. I take it that whether the article was first written in French or in English is immaterial, if there is no absolute contradiction between the two versions (22). In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read

out of the law. It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is. Here, the words: bodily injuries leave no room for doubt and we must conclude that *injures corporelles* mean bodily injuries, and that bodily injuries mean *injures corporelles*. In fact that is what the two versions of the code, read together or by the light of one another, say in express terms. "

If the general rule is equal authenticity, what role do the normal canons of construction play,

1. when one version is ambiguous while the other is clear, and
2. when there is clear conflict between the two versions?

While Driedger has largely silenced the
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Maxwellian oracle, we are nevertheless faced with one strong rule of reason, which may be called, loosely, the "context approach":

" The words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. "

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This contextual approach has some interesting variations and adaptations when applied concurrently with the peremptory rule of equal authenticity in bilingual interpretation, where two versions of the same law must be reconciled.

2. Dubois Applied

The equal authenticity rule has been applied in countless subsequent cases, with varying results. In Tupper v. The Queen, it was applied with some reluctance, as the result seemed unreasonable to the Bench, but they confined themselves to the rule and recommended that Parliament amend the provision in question. Tupper v. The Queen is a most interesting example of Dubois, proving in an extreme case the validity of the formula $A_e + B_e + A_f \Rightarrow A$. The issue, revolving around the interpretation to be given to the phrase "any instrument for house-breaking" in subsection 295(1) of the Criminal Code (1967), was whether the instrument must only be objectively capable of being used for house-breaking or whether it must first be inferred from the evidence that the accused intended to use the instrument for such a purpose, before the burden of proof would shift to the accused to justify his possession. Judson, J., speaking for the Court in his usual succinct manner, required only a reference to the French version to clear up the ambiguity of the English:

" In my opinion, this statement of the law is erroneous and ignores the plain wording of the section. The English version reads: "any instrument for house-breaking"; the French version reads: "un instrument pouvant servir aux effractions de maisons". The French version makes the meaning clear. Both

versions mean the same thing. An instrument for house-breaking is one capable of being used for house-breaking."

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His statement that "both versions mean the same thing" is to say, of course, that when read together, the two versions point to one conclusion: the English version, in light of the French, is reasonably capable of only one construction.

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Hall, J. comes to the same conclusion and feels bound by the clarity of the French version "whether Parliament intended it or not". The Court thus accepts the doctrine that where words are clear they should be applied, however unreasonable the result may appear to the Court.

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This attitude caused at least one writer some concern. Commenting on the case in an article, Mr. J.C.E. Wood took great pains to analyze the approaches of English positivism and American realism to the interpretation of statutes and expressed great disappointment in the Court's failure to apply the "ratio legis" of section 295 C.C. He was quite convinced that the inherent purpose of the particular law served to clarify the ambiguity of the English version and justified the rejection of the French version, as did the legal presumption against a departure from the general system or traditional

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principles of the law. But with great respect
to Mr. Wood, this is precisely where an understanding
of the place of bilingualism in statutory interpreta-
tion is essential. However much one may lament the
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equal authenticity rule in that "the vast majority
of Canadians are fluent in only one (language)"
and therefore interpreting a bilingual statute is
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for them an "arcane science", the rule persists
and prevails over Maxwellian canons of interpretation,
which in any case should be used only as guides and
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not peremptory indicators of legislative intent.)
Wood argues that having two versions instead of one
merely increases the ability of the judiciary to
circumvent legal principle, to obfuscate reasoning,
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and to make policy decisions they find "expedient".
But here Wood is not consistent with himself. The
Tupper decision was clearly arrived at with marked
reluctance, offending as it did the sensibilities
of at least one Justice who went so far as to call
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on Parliament to amend the section. The availability
in this case of another version of the law, if
anything, hampered the ability of the Court to play
a more creative role in line with their own consciences.

3. Language Versions in Conflict & the Rule to Avoid Repugnancy: Reconciliation by Variation
(Food Machinery Corp. v. Reg. T.M.)

The case of Food Machinery Corp. v. Registrar of Trade Marks revolved around the construction of section 26 of the Unfair Competition Act, 1932, S.C., c. 38 and the appellant's contention that it allowed a word mark to be registered even though it was the full name of a corporation. The relevant portions of section 26 read as follows:

" 26(1) Subject as otherwise provided in this Act, a word mark shall be registrable if it ...

(b) is not the name of a person, firm or corporation;

(2) An application for the registration of a word mark otherwise registrable shall not be refused on the ground that the mark consists of or includes a series of letters or numerals which also constitute or form part of the name of the firm or corporation by which the application for registration is made. "

The appellant contended that subsection (1) was in its own words subordinate to the rest of the Act and that under subsection (2) the name of the corporation was indeed registrable as a word mark. The issue, then, called for a proper reading of the relative clause in s. 26(2): "which also constitute or form part of the name of the ... corporation". Should it be read:

1. "Which also constitute the name of the corporation",

or

2. "which also constitute part of the name of the corporation"?

The Court rejected the first construction as being repugnant to subsection (1) which states that the name of a corporation is not registrable as a word mark.

This, however, was only the first step of the construction process, for the Court still had to deal with an apparent difference between the English and French versions of section 26. The appellant's case was based on the French version of the provision which read "qui constituent aussi le nom de la ... corporation, ou en font partie". The French clearly renders only one possible construction, one that is identical to a possible construction of the English but that was rejected for repugnancy to the section as a whole.

How, then, does the Court come to terms with an apparent conflict between two principles of construction: the equal authenticity rule on the one hand, which would resolve the issue in favour of the unambiguous French version, and the doctrine of repugnancy on the other hand, which would ignore the French version as a translator's error and resolve the issue in favour of the only possible

construction of the English version that was in harmony with the section as a whole?

In Food Machinery, the ambiguity in the law did not arise from ambiguity in the one or the other version of the law, but from the fact that each version tended to say something different:

" The grammatical meaning of the French text appears to be clear and accords with the appellant's construction. My own opinion of the English text is that its meaning is also clear, but two constructions of it have been advanced, one of which is objectionable and the other free from objection. ... [I]f there is any ambiguity it is because of the divergence between the two texts, and it seems to me that the Court should deal with the matter as it would deal with any other question of ambiguity, namely, seek to ascertain the true intent of Parliament, following the guidance of the canons of construction recognized as applicable in such cases. Under the circumstances, it would, I think, be sound to hold that where two constructions are advanced for either the French or English text of a statute, one subject to objection and the other free from it, that construction which is free from objection, according to the recognized canons of construction, should be adopted, even although the language of the other text is at variance with it and in accord with the objectionable construction; the objectionable construction is not rendered free from any objection by reason of such accord and is not entitled to any support from it. "

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The conundrum of inconsistency between versions is not easily solved, but solve it the court must from time to time. Here is Thorson's approach in Food Machinery:

(a) Presumption in favour of a reasonable interpretation

" Where the meaning of words is clear, effect must be given to them regardless of their consequences and in such cases no problem of interpretation or construction arises. Here Parliament has spoken in two languages with a variance of meaning between its French and English statements. Such a situation calls for the guidance of settled canons of interpretation and construction. One of these is the presumption in favour of a reasonable interpretation, ... It is elementary that, in the first instance, the grammatical and ordinary sense of words is to be adhered to but this is not possible in the present case where such sense is not the same in the French and English texts of s. 26(2). "

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The first observation that can be made is that Thorson's invocation of "settled canons of interpretation and construction" may not be totally apt in cases of divergence between versions that are supposedly equally authentic. These canons were developed by courts working in one language and within the framework of a single, unified legal system. The presumption in favour of a reasonable interpretation relates surely to the problem where language in itself creates ambiguity and diverse interpretations that have to be ordered according to some hierarchy of reasonableness. With all due respect to Thorson, P., the present writer

would contend that once the court determines that each text is clear but at odds with the other, we are no longer speaking of mere interpretation. The language in question requires no interpretation; the law needs only to be applied. And the impossibility of applying two clear texts that are at odds with one another is the essence of the problem which, for its solution, seems to require a legislative act on the part of the judiciary.

One final remark on the reasoning in Food Machinery regarding the first canon cited. While Thorson's judgment on the whole is unquestionably based on objective criteria and analysis, the rejection of one clear version of the law on the basis of "unreasonableness" has obvious dangers. Construing the law in this manner should be only a last resort. Purporting to ascertain the law by choosing between conflicting statements of the law on this basis in the first instance makes unconvincing jurisprudence and smacks of rank subjectivity.

(b) The Rule in Grey v. Pearson

Thorson's second basis for decision, however,

the rule in Grey v. Pearson, is more compelling. Its reasoning is quite amenable to the problems of construing a bilingual statute of the kind that arose in Food Machinery:

" No departure from the grammatical and ordinary sense of the English text of s. 26(2) is involved in the respondent's view of its meaning, for it is in accord with the reasonable construction of the two subsections of s. 26 which has been outlined. The same cannot be said of the appellant's construction. It is, I think, a distortion of the grammatical meaning of the English text, and its adoption would run counter to the reasonable construction referred to, for it would enable every firm or corporation to register its full name as a word mark, notwithstanding the express prohibition against such a registration contained in s. 26(1)(b). Such a result would, in my opinion, be an unreasonable one under the circumstances and could not have been intended by Parliament."

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The rule to resolve "disharmony", as Driedger⁴² calls it, when applied to the bilingual universe, really amounts to varying the language of the anomalous version (the French version in Food Machinery), as authority permits, to make it conform to the whole context of the law in question, no minor part of which is the English version itself. Unfortunately, Thorson, P. did not express his process of reasoning in quite this orthodox manner:

" It follows from the rejection of the appellant's construction of the English text on this ground

that the French text must fall with it, for although its grammatical meaning appears to be plain, it is clear from the contents of s. 26 that it cannot be the true meaning, for it also runs counter to the "expressed intention and declared purpose" of the two subsections of s. 26 when read together. ...

Moreover, the adoption of his construction and the French text would result in a complete antithesis between two subsections of the same section which it would be unreasonable to attribute to Parliament."

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(c) Presumption Against Repugnancy

The third canon that Thorson purports to apply is the presumption in favour of consistency and against repugnancy. Here again, the doctrine applies more aptly to problems of ambiguity arising from a single language version and is not very helpful in construing a law whose two language versions are manifestly inconsistent with one another.

(d) Presumption Against Implied Repeal

The fourth and final basis for Thorson's decision in Food Machinery relates to the presumption against implied repeal of a provision of the same Act. There must be "strong reason" for it; it must be an "inevitable" interpretation.
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Again, we would counter that the rule

is more helpful for interpreting ambiguous words than for resolving the problem of how to apply clear words in conflict. Indeed, looking purely at objective effect rather than attempting to sort out legislative intent, one writer and one court have suggested that the case of language versions in conflict is a classic one for the application of the theory of implied repeal.⁴⁵ Conflict between versions would import nullity on the point legislated -- and reversion to the former law. In the present case, it would also have resolved the apparent internal conflict with a preceding provision in the Act.

(e) The Thorson Gloss: Summary

The initial Duff formula $A^e + B^e + A^f \Rightarrow A$
now has a corollary: $A^e_o + B^e + A^f_o \Rightarrow B$

(Key: "A" and "B" are possible constructions.
"e" symbolizes the English version.
"f" symbolizes the French version.
"o" means "subject to objection".)

In words, the formula represents the following conclusion: even though the clear meaning of one language version may have its analogue in a "possible"⁴⁶ construction of the ambiguous version, the clear meaning will not be deemed the true legislative intent where it is subject to objection in light of the intent or purpose

of the section or Act as a whole and where another construction is available that is not subject to objection, even though this latter construction has no possible analogue in the other language version.

It is not enough to say, if one version is clear while the other is unclear, that the clear version shall be preferred and applied. Thorson emphasized that the clear version must be in harmony with a reasonable construction of the unclear one. But what is reasonable can only be determined by reference to the whole Act. Both versions, in such a case, must be compared and, where possible, justified; one must attempt to extract a mutually compatible rendering. If that is impossible, the context naturally rules the inevitable choice of the version to be preferred. Thus, what appears on its face to be a departure from the principle in Dubois became, with Food Machinery, an important refinement of the rule of equal authenticity, which is now largely reflected in s. 8(2)(d) of the Official Languages Act.⁴⁷

In the final analysis, Thorson, P. has resolved linguistic conflict through traditional

means -- reference to context -- an approach canvassed much earlier by the Supreme Court⁴⁸ when construing a Québec statute. Westmount v. Montréal Light was a classic example of how the bilingual approach fits in with the normal context approach of construing legislation. In fact, in this case, the "bilingual approach" might be described not as an independent approach at all, but rather as a more dynamic form of the context doctrine: Idington, J., albeit in a dissenting opinion, had one clear rule of reason:

" I am inclined to think the purview of the Act itself must be kept in view, and the selection of the version to be adopted in case of conflict, ought to be that which will best effect the purpose of the Act looked at as a whole. "

4. Restricted Versus Unrestricted Meaning (Primary Versus Ordinary Meaning): The Scope of Words In A Dual Linguistic Context

An interesting technique of clarifying ambiguity and imprecision was demonstrated in the case of Jones & Maheux v. Gamache. There the question was asked whether the expression "fonctionnaire de la Couronne" in the French version should be read restrictively so as to mean only a civil servant, or whether it should be read to include a minister. Although it was conceded that "civil servant" was the "ordinary meaning currently being given to the word" (fonctionnaire), its primary meaning, a person fulfilling a public function, was wide enough to include a minister.

With the question put in this manner, the Supreme Court of Canada opted for the wider, unrestricted meaning on grounds that may be stated in the following manner:

(a) Reviewing the Work of the Statute Revision Commission

Although the word "fonctionnaire" was used in the Revised Statutes of Canada, the original version of the Act as passed read "officier", corresponding more closely with the English

"officer". Therefore, no special significance should be attached to the use of the word "fonctionnaire" as opposed to "officier".

The change was apparently made by the Statute Revision Commission "solely to correct the language to preserve a uniform mode of expression".

(b) Acts of the Same Parliament are Deemed to Carry the Same Meaning in Identical Expressions

" In the same volume of the Statutes of Canada (50-51 Vict.) containing the Act originally enacting s. 29, the following appears in c. 14:

1. Le Gouverneur en conseil pourra nommer un fonctionnaire, qui sera appelé "Le Solliciteur général du Canada," et qui aidera au ministre de la Justice ...
1. The Governor in Council may appoint an officer, who shall be called "The Solicitor General of Canada," and who shall assist the Minister of Justice ...

The Solicitor-General of Canada is certainly not a "civil servant" but in French he is "un fonctionnaire", and in English "an officer". This would appear to decide the matter. Nothing indicates that in c. 16 the word "officer" should have a different meaning from the one it has in c. 14. Now it can easily be seen how the 1927 revision Committee was led to substitute in the French version of c. 16 the word "fonctionnaire" for the word "officier", "in the interests of uniformity" as required by the Act governing the revision."

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(c) The French Version: Reference to Québec Legislative Usage

Reference to linguistic usage in the statutes of Québec, where French has always been the working

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language of the legislative process, was made by the Supreme Court to reinforce the Court's reasoning that "fonctionnaire" and "officier" have been used interchangeably in the past, and that "fonctionnaire" in the French version does not cut down the broad meaning of "officer" in the English version.

In addition, it must be noted that the word "fonctionnaire" does not necessarily mean "civil servant". It is, of course, the "ordinary meaning currently being given to the word". There is no doubt that, having regard to the primary meaning of the word, Ministers are "fonctionnaires", since they fulfill a public function. It should be remembered too that they are so designated in an Act originally passed by the Quebec Legislature several years prior to the said s. 29 and entitled "An Act concerning the Executive Council" ("Loi concernant le Conseil Executif", 1882 (Que.), c. 2, s. 2). At the same time another Quebec statute (1885 (48 Vict.), c. 6, s. 1) stipulated that "the Attorney General and Solicitor General ... are the recognized officers of the Crown referred to in article 19 of the Code of Civil Procedure". This article in the 1867 *Code* reads in part as follows:

19. Personne ne peut plaider avec le nom d'autrui, si ce n'est le souverain par ses officiers reconnus ...
19. No person can use the name of another to plead, except the crown through its recognized officers ..."

5. Summary

Thus we see that the "context" approach is at the root of any bilingual approach of interpretation by réconciliation. Just as it is normal to resolve ambiguity by resort to all aspects of context, which are ordered according to traditional canons, so should context be an essential vehicle in the resolution of apparent divergency between English and French texts of the law. Just as we expect provisions to be read together, and not in a vacuum before meaning can be ascertained objectively, so is it natural to expect reference to be made to both language versions and réconciliation to be sought. This is the major premise of Dubois and its line of cases.

C. Special Cases -- When Traditional Doctrine Confronts
A Second Version

Apart from the frequent situation of ambiguous versus clear version and the rather exceptional case of clear versus clear version, there are numerous examples of old rules having new twists in the bilingual universe, as well as examples of interesting glosses being placed on the equal authenticity rule when it confronts the exigencies of traditional doctrine.

1. Consistent v. Inconsistent Use of Language
Between Versions

A subordinate principle that may be invoked as a last resort to resolve ambiguity requires that the same word or expression be given the same meaning throughout an Act or a series of cognate Acts, in the absence of a contrary indication.⁵⁵

This is admittedly a rather unhelpful principle of construction in most cases but it attains some significance in the bilingual universe. Thus, where one version uses two words or expressions for the other version's one, it is deemed inconsistent as an example of untidy draftsmanship. The presumption is invoked to resolve the doubt in favour of the consistent version and no distinction is deemed to have been intended. An example of this approach

arose in North Coast Air Services Ltd. et al. v. The Canadian Transport Commission where Martland, J., speaking for the Court, had this to say:

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" My view as to the meaning of s. 5 is strengthened by the wording of the French text. In the English text, in subs. (1) the word "procedure" is used in one place, and the word "proceeding" in another, both words occurring in the same sentence, but in the French text the word "procédure" is used in both places. In subs.(2) where the English text refers to "proceedings", the word "procédures" is used in the French text. This emphasizes the fact that s. 5 is concerned with procedural matters. "

At the risk of oversimplifying the matter, one could again invoke the simple formula $A_e + B_e + A_f \Rightarrow A$ to explain the outcome.

(The next page is #26.)

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2. Statute Amended in Only One Version

One very peculiar problem is unique to a bilingual legislative format and, judging from the manner by which Parliament scrutinizes the French version of its bills and the limited extent to which French is used in the federal legislative process, it is likely to arise more frequently in future. There are increasing examples in the annual statute books of Acts that for some reason seem merely to "correct" or modify the wording of the French (or more rarely, the English) version of a statute. On at least two occasions where one of these "amendments" was under judicial review, the Supreme Court ruled that in cases of doubt between the two versions, the amended text must prevail over the unamended one if parliamentary "intent" was to have some meaning. One must always look to the latest manifestation of Parliament's intent in order to discover it:

" We are not dealing here with a situation where each of the English and of the French text is capable of assisting the other, in a matter of interpretation, but with a situation where one has to elect between either the English text, which manifests the actual intervention of Parliament to change the existing law with respect to one of the constituent elements in the definition, or the French text, which is indicative of no change at all. In *Blachford v. McBain* (1892), 20 S.C.R. 269, Taschereau, J., as he then was, disposed of a similar question by ignoring the version which left the law in the

state in which it was, prior to the Act adopted to change it, cf. p. 275. Indeed, to give priority to the French version would, in this case, render the change made in the English version meaningless and the actual intervention of Parliament, to make this change, futile. "

This special case, arising as it does in a bilingual legal universe, may simply be explained as a peculiar manifestation and application of the normal presumption against tautology. In other words, every intervention of Parliament is presumed to have some meaning.

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3. Statutes Implementing Treaties

(a) In England

The "normal" situation that arises in a unilingual jurisdiction is exemplified by the case of Corocraft v. Pan American Airways ⁶⁴ where there was a discrepancy between the official (French) text of a treaty and its English translation, which had been incorporated into the unilingual (English) statute. In such a case, it is a fairly simple matter of referring to the unilingual treaty and altering the wording of the implementing statute to comply with it, for a number of reasons:

- 1) since the treaty was scheduled to the Act so as to become an integral part of it and since an article of the treaty designated the French version as its sole official text, the interpretative problem was solved by construing the Act as a whole, i.e., by applying this overriding article of the treaty and the section of the Act incorporating it; ⁶⁵ one had to presume that Parliament intended to give effect to an exact translation of the original treaty; ⁶⁶

2) since the treaty gave authority to the French text alone, it was the duty of the domestic court to construe the ambiguous domestic legislation so as to be in conformity with international law and not in conflict with it;⁶⁷

3) since another jurisdiction (the U.S.) had ruled in a case of its own that the French text was to prevail, the Court should take the same view, for the sake of uniformity among the signatories to the treaty.⁶⁸

(b) In Canada

When such a problem is extrapolated to Canada and its bilingual legislative system, one would think that a fourth and more obvious reason would apply to facilitate an easy solution -- surely if the official version of the treaty were French, this French text would be incorporated lock, stock and barrel into the implementing statute to serve as its official French version, which under these circumstances would have a natural ascendancy over the "official" English version of the statute that

had no official counterpart in the treaty. Nevertheless, despite such a logical expectation, we must take into account the fact that the legislative process in Canada does not proceed so logically: in this country English is so entrenched as the language of legislative drafting that in C.A.P.A.C. v. C.T.V. & Bell Telephone it was discovered that the French version of the treaty annexed to the implementing statute did not coincide with the official French text but was in fact a Canadian translation of the unofficial English translation of the treaty currently in use. The official French text of the treaty was ignored, but not for any particular purpose, such as to reflect some disagreement by Parliament with the terms of the treaty, since the unofficial English translation of the treaty became the "official" English version of the statute!⁷⁰

This conundrum did not, however, deter the Court from a realistic solution. Pigeon, J., speaking for the Supreme Court, disregarded the multiple mistranslation and returned to the original French text of the treaty:

" It will be noted that where the Convention speaks of "radiodiffusion" i.e. radio broad-

casting, the unfortunate translation reads "radiocommunication". The error in translation of the Convention was obviously carried into the statute intended to implement it, and, as happened in the case of the Hague Rules annexed to the *Water Carriage of Goods Act*, the English text was translated into French.

... Once it is ascertained that interpretation has to be resorted to, the intention must be gathered from the statute as a whole and this certainly includes the Schedule that is referred to in the body of the Act and is printed with it. Upon such consideration it becomes apparent that sub-para. (f) is intended to achieve the result contemplated in paragraph 1 of article 11bis. Bearing in mind that the Rome Convention is in French no other conclusion is possible but that the intent is to provide that copyright includes the exclusive right of public performance or representation by radio broadcasting ("communication au public par la radiodiffusion"). "

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(As a parenthesis, we should point out that such realism has rarely been extended by the judiciary to an analysis of the relative use or non-use of English and French in the domestic legislative process since the emergence of the equal authenticity rule; moreover, section 8 of the Official Languages Act would now seem to preclude such a development. The interpretative rule does not reflect the drafting process in Canada, nor has the drafting process evolved to reflect the interpretative rule.)

In the same year, the Supreme Court of

Canada in the case of Furness, Withy & Co. Ltd. v. M.N.R. made a very terse comment on the weight to be given to the French translation of a treaty incorporated into an Act of Parliament:

" There is nothing that I can usefully add to the able and exhaustive reasons for judgment of Thurlow, J., with which I am in agreement, and I am content to adopt them with one minor exception. In interpreting art. V of the Canada-United Kingdom tax convention, I do not rely upon the translation of the Convention, which appears as a schedule to the French text of 1946 (Can.), c. 38. "

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We are to assume from this that the English version of the treaty was its sole authentic version.

In the Exchequer Court below, Thurlow, J. applied the domestic rule of equal authenticity as an absolute rule of construction and treated the French translation of the treaty, used in the statute, as equally authoritative:

" Finally, the French language text, which also states the law in this country, in section 10(1)(c) expresses the meaning of *operated by him* by the words "qu'elle met en service" and the corresponding expression "de la mise en service" is used in Article V to represent the meaning of *operated by* in the English language text of Article V. The French expressions so used

appear to me to be apt ones to refer to operation by an owner or charterer who puts a ship into service in the trading in which he is engaged and to be quite inept to embrace or refer to one who simply carries out tasks, however extensive, for such an owner or charterer whether generally or in a particular geographical area into which the ship is sent in the course of a voyage.

Accordingly I shall hold that neither section 10(1)(c) nor Article V exempts earnings of the appellant from managing or agency or stevedoring services which it renders in Canada to other corporations and since for tax purposes each other corporation must in my opinion be treated as a separate entity there is, as I see it, no distinction to be made for this purpose between such other corporations whether they are subsidiaries or affiliates of the appellant or mere strangers. "

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As it happens, such reasoning, although rejected by the Supreme Court, would not have changed the result. Nevertheless, the case does raise the interesting question whether s. 8 of the Official Languages Act would today preclude the Supreme Court's technique and favour that of the Exchequer Court. That section establishes no express exception to the domestic rule of equal authenticity so as to take into account the very real possibility of an international treaty giving sole authenticity to one or other of its versions, to the exclusion of the French or the English that was incorporated into a Canadian statute.

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(c) Summary

9

It should follow from the above that where bilingual a statute is passed to implement a unilingual treaty, and ambiguity is seen to arise between the two versions of the statute, the official text of the treaty, where this corresponds verbatim, or ⁷⁹ in substance, with one of the official versions of the implementing statute and schedule, will establish an implicit hierarchy between the two domestic language versions. Such a rule is merely a rational application in a bilingual jurisdiction of the prima facie presumption that Parliament will not, save by the clearest of language, violate ⁸⁰ international law. This approach would also be justified under the rule of comity encouraging uniformity in the application of treaties among ⁸¹ their signatories.

(The next page is #38.)

OMITTED LEAVES 35, 36, 37, IN PAGE NUMBERING

4. Departure from the General System of the Law

There is a strong presumption, however useful it may prove in practical situations, that ambiguity should not be resolved in a manner that would substantially alter an institution or fundamental principle of the common law or "droit commun".⁸⁹ This, it is to be presumed, would have been accomplished only by the clearest possible language.

If such a problem arises in the Canadian bilingual legal universe so as to pose a choice between one version that clearly alters fundamental principle and another version that does not clearly do so, it may not be possible to give effect to such a presumption if we bear in mind the equal authenticity rule. While this is somewhat speculative in the absence of a case on point, the basic formula should still apply to give effect to the clearest available version: $A^e + B^e + A^f \Rightarrow A$.⁹⁰ Logically, the presumption could be invoked with some justification in the rather extraordinary case where each version was equally clear but at odds with the other, the one altering a fundamental principle of the law, the other not making a dramatic departure. This, of course, would be subject to any overriding purpose in the statute to alter such a fundamental principle.

Thus presumptions of this kind, which by themselves are subordinate and indeed often questionable as they tend to approach the level of dogma, receive new meaning when considered in the light of the rule to seek harmony between the two linguistic versions. For example, in Goodyear⁹¹ Tire & Rubber Co. v. T. Eaton Co., Fauteux, J., speaking for the Supreme Court of Canada, had this to say: .

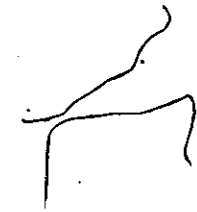
" That section 57 thus affords a substantial alteration of the general system of the law and particularly of the provisions of the Act dealing with the recovery of taxes, is manifest. In like circumstances, the construction of this subsequent enactment, section 57, is subject to the rule that a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed. There being a presumption against the implicit alteration of the law, effect cannot be given to the suggestion of counsel for the Department to read after the word "payable" twice appearing in the first paragraph of the section, the words "by any persons". To do so would not only extend the scope of the question but stretch it to a point creating clear conflict between the English and the French texts of paragraph (1). ... In the context, the word "payable" does not appear; and the context does not either lend itself to the inclusion of the words "payable par quiconque"."

(The next page is #43.)

OMITTED LEAVES 40, 41, 42, IN PAGE NUMBERING

D. Summary to Part I

From the preceding analysis of the Supreme Court's approach to the construction of bilingual statutes in Canada prior to 1969, it may be a fair conclusion to state that a "bilingual approach" does exist as a distinct and perhaps more correct approach to the interpretation of federal law in this country. The difference between this and the approach followed in unilingual common ⁹⁸ law jurisdictions (whose courts, as a rule, approach federal statutes in the same way they would a unilingual statute originating within the jurisdiction) ⁹⁹ is partially explained by the complexity that is sometimes presented by two not so compatible versions of the same law. The substantial difference, however, arises as a factual problem created by the availability of a context not simply twice as large as the unilingual context, but one that is dynamic and complex because of the necessary interrelationship of the two versions, however much they may purport to be an independent expression of the same law. ~~It~~ has been amply shown that the technique evolved in the Supreme Court of Canada for interpreting bilingual Canadian legislation, which is often modeled on time-honoured Québec jurisprudence, is frequently no more than a logical extension and extrapolation of the classic canons of construction that have been acknowledged in all Canadian ¹⁰⁰ jurisdictions since the days of Ilbert. Some of these,



however, have proved ^{themselves} to be not particularly apt for the construction of a bilingual statute at odds with itself. ¹⁰¹ Choosing between two constructions that may reasonably be placed on a single set of words in a manner compatible with a single legal system cannot be said to be a problem of the same magnitude as that presented by two equally authentic linguistic versions of a statute that must be applied uniformly within the context of two legal systems. The former has always been a natural exercise for the traditional courts, but for them the latter may at times cause considerable difficulty. Any preference given to one version over the other without due regard to the equal authenticity rule as it affects the accepted canons of construction may appear to usurp the legislative function of Parliament.

The common law canons, of course, do not foresee the case of inconsistency or out-and-out conflict between two authentic versions of the same law. Nevertheless, solving internal inconsistency within the general theory of the context approach is already well known to the legal world and has its logical extension ¹⁰² in cases of bilingual difficulties.

One author has argued that the technique involved in construing a bilingual statute is quite independent

of the common law canons, having its own rules; in effect, another layer of rules is superimposed upon the existing hierarchy of rules of construction. ¹⁰³ As we have attempted to demonstrate, most existing canons, so called, are applicable to the bilingual universe, but must always be reconsidered or reassessed in the light of the peremptory rule of dual authenticity applicable to federal statutes. ¹⁰⁴ Indeed, as some cases have indicated, the traditional "canons", which as dogma are at times meaningless, have taken on original glosses under bilingual exigencies and sometimes attain an unexpected dimension of meaningfulness. Boulton argues that there are two independent categories of rules that, although not entirely mutually exclusive, remain, nevertheless, separate packages capable of coming into conflict, at which time the normal canons must yield to the rules of his "interprétation croisée". ¹⁰⁵ With all due respect to an able researcher, the jurisprudence does not support such analysis. While it must be conceded that the canons normally applied to a unilingual legal universe cannot be transplanted lock, stock and barrel to a bilingual and bijural one, the rules that have evolved for construing bilingual statutes are at most refinements and logical extensions of the time-honoured canons; they are not magical recipes for harmonizing French and English in our statute books. The technique of applying

the trusted canons and the technique of cross-checking or cross-construing the two versions have simply fused into a more dynamic process of reading and applying statutory matter.

E. NOTES TO PART I

E. NOTES TO PART I

(Citations are shortened for the sake of convenience. See Table of Cases and Bibliography for complete legal citation. "T" references are cross-references to other pages of the present thesis.)

Foreward

1. E.A. Driedger, The Construction of Statutes, p. 73
2. P. St. J. Langan, Maxwell on the Interpretation of Statutes
3. The following is a note on the methodology applied to the research of cases for the present thesis.

As any researcher knows, intelligent access to the jurisprudence of most jurisdictions is virtually impossible. (See C.-A. Sheppard, p. 147, in fine.) Indexes are rare and incomplete. The "Dominion" Law Reports report only in English, so they do not even take note of most Québec jurisprudence. (In an article entitled "Chief Justice blames legal community for ignoring Québec" appearing in the February 1978 edition of The National at p. 10, the Honourable Chief Justice Jules Deschênes of the Superior Court of Québec underscores his claim by citing some hard-sought statistics: "The Canadian Criminal Cases, published in 1976, included 29 Québec cases out of 447 and, in 1977, 14 out of 296. The Dominion Law Reports published, in 1976, 21 Québec cases out of a total Canadian content of 776 judgments; in 1977, the proportion stood at 18 out of 775.") Where they do report Québec cases, it is mainly to record decisions of the Supreme Court of Canada, and where these discuss the intricacies of the French with the English version, the discussion is often rendered incomprehensible with the translation, by the D.L.R. reports, of virtually every French word in sight. In such cases, they present us with a discussion of the difference between the official English version and the "French" version in translation.

Raw material for the present thesis was gathered in spurts by several overlapping methods that each had their limitations:

1. Computer Retrieval

a) Quic/law Retrieval

This was most unsatisfactory, as a research tool, since the data-bases offered by Q-L Systems Ltd. were merely test data-bases of head-notes of a limited number of cases contained in a few collections. These data-bases have been extended dramatically since research began; however, since issues of statutory interpretation are often raised as ancillary matters to larger issues, they are just as often not likely to be noted in head-notes in a way meaningful to computer retrieval. A search of these within the Q-L system turned up only a handful of relevant cases.

b) Datum/Sedoj Retrieval

Datum/Sedoj (Service de Documentation Juridique Inc., Montréal) offered a much more useful service, because it contained in its data bank most decisions, in full, of all levels of courts construing Québec law, rendered between 1945 and 1973. A search of their data bank rendered 176 Québec cases from the Superior Court of Québec to the Supreme Court of Canada that had some relevance to the present thesis topic. Culling through such high quality raw material was exhausting but very rewarding. The main inconvenience of the Datum/Sedoj system was its cost to the student -- approximately \$200 for our search and the computer time involved.

2. Periodical and Encyclopedia Indexes

The normal method of searching periodical and law review indexes rendered very little, as expected, since it appears that very little has ever been written on the present topic. Boulton's article proved a gold mine, in that he seems to be the first to have taken a systematic approach to the matter, albeit solely at the level of Supreme Court of Canada decisions. The Canadian Abridgment and

Sheppard's The Law of Languages in Canada cited some cases that proved useful, as did Mignault and other civil law writers in their chapters on the interpretation of the Québec statutes and codes.

3. Manual Labour

The fear that the preceding incomplete and overlapping methods did not exhaust the raw material available led the present writer to the despairing travail of paging through the entire third series of the D.L.R. collection in the vain hope that, maybe, Sheppard was wrong in his statement (par. 3.43, p. 147) that English-Canadian courts in the provinces rarely if ever gave attention to the French version of federal statutes. The exercise did turn up a few surprises, such as Re Black and Decker at the Ontario Court of Appeal, but these later found their way into the computer data banks anyway. The indexes of the Canada Tax Cases, Dominion Tax Cases, Canadian Bankruptcy Reports, Canadian Criminal Cases, and Federal Court Reports were also searched with some success.

4. As far as the writer is aware, the term "bijural" was coined in the final Report on Evidence of the Law Reform Commission of Canada, p. 10; the terms "bilegal" and "bilegalism" were used by Prof. F.B. Sussmann in a speech entitled: "The Future of Bilingualism and Bilegalism in Canadian Legislation: implications for Law Teaching".
5. J.D. Honsberger, "Bilingualism in Canadian Statutes", p. 314; Jérôme Paradis, "Language Rights in Multicultural States", p. 673.

Introduction

6. Section 133 reads as follows:

" 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of Parliament of Canada and of the

Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages. "

Nor did
Duff, C.J.
specifically mention s.
133 in his reasoning !

It is important to note that in The King v. Dubois (cf. Duff, C.J., pp. 382, 400), the landmark case to end all discussion on the basic principle of dual authenticity, the French version of the statute in question was not even raised in argument by counsel. Surprise that the Canadian Constitution itself has never contained any formula of equal authenticity for the two linguistic versions of Canadian law was expressed by Prof. Hans Dölle in his essay: "Zur Problematik mehrsprachiger Gesetzes- und Vertragstexte" at pp. 17-18. He remarks that their equal authority seems to have been taken for granted and offers some gentle criticism in the following terms:

" Der Gedanke, dass es sich bei mehreren Texten eines Gesetzes um den Ausdruck eines einheitlichen Willens des Gesetzgebers handelt, auch wenn die sprachliche Fassung dieses Willens inkongruent ausfällt, findet sich in einigen Entscheidungen und führt zu dem Resultat, dass letztlich, unabhängig von der äusseren Form eines Textes, die sich aus beiden Texten ergebende ratio legis den Ausschlag zu geben habe. "

Of course, as Prof. Dölle well points out in the conclusion to his essay (p. 34), it is an inadequate solution that postulates the "ratio legis" or underlying purpose or mischief and remedy of the Act as the deciding factor in any case of textual incongruity between versions. Such a "ratio legis" is itself not always apparent. The whole exercise in construing a bilingual statute is to uncover a single and uniform legislative intent that has been expressed in two equal but sometimes incongruous language versions, and this uniform intent may in the end be highly fictional.

7. These, at least, are the implications of the reasoning of Duff, C.J. in The King v. Dubois and its line of cases. There has been a recent judicial interpretation made of section 133 of the B.N.A. Act in connection with the constitutionality of Québec's Bill 101, Charter of the French language, purporting to make French, inter alia, the sole official language of legislation in Québec. (See Blaikie et al. v. A.-G. of Québec et al.) In that decision, Deschênes, C.J. of the Québec Superior Court was of the contrary view that section 133, by making French and English equal languages of the "records and journals" of the Legislature and by requiring the publication of its statutes in both those languages, had in effect made French and English "official" as original and equally authentic legislative languages. (See pp. 11-28 of original unreported decision, pp. 257-264 of D.L.R. version.)

While Deschênes' judgment was upheld by a unanimous Court of Appeal, the reasoning of that court was highly fragmented as four of its seven members each wrote an "opinion" from which the court's reasoning must be distilled. As it turned out, the detailed analysis provided by the trial court was not closely examined for its validity in the reasons of the Court of Appeal, and the point we make here was not even broached by the latter court (except in the most general of terms expressed by Dubé, J.A. at p. 3 of his opinion, unreported copy). The basic attitude of the Court of Appeal was that the entire chapter III of Bill 101 entitled "The Language of Legislation and of the Courts" was so tainted as to make it pointless for the court to attempt to sever inoffensive portions from the obviously invalid ones (which dealt with language in the courts).

Leave to appeal was granted by the Supreme Court of Canada on February 19, 1979 and the hearing has been set for June.

8. The King v. Dubois, p. 401.
9. Bradlaugh v. Gossett, p. 275.
The courts forbid themselves from looking into matters of internal parliamentary procedure, irrespective

of the illogicality of this position in a given case that may require the court to make value judgments and pragmatic decisions directly dependent on the existence of some facet of this "internal procedure". There are some exceptions to this of course. See for example K. Swinton: "Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege", (1976) 14 Osgoode Hall L.J. no. 2, p. 345.

10. juris dictio (declaration of the law).

- 10.1 When Duff, C.J. rendered his landmark decision in Dubois, he had been on the S.C.C. bench for thirty years. As the strongest intellect in a court that was learning to be Canada's final appellate court, Duff had witnessed and participated in the evolution of the bilingual rule as it relates to Québec legislation. In that context, he had already attempted to apply the logic of equal authenticity as an uncompromising absolute, untempered by the general system of the civil law. (See Duff's dissent in Johnson v. Laflamme.) While Dubois made its way through the courts, Parliament was debating major policy advances in institutional bilingualism such as the implementation of a policy of bilingual currency, bank notes and bonds, the establishment of a central Bureau for Translations and greater participation of francophones within federal institutions on the basis of an equitable balance with anglophones. (See House of Commons Debates, especially 1932-33, pp. 2514-2536; 1934, pp. 979-1026, 4236-7; 1936, 3623-4, 3753-4, 3764-5. At one point, Prime Minister Bennett even discussed the meaning of s. 133 of the B.N.A. Act in the debate on Bill No. 19, to incorporate the Bank of Canada. (See 1934, pp. 4239 ff.)

Quite apart from these political developments, which Duff could not have ignored as judge and eventually Chief Justice, Duff had always been an active Liberal partisan. That he continued to be one subsequent to his appointment to the Bench, albeit somewhat more discreetly, is revealed in the diaries and letters of the three prime ministers he corresponded with during his judicial tenure. (See R. Gosse, "The Four Courts of Sir Lyman Duff", (1975) 53 C.B.R. (no. 3) 482 at 488, 493-8, 506-8, 512-13.

- 10.2 It may be that courts are incapable of objectively severing the issue of linguistic equality in court process from the issue of linguistic duality in the expression of the law. Certainly, a final appellate court may be expected to complement the executive in matters of high public policy and so in some ways may tend to act as a partner in the overall process of government. See, for example, P. Weiler: In the Last Resort, pp. 53, 115-19, 150-4, 229-30 and P. Russell, "Judicial power in Canada's political culture" in M.L. Friedland, ed.: Courts and Trials: a multidisciplinary approach, p. 75, at 83-8.
11. Some might argue to the contrary that "l'économie de la loi" or the overall harmony of our body of law requires such a conclusion. The question is not an academic one as this latter position is held by the Superior Court of Québec in Blaikie et al. v. A.-G. of Québec et al..

Here is what the Royal Commission on Bilingualism and Biculturalism had to say in Book I of its Report (pp. 52-3):

" Yet even a superficial analysis of the terms of section 133 makes it evident that its scope is very limited. True, it is quite comprehensive so far as either federal or Québec legislation is concerned: either language can be used in the records and journals as well as in the publication of all statutes. If legislation is considered in its traditional sense, and if we disregard the omission of any reference to the language of enactment of statutes, as distinguished from the language of publication, this might seem to be fairly unambiguous and satisfactory." (emphasis mine)

This is the very point that the present writer does not want to disregard, and he regrets that the precise point has not yet received adequate analysis in an appellate court, including the Court of Appeal of Québec in Blaikie.

The Royal Commission expressed its concern about the treatment of French in the drafting of legislation as follows:

" 163. Section 133 of the B.N.A. Act requires all acts of Parliament to be printed and published in both English and French. Parliament has observed faithfully this requirement but its compliance has been essentially literal. All officials interviewed confirmed that the universal rule for all federal statutes is that they are drafted in English only, in the Department of Justice, by an officer working with officials of the various departments involved in their preparation. The drafts are then submitted to the Legislation Committee in the Department of Justice, whose deliberations are also entirely in English. Any changes it may suggest will be in English only and relate to the English draft. It is only after completion and approval of the final text in the English language that the French version is prepared by the Law Translation Branch of the Translation Bureau. Usually the explanation given is the 'statutes can only be drafted in one language' and that this language has to be English because the majority of officials who must be consulted are also English-speaking."

Among government and parliamentary draftsmen, it is notorious that, with rare exception, this condition continues basically unchanged today. That was also the conclusion of the Commissioner of Official Languages in his Sixth Annual Report (1976), p. 151. (See T-209).

12. Reynald Boulton, "Le Bilinguisme des lois dans la jurisprudence de la Cour suprême du Canada", p. 323.
13. Driedger, The Construction of Statutes, p. 73.

14. Claude-Armand Sheppard, The Law of Languages in Canada, pp. 111 ff.

Indeed there are cases, apparent only on scrutinizing the "House Copy" of a Bill, when normal House of Commons procedure is suspended with the consent of its members and the French version of amendments (moved by private members) has not been prepared until after adoption of the amendments in the House and even after passage of the Bill at third reading.

That the courts themselves (in the common law provinces) may be incapable of coming to terms with a rule of dual authenticity is commented upon in the appendix to the present work.

Expressing his views on the limitations of section 133, C.-A. Sheppard in his The Law of Languages in Canada (pp. 99-100) had this to say:

" Section 133 of the B.N.A. Act is thus the cornerstone of linguistic jurisdiction in Canada. One cornerstone is not sufficient to support an edifice, however, and section 133 is a rather shaky cornerstone, as an examination of its terms will establish clearly. Indeed a careful analysis of the terms of section 133 leads to the unavoidable conclusion that its scope is surprisingly limited. In effect, it deals only with some aspects of the legislative and judicial processes at the federal level and in Québec. ... Also, the guarantees of section 133 remain somewhat academic in the absence of adequate provisions for bilingual judges and court personnel."

It is the present writer's view that this comment is particularly valid when discussing

- 1) the origins of an equal authenticity rule, and
- 2) the effectiveness of such a rule in the absence of compatible legislative and judicial processes.

For 1), see the introduction to the present work; for 2), see Part IV and the appendix.

15. In 1935, Dubois established a line of jurisprudence that might have evolved further and refined the rule, had subsection 8(2) of the Official Languages Act not been passed. The implications of section 8 are explored in Part II.

Part I

16. The Act, by section 41, came into force 60 days after its enactment of July 9, 1969.
17. The King v. Dubois, pp. 382, 401-3.
The same postulate for the Québec civil code and statutes had been made by the Supreme Court many years earlier: C.P.R. v. Robinson, p. 325 (Taschereau J. for the majority); Johnson v. Laflamme, pp. 518-520 (Anglin J.) and pp. 513-514 (Duff J.) (both dissents). While federal statutes had been referred to simultaneously in their two official versions prior to 1935 (cf. p. 323, Boulton), the Supreme Court (other than in dissenting judgments) had before this time not revealed its thinking in any detail on the matter of equal authenticity and the principles of interpretation deriving therefrom for the purposes of federal statutes.
18. For example:
CAPAC v. Western Fair, pp. 598, 605.
Commissioner of Patents v. Winthrop, p. 54.
Manning Timber Products Ltd. v. MNR, p. 483.
Goodyear Tire v. T. Eaton Co., p. 614.
More v. The Queen, p. 530.
Tupper v. The Queen, p. 292.
Salmo Investments Ltd. v. The King, p. 269.
The King v. Moscovitz, p. 407.
19. Key:
A, B -- two constructions that the words are reasonably capable of bearing.
e -- in the English version.
f -- in the French version.
The formula in words: two possible constructions, A and B, in the English version juxtaposed to one possible construction, A, in the French version renders A as the only acceptable construction of the entire provision as expressed in both official languages.
20. The King v. Dubois, pp. 401-3.

21. C.P.R. v. Robinson, p. 325.
22. Art. 2714 (formerly 2615) of the Civil Code applies a special rule of construction in the case of divergence between its two language versions that seems in keeping with the nature of a code but that has proved somewhat difficult of application. See Part III on interpreting the codes of Québec.
23. The propensity of Maxwell and Ilbert, among others, for doctrinaire statements of principle that are taken for a priori rules of interpretation has been largely discredited as a valid approach to the construction of statutes in modern times. See Driedger, The Construction of Statutes, pp. viii-ix, 1-2, 85-107, and Cross, Statutory Interpretation, p. 42.
24. Driedger, The Construction of Statutes, p. 67.
25. Tupper v. The Queen, p. 292.
26. ibid., p. 293.
27. See Driedger, The Construction of Statutes, pp. 14-15.
28. J.C.E. Wood, "Statutory Interpretation: Tupper and the Queen".
29. ibid., pp. 95, 107.
30. ibid., p. 108.
31. ibid., p. 106.
32. ibid.
33. See fn 23.
34. Wood, "Statutory Interpretation: Tupper and the Queen", p. 107.
35. Tupper v. The Queen, pp. 292-3.
36. Food Machinery Corp. v. Registrar of Trade Marks, p. 263.
37. ibid., pp. 263-4.
38. S. 8(2)(d) Official Languages Act attempts to cure this conundrum. See Part II.

39. Driedger, The Construction of Statutes, pp. 14, 37-43...
40. Such a pitfall is demonstrated in Stevenson v. Canadian Northern Ry. Co., p. 256, where Richards, J.A. merely cites Thorson on this point and without further analysis of the statute before him, recites:

" The interpretation of s. 203 given to it by Cannon J. appears to be the most in accord with convenience, reason and justice, and should be adopted. "

With respect, that is not enough. See Driedger, fn 39.

41. Food Machinery, p. 265.
42. Driedger, The Construction of Statutes, p. 30.
43. Food Machinery, p. 265.
44. ibid., p. 266.
45. C.-A. Sheppard, p. 151. A Québec case, Lacerte v. Verrault, actually applies this principle. See Part III.
46. "Possible" in strictly semantic terms, before consulting a wider context.
47. See Part II.
48. Westmount v. Montréal Light, pp. 366, 370. The Supreme Court of Canada, in construing federal bilingual statutes has quite obviously been inspired by early Canadian jurisprudence as well as by its own experience in construing Québec statutes. One must take care, however, not to make a wholesale adoption of the Québec approach when construing a federal statute, since Québec has from time to time legislated on the matter of bilingual interpretation, so that the courts there have not necessarily been applying rules that have evolved from within. (See Part III for detailed analysis of the particular rules of the Québec approach.) Of course, since the passage of Bill 22 in 1974, Québec jurisprudence on the interpretation of statutes must be approached with even more caution; by that Act, the French version prevailed in cases of discrepancy

between versions that the ordinary rules of interpretation do not resolve satisfactorily. See section 2, chap. 6, S.Q., 1974. Moreover, the adoption of Bill 101 in 1977 may effectively put an end to bilingual cross-construction in Québec. See summary to Part III.

49. Westmount v. Montréal Light, p. 370.
50. Jones & Maheux v. Gamache, p. 327.
51. ibid., p. 326.
52. ibid., pp. 326-7.
53. ibid., p. 327.
- 53.1 Except for the aberration of 1840-8, when under the Act of Union English was the sole language of legislation.
54. ibid.
55. Maxwell, p. 282; Driedger, The Construction of Statutes, pp. 74-75; Pigeon, p. 35; Jones & Maheux v. Gamache, pp. 326-8.
56. North Coast Air Services et al. v. C.T.C., p. 947. Two earlier decisions of the Court in the area of Québec law that appear to adopt this approach are MacKinnon v. Keroack, pp. 116 and 130; Syndicat catholique des employés de magasins de Québec v. Cie Paquet Ltée, pp. 210-211.
57. (deleted)
58. (deleted)
59. This aspect of the problem is commented upon in Part IV.
60. This fact was noted by Professor F.B. Sussmann of the Faculty of Law of the University of Ottawa in a speech he gave in 1968 called "The Future of Bilingualism and Bilegalism in Canadian Legislation: Implications for Law Teaching" in which, according to his notes, at page 4, he stated:

" It has happened, for example, that one version of a Federal statute says and means, at one point or other, something different from the other version. When such an instance is discovered, an amending statute is passed which appears in both languages,

2 but affects only the version deemed not accurately to reflect the intention of Parliament. This has happened in the past, notably with the Criminal Code, the Income Tax Act, and the Canada Elections Act. "

Professor Sussmann was referring to Honsberger's article on "Bilingualism in Canadian Statutes", p. 322, fn 25, which listed several now fairly old examples of amending statutes affecting one version only of a statute.

While both authors spoke in general terms of several statutes amending "one version" of an enactment, the fact is that the version amended is almost consistently the French version, to the exclusion of the English. The most recent and gross example is the recent innovation of the annual "House-keeping Bill", or as it is properly called, the Miscellaneous Statute Law Amendment Act, a Bill based on a document prepared by the Justice Department during the year called "Proposals to correct certain anomalies, inconsistencies, archaisms, errors and other matters of a non-controversial and uncomplicated nature in the Revised Statutes of Canada 1970 and other Acts subsequent to 1970." The title of the document is basically the long title of the Bill that emerges from it.

In Bill C-53 (now S.C. 1976-77, c. 28), the 1977 version of the annual Housekeeping Bill set out two schedules amending Acts in one version alone. Schedule I, amending only the English version of nine different Acts, is three pages long. Schedule II, amending only the French version of twenty-one different Acts, is ten pages long.

61. Fauteux, J. in Klippert v. The Queen, p. 709; Blachford v. McBain, pp. 274-5 (dealing with the Québec code of civil procedure and the R.S. of Lower Canada, 1860 and 1862. See also Driedger, The Construction of Statutes, p. 104.
62. Driedger, ibid., pp. 72-74.
63. The writer does not brandish this special case as a binding dogma, since the "intention" that one may ascribe to such intervention by Parliament remains subject to interpretation. For example,

it may be more convincing in future cases (see fn 60) to assume that Parliament was simply correcting a mistake -- as a housekeeping measure -- so that if anything, the version it left untouched might merit greater weight as having survived Parliament's second scrutiny.

64. See also Salomon v. Commissioners of Customs and Excise for a case where the convention upon which the statute was apparently based was not expressly mentioned or incorporated in the statute. The terms of the statute and the convention being nearly identical, the inference was irresistible that the statute was intended to embody the convention. The convention incorporated interpretative notes that were held to be conclusive by the U.K. C.A..
65. Corocraft, p. 631.
66. ibid., pp. 617, 644, 652.
67. ibid., pp. 643-4.
68. ibid., p. 653.
69. Composers, Authors & Publishers Association of Canada Ltd. v. CTV Television Network Ltd. and the Bell Telephone Company of Canada, pp. 680-1.
70. ibid., p. 681.
71. ibid., pp. 681-2. The Court took judicial notice of the fact that the Rome Convention, attached as a schedule, had French as its sole official version, the English version of the convention being expressly referred to in the schedule as a translation: pp. 680-1.
72. discussed in Part II.
73. If it did, the English version would be the sole authentic version for purposes of construction. See Part IV.
74. Federal statutes are still drafted solely in English and translated all into French. The participation and scrutiny of the French version in the legislative process is minimal. See Part IV.
75. Furness, Withy & Co. Ltd. v. M.N.R. (S.C.C.), p. 659, Abbott, J. for the Court.

76. ibid., (Exch. Ct), pp. 5365-6.
77. See Part II.
78. One author, writing prior to 1969, put a similar question. (V. Sheppard, p. 286). He also ventured the opinion that the original text of the treaty should prevail. Since 1969 and the passage of the Official Languages Act, this has become a very serious question. An exhaustive study of the language of bilateral and multilateral treaties entered into by Canada up to August 1965 ("Linguistic Practices in Canadian International Agreements and Diplomatic Exchanges" in C.-A. Sheppard's The Law of Languages in Canada, p. 272, 279-281) clearly demonstrates that the overwhelming majority of bilateral treaties (where Canada presumably had some discretion in the choice of language) are in English only, whereas a large proportion of multilateral treaties (where, presumably, Canada had little discretion in the choice of language) are in both English and French. It is clear, then, that there are extant and subject to ongoing interpretation in our courts a great number of international agreements affecting Canada that have only the one or the other of our official languages as their sole authentic version. Section 8 of the Official Languages Act should be amended to take into account this international reality. (Our own research reveals that in 1966 a dramatic change took place in the policy of choosing the language of our treaties. In that year, the overwhelming majority of our bilateral and multilateral treaties had French and English as their equally authentic versions. Moreover, External Affairs informs us that since the passage of the Official Languages Act, the international community has been informed that Canada speaks in two official languages at home and abroad and will expect any treaty entered into by her to have English and French as equally authentic versions.) Apparently, the international community, including anglophone friends such as the U.K. and the U.S.A., have accepted this as being in line with the practice of certain other countries such as Finland and Belgium. Of course, such a practice does not rule out the possibility of a third, fourth or fifth authentic version of the treaty.) See Part II for the more recent case of Armand Mekies v. A.-G. of Canada.

79. See Salomon, pp. 872, 874, 876.
80. Maxwell, pp. 54, 183.
81. ibid., p. 183.
82. (deleted)
83. (deleted)
84. (deleted)
85. (deleted)
86. (deleted)
87. (deleted)
88. (deleted)
89. For the common law: Maxwell, p. 116; for the civil law: Pigeon, Rédaction et Interprétation des Lois, p. 49, and Laliberté v. Larue, p. 13 (Duff, J.), and p. 18 (Rinfret, J.).
90. Of course, such a presumption does not stand in the face of clear language: Driedger, op. cit., p. 137; Maxwell, p. 122. The equal authenticity rule and formula resolve the problem of clarity in one version juxtaposed with ambiguity in the other.
91. Goodyear Tire, pp. 613-4. See also Johnson v. Laflamme, p. 505.
92. (deleted)
93. (deleted)
94. (deleted)
95. (deleted)
96. (deleted)
97. (deleted)

98. See Part III for a discussion of the Québec interpretative system.

99. See conclusions in Part IV and appendix.

According to C.-A. Sheppard (The Law of Languages in Canada, page 147, paragraph 3.43), only the Québec courts and the Supreme Court of Canada appear to consult both versions regularly, although both versions are always entitled to equal authority in all courts. A 1965 survey by questionnaire conducted by Mr. Sheppard for the Royal Commission on Bilingualism and Biculturalism revealed that "the large majority of judges in provinces other than Québec almost never examine the French version of federal statutes. The few who do are all French speaking." The present writer's impression that this is still so in 1978 was heavily reinforced in the process of the manual labour that was required to hunt down cases that expressly deal with both versions of a federal statute (see note on methodology, fn 3). One notable exception, which can hardly be counted as a new trend, occurred recently in the Ontario Court of Appeal in the case of Re Black and Decker Manuf. Co. and the Queen. Although the Supreme Court reversed the Court of Appeal's decision, it did not fault that court's attempt to reconcile the English version with a clearer French one. (The problem was simply that the court of appeal had missed a more fundamental issue in the case -- a failure to seek harmony with other provisions of the Act in question.) One would hope that the Ontario court will not be discouraged by this set-back from becoming more experienced in consulting the French version along with the English version as a general approach. (See Part II for a detailed discussion of this case.) The Federal Court, at both the trial and appeal levels, as one would expect, makes frequent use of both versions. The present writer has not failed to note in the course of his own research that a francophone judge at any level of court is more likely than an anglophone judge to expressly refer to both versions of a statute; in fact, the process

is almost mechanical, as if it were a natural step in the process of construction, even though, in the end, no particular help may be gained from the other version of the statute at hand. This fairly automatic process in the case of francophone judges is almost totally absent in the case of anglophone judges. One wonders, as a result of this long-standing state of affairs, whether all litigation under federal law should not be reserved for the federal courts which, more and more (as can be observed in the cases discussed in Part II) are demonstrating unusual ability to make full use of both versions of the law before rendering judgment.

100. Sir Courtenay Ilbert, an English draftsman and former Clerk of the English House of Commons, wrote, inter alia, Legislative Methods and Forms, 1901, and The Mechanics of Law Making, 1914.

101. For example,

- 1) the presumption in favour of a reasonable "interpretation" (Food Machinery);
- 2) the presumption in favour of consistency and against repugnancy (Food Machinery);
- 3) the presumption against implied repeal, (Food Machinery).

102. The main reason for general silence outside of the federal courts on a bilingual approach must be, as elsewhere, the language barrier.

103. Boulton, p. 324.

104. For example,

- 1) the rule to resolve "disharmony" (Grey v. Pearson; Food Machinery);
- 2) the context approach (Westmount v. Montréal Light; Central Vermont Ry v. St. Johns; Re Black & Decker);
- 3) the presumption against departures from the general system of the law (Goodyear Tire v. T. Eaton Co.; Laliberté v. Larue).

105. Boulton, p. 324.

PART II

FEDERAL LAW JURISPRUDENCE SINCE SEPTEMBER 7, 1969

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A. Introduction -- Section 8 of the Official Languages Act --
Construction of Versions of Enactments

With the preceding review of the evolution of the equal authenticity rule as it applied before 1969 to the interpretation of bilingual statutes in Canada, it is important now to turn to its legislative crystallization in section 8 of the Official Languages Act and the jurisprudence that has developed around that section. Section 8 of the Official Languages Act, R.S.C. 1970, c. 0-2, at present reads as follows:

" Construction of Versions of Enactments

8. (1) In constructing 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. "

The Supreme Court of Canada has recently provided an important statement as to the effect of section 8 on the normal processes of legislative construction:

" The rule therein expressed (in s.8(2)(b)) is a guide; it is one of several aids to be used in the construction of a statute so as to arrive at the meaning which, "according to the true spirit, intent and meaning of an enactment, best ensures the attainment of its objects" (s.8(2)(d)). The rule of s.8(2)(b) should not be given such an absolute effect that it would necessarily override all other canons of construction. 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. "

B. Interpretation by Reconciliation, Restated (s. 8(2) (a) & (b))

" s. 8(2)

(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. "

1. The "Common Meaning" and the Federal Court of Appeal

In 1973, the Federal Court of Appeal in Olavarria v. Minister of Manpower and Immigration had to decide whether the duty of a special inquiry officer to inform a person in respect of whom an inquiry was being held, and who was not represented by "counsel", of his right to "retain, instruct and be represented by counsel" at the inquiry applied to a case where the person had an adviser albeit not a lawyer. Did the clause "(person who is not represented by counsel" include a person represented by a non-lawyer?

This appears to be a straight-forward case, as the ambiguity of the word "counsel" was clarified

by the more precise "avocat ou autre conseiller" in the French version of the regulation in question. However, the case is more interesting for its treatment of the effect of an important discrepancy between the wording of the regulation and the wording of the statute.

Subsection 26(2) of the Immigration Act, R.S.C. 1970, c. I-2 confers the right to "counsel" in the English or the more strict right to an "avocat" in the French. There is no mention of the phrase "ou autre conseiller", which is found only in the regulation.

The Court dealt with the problem as follows:

" If one referred only to the English version of section 3 of the *Immigration Inquiries Regulations*, one would be constrained to the view that the word "counsel" therein had the same meaning as that word has in section 26(2) of that Act and was, therefore, used in the sense of "lawyer". However, when the French version is referred to, it is found that, where the English version refers to "counsel", it unambiguously refers to both lawyer and other adviser. As the word "counsel" in the English language has a sense that is wide enough to include an adviser whether or not he is a lawyer, it must be concluded that, in section 3 of the English version of the *Immigration Inquiries Regulations*, the word has been used in this wider sense. See section 8(2) of the *Official Languages Act*.

When section 3 of the *Immigration Inquiries Regulations* is so construed, the result is that the duty to inform only arises thereunder when the person concerned is not represented by a lawyer

or other adviser and that when a duty does arise thereunder, it is a duty to inform the person concerned

- (a) of his right under section 26(2) of the *Immigration Act* to be represented by a lawyer; and
- (b) of the right to be implied, unless it is expressly or impliedly negated, to be represented by any agent of his choice whether or not he is a lawyer. ...

That conclusion as to what the Regulation was designed to accomplish seems to me to be one that is of practical effect and that flows from the words used in the Regulation.

On that view of the Regulation, there was no breach of it in this case and the section 28 application should be dismissed. "

1.1

The present writer would argue that the Federal Court of Appeal failed to come to terms with the discrepancy between the regulation and the statute. If one accepts, as the Court did, that the words "counsel" and "avocat" in the statute bear the highest common meaning of lawyer, then how could the regulation be accepted to go further? Driedger, among others, has said, and it should now be trite law, that

" It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation. "

2

Indeed, section 58 of the Immigration Act, R.S.C. 1970, c. I-2, pursuant to which the regulation in question was made, limited the power of the Minister to make regulations not inconsistent with the language of the Act:

" 58. The Minister may make regulations, not inconsistent with this Act, respecting the procedure to be followed upon examinations and inquiries under this Act and the duties and obligations of immigration officers and the methods and procedure for carrying out such duties and obligations whether in Canada or elsewhere. "

Surely, then, the solution for the Court was to find the regulation ultra vires the statute in so far as it purported in the French version to extend the meaning of "counsel" to advisers other than lawyers, or to construe the regulation with that limitation in mind.

In an application under section 28 of the Federal Court Act, the Federal Court of Appeal in The Professional Institute of the Public Service of Canada -- Aircraft Operations Group v. The Anti-Inflation Appeal Tribunal set aside the decision of the Anti-Inflation Appeal Tribunal dismissing an appeal by the applicant from an order of the Administrator under the Anti-Inflation

Act ruling that the maximum permissible rate of salary increase for the applicant was \$2400 per year by virtue of section 43(1)(b) of the "Guidelines" established under that Act.

The Court based its decision on a simple, straightforward reading of the French version of subsection 44(1) of the Guidelines. That subsection exempted employees from the strict application of the Guidelines where "a new compensation plan was not entered into or established prior to October 14, 1975 ...".⁴ In fact, the Treasury Board in this case had, before October 14, 1975, unilaterally granted a \$500 increase in pay ranges, quite outside of any process of collective bargaining, "in order to ensure that the pay levels of public servants will maintain their relative positions with those of persons performing similar work outside the Public Service."⁵

The question, then, was whether the unilateral action of the Treasury Board resulted in a "new compensation plan" having been entered into or established within the meaning of subsection 44(1). The Guidelines defined "compensation plan" and its French equivalent "régime de rémunération"

to mean:

" an arrangement for the determination and administration of the compensation of employees.

une entente visant la détermination et l'administration de la rémunération d'employés".

6

The Court came quite easily to the conclusion, based on the French "entente", that there had not been a new compensation plan entered into or established:

" In my view, reading the definition of the French expression with the definition of the English expression, the word "arrangement" must be given the sense of an agreement duly arrived at between agreeing parties and does not include a unilateral agreement made by one party even though such arrangement benefits the other party. On that view, the unilateral action by Treasury Board did not, in itself, constitute a "new compensation plan" ... "

7

Thus, in an application of the formula $A_e + B_e + A_f \rightarrow A$ deduced much earlier, we have a serious ambiguity in the English version clarified by the French version that permitted only one possible construction.

The first decision to demonstrate a conceptual approach to section 8 of the Official Languages Act came from the Federal Court of Appeal in the case

of Dep. M.N.R. (Customs and Excise) v. Film Technique Ltd. and Canadian Kodak Co. Ltd. There, the Court had to decide, for the purpose of a tariff classification, whether the meaning of the expression "timing devices" was limited to a device regulating time of exposure or whether, as was maintained by the Tariff Board, the meaning could be extended to include a colour film analyzer, which was a meaning current in the vernacular of the photographic trade.

Jackett, C.J. held for the Court that the broader construction was not open, having regard to the French version, "dispositifs réglant le temps de pose", which was limited in its meaning to a device regulating time of exposure:

" If the sole version of Item 46240-1 to be considered were the English version, I can see that the Board's conclusion may have been correct.

We are bound, however, to consider also the French version of the Tariff Board item in question, the relevant part of which reads as follows:

Accessoires pour prise de vues, savoir:
Dispositifs réglant le temps de pose " 8

Chief Justice Jackett characterizes and applies section 8 of the Official Languages Act in the following manner:

" Section 8(1) of the *Official Languages Act*, R.S. 1970, c. 0-2, requires that, in construing an enactment, both its versions in the official languages are equally authentic; and section 8(2) provides a number of rules for applying section 8(1), of which those that I find applicable here read as follows ...

(2)

(He then cites paragraphs 8(2)(a) and (b).)

(2) Paragraph (a) directs that, even though it appears that the two versions of an enactment differ in meaning "regard shall be had to both its versions" so that, leaving aside paragraph (c), which has no application here, "the like effect is given to the enactment" in all parts of Canada unless otherwise expressly or impliedly provided. Paragraph (b) provides, in part, that, where there is a reference to a "thing", the reference shall, in both versions, be construed as a reference to the "thing" to which "in its expression in both versions" the reference is apt. Here, as I see it, both versions are apt to refer to devices to regulate the time of exposure in photographic work and the French version is not apt to refer to devices for "timing" when that word is used in the jargon of the photographic trade to refer to "determining the exposure and colour balance for printing each scene of a film". ...)

Having regard to the requirements of section 8 of the *Official Languages Act*, it seems clear to me that, while it was, in my view, an acceptable conclusion on the part of the Board, in the light of the evidence, if one looked only at the English version of Item 46240-1, that the word "timing" was used in the vernacular of the photographic trade, that conclusion is not open, when one looks at both versions because the French version is so worded as to exclude any meaning other than that of a device to regulate the time of exposure, which meaning is consistent with the ordinary meaning of the words used in the English version⁽³⁾ but is not consistent with the meaning, as found by the Board, of the word "timing" as used in the vernacular of the photographic trade. Reading the two versions together, as required by section 8, I am of opinion that the words "Timing Devices", as used in Item 46240-1, do not include the Hazeltine Color Film Analyzer in question.

(3) The English version refers to "timing devices" under the heading of "Photographic equipment". It does not take too much of a stretch of the imagination to regard this as referring to what is described in French by words meaning devices for regulating the time of exposure under a heading which is presumably intended to have the same meaning as the English heading "Photographic equipment". The difficulty involved in finding a common meaning for the two versions of the *Customs Tariff* is illustrated by these two versions of the heading to Tariff Item 46240-1. In English, we have "Photographic equipment" and, according to the Shorter Oxford Dictionary "photographic" means "of, pertaining to, used in or produced by 'photography'", and "Photography" means "The process or art of producing pictures by means of the chemical action of light on a sensitive film ...". In French, the heading is "*Accessoires pour prise de vues*" and, according to Harrap's, "*prise de vues*" means "taking of photographs". However, when we look at Ouillet, we find that "*prise de vues*" means "*action de photographier*", that "*photographier*" means "*Reproduire un objet par la photographie*" and "*photographie*" means "*Art de fixer sur une surface sensible à la lumière les images produites dans une chambre noire au moyen d'une lentille convergente, puis de les reproduire, par inversion du cliché négatif primitif.*") "

In summary, Jackett, C.J. has analyzed section 8 in the following manner:

1. Subsection (1) enunciates the equal authenticity rule, already well-known.
2. Subsection (2) provides a number of rules for applying subsection (1).
3. Paragraph (2)(a) does not allow one version to be "read out": regard shall be had to both versions for the sake of uniform application of the law across the country. (In this connection, Jackett appears to see a difference between the two versions of the tariff in the sense that one version is ambiguous and the other is clear.)
4. Applying paragraph (2)(b), the clearer French version precludes one of the constructions arguable under the English version standing alone. Only one construction is said to be "apt" as a construction of both versions read together.

Thurlow, J., in agreement with the conclusions of the Chief Justice, views section 8 in a somewhat different light:

" For my part I do not think that any way can be found to resolve the question raised by

the appellant's submission by the application or attempted application of section 8(2)(a) of the *Official Languages Act* but I feel constrained by section 8(2)(b) of that Act to take the view that the reference to "devices" or "*dispositifs*" in item 46240-1 must be construed as a reference only to such devices and *dispositifs* as fall within the wording of both versions. As I read it the French language version is not apt to refer to the device here in question. Moreover as there appears to be at least some area of operation common to both versions I do not think resort can be had to section 8(2)(d). "

10

Based on Thurlow's analysis of section 8, one might draw the following conclusions on how to apply it:

1. Paragraph (2)(a) is not likely to settle a dispute over a construction based on common usage within a special trade or profession, since trade vernacular does not, as a rule, develop symmetrically in two languages.
2. Paragraph (2)(b) proves useful in solving ambiguity. Thurlow, J. is able to dismiss one construction of the English as inapt in the French. By elimination, then, he has found the highest common meaning (h.c.m.)¹¹ of the two versions.
3. Paragraph (2)(d) is ^{for Thurlow, J.} a last resort: when all else fails, and outright conflict remains, preference must be given to one version over

the other by looking to the "objects" of the enactment. A case where there is no "commonality" that the two versions can be reduced to would be rare indeed; in the end, the context would again be called on to decide.

2. Restricted versus Unrestricted Meaning:
The Scope of Words in a Dual Linguistic Context

That Thurlow, J.A. could have come to the conclusion he did in Film Technique as to the interplay of paragraphs 8(2)(b) and 8(2)(d) of the Official Languages Act underlined for the present writer the inappropriateness of the expression by subsection 8(2) of the application of the general rule of equal authenticity set out in subsection 8(1).

Clearly, the jurisprudence before 1969 establishes that versions of enactments, just like enactments themselves, cannot be severed from their overall context, but must be related back to it, including the objects of the enactment, before characterizations of inconsistency between versions have any validity. To attempt to sever the process of comparing and reconciling two versions of an enactment from the process of relating the entire enactment, in both its versions, back to its spirit, intent, meaning and object, is to misapprehend the very dynamic process of reasoning engaged in by our judiciary.

The Scope of Words in a Dual Linguistic Context

a) Pfizer Co. Ltd. v. Dep. M.N.R. (Customs & Excise)

The first case of the Supreme Court of Canada to apply section 8 of the Official Languages Act did not come until 1975 in the case of Pfizer Co. Ltd. v. Dep. M.N.R. (Customs and Excise).

Pigeon, J., speaking for the five-member Court, had to decide for the purpose of a tariff classification whether the meaning of the word "derivative" in the phrase "tetracycline and its derivatives" was limited to a substance actually derived from tetracycline, or whether, as was maintained by the Tariff Board, the meaning could be extended to include a drug of a similar group, without any derivation in fact.

Pigeon, J. found that its meaning was intended to be the primary meaning of the word "derivative", which was also its ordinary meaning. While basing his judgment on several reasons, Pigeon, J. attached especial importance to the interplay of the English and French versions of the Order in Council and to paragraph 8(2)(b) of the Official Languages Act. He agreed with Choquette, D.J., of the Federal Court of Appeal who, in a dissenting judgment,

found that "dérivé", the word used in the French version of the Order in Council, "did not appear to have any meaning other than the primary meaning of "derivative", that is, a thing obtained from another." Pigeon's application of section 8 recalls to us the formula $A^e + B^e + A^f \Rightarrow A$ that we deduced from cases decided prior to 1969.

" In my view, the meaning of the enactment under consideration could not be ascertained by the Board as it did, taking together the English and French dictionaries as if just one language was to be considered. The *Official Languages Act*, R.S.C. 1970, c. 0-2, clearly requires that each version be read in the language in which it is written. Paragraph (b) of s-s. (2) of s. 8 reads:

(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;

Applying this principle to the case at hand, it appears to me that the conclusion should be that the "concept" to be selected as being equally applicable to both versions is that of a thing actually derived from another. This is the primary meaning of the word "derivative" and it is also the meaning of the word "dérivé". "

The Scope of Words in a Dual Linguistic Context

b) Compagnie Immobilière B.C.N. Ltée v. The Queen

The recent decision of the Supreme Court of Canada in Compagnie Immobilière B.C.N. Ltée v. The Queen was a truly landmark decision involving the application of section 8 of the Official Languages Act and the relationship between the equal authenticity rule and the normal canons of construction.

In the framework of a fairly complicated case to apply the terminal loss and capital cost allowance provisions of the Income Tax Act in relation to a building that had been demolished, a question arose as to the meaning of the phrase "disposed of" when the taxpayer argued that it was entitled to a deduction in the year that its building was demolished, pursuant to Regulation 1100(2) of the Income Tax Act, R.S.C. 1952, c. 148, which read:

- " (2) Where, in a taxation year, otherwise than on death, all property of a prescribed class that had not previously been disposed of or transferred to another class has been disposed of or transferred to another class and the taxpayer has no property of that class at the end of the taxation year, the taxpayer is hereby allowed a deduction for the year equal to the amount remaining, if any, after deducting the amounts, determined under sections 1107 and 1110 in respect of the class, from the undepreciated capital cost to him of property of that class at the expiration of the taxation year. "

Jackett, C.J., of the Federal Court of Appeal, concluded on a reading of the French version with the English version of the regulation:

" Regardless of whether the expression "disposed of" would have been given some other sense if the English version were read alone, in my view, when the two versions are read together, "disposed of" must be read in the sole relevant sense that that expression has in common with the French word "aliénés". In my view, this sense would include any transfer, by way of sale, gift or otherwise, of legal title, to some other person but would not include the bringing about of the destruction or extinguishment of the property. Applying that sense of the expression "disposed of" in the application of Regulation 1100(2) to what happened in 1965 as set out above, I am of opinion that the regulation did not confer on the appellant any right to a capital cost allowance deduction for that year. "

That, however, should not have completed the process of construing the provision, as the Supreme Court of Canada well explained in reversing the Court of Appeal.

The issue was generally stated as follows:

" This appeal is concerned with the right of Respondent to deduct, in computing its income for the taxation years 1967 and 1968, certain amounts in respect of the capital cost of property previously owned by it for the purpose of gaining or producing income when such property has, in a previous year, ceased to be in a prescribed class and no other property was in such class as at the end of both taxation years in question. "

14.1

The respondent in 1964 became the successor in title of a company with respect to two distinct assets, namely

- (a) the rights of the company as lessee of a piece of land under the terms of an emphyteutic lease (the "first lease") made in 1910, and
- (b) the full ownership of a building that had been erected on the piece of land.

The Court accepted that these assets were acquired by the respondent "for the purpose of

gaining or producing income" (Income Tax Regulations 1102(1)(c)) and that the respondent was in 1964 entitled to claim capital cost allowances in respect of both assets, the building to be classified in class 3 ("property not included in any other class that is a building ...") and the lessee rights under the first lease in class 13 ("property that is a leasehold interest...")^{14.2} of the Income Tax Regulations.

In January of 1965, the respondent lessee acquired the lessor's rights under the same lease, thus becoming full owner of the piece of land previously occupied as lessee only. Thereupon, the respondent as owner conveyed the land by emphyteutic lease (the "second lease") to another company (the "Société") under which the lessee Société undertook to demolish the building and to build a new office building for the use of the respondent. In partial fulfilment of this contractual obligation, the building was demolished by the lessee Société before the end^{-14.3} of the respondent's 1965 taxation year.

Thus following these events, the respondent had no property left in classes 3 and 13 and none was acquired during the taxation years 1965 through 1968.^{14:4}

The dispute concerned the years 1967 and 1968 for which the respondent claimed depreciation in respect of the undepreciated capital cost of the two classes of assets, such claim being denied by Revenue Canada on the basis of the fact that the respondent did not have any property in these classes at the end of these two years. The Federal Court, trial division (Addy, J.) upheld Revenue Canada's assessment on the basis that property in the class under consideration must be used to produce income or be held for that purpose, which is impossible if it no longer exists.^{14.5}

The Federal Court of Appeal allowed the appeal and referred the assessments for 1967 and 1968 back to the Minister for re-assessment on the basis that

(a) Regulation 1100(2) did not confer on the taxpayer any right to a deduction for 1965; and

(b) it is not necessary for property to be in existence or used or held for income producing purposes for its capital cost to be included in the computation of capital cost allowance under Regulation 1100(1).^{14.6}

The Supreme Court of Canada restated the two main issues as being:

(1) the application of the terminal loss provision of Regulation 1100(2) of the Income Tax Regulations; and

(2) the right of the taxpayer to claim in any event a capital cost allowance (other than a terminal loss) when there is no property in the relevant class.

According to the Supreme Court, it was only a first question to decide whether the building and the taxpayer's rights under the first lease must be regarded as having been "disposed of" or "aliénés" during the taxpayer's 1965 taxation year.^{14.7}

The Federal Court of Appeal had favoured the taxpayer's restrictive construction of the provision, ^{14.8} reached on a strict application of s.8(2)(b) of the Official Languages Act. The Supreme Court took the stance that the Federal Court of Appeal misconstrued s.8(2) and that it had misapplied the rule of equal authenticity:

" I do not believe that s.8(2)(b) of the Official Languages Act is of much assistance to Respondent. The rule therein expressed is a guide; it is one of several aids to be used in the construction of a statute so as to arrive at the meaning which, 'according to the true spirit, intent and meaning of an enactment, best ensures the attainment of its objects' (s.8(2)(d)). The rule of s.8(2)(b) should not be given such an absolute effect that it would necessarily override all other canons of construction. 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. " ^{14.9} (emphasis added)

Thus the implications of the reasoning of ^{14.91} Thurlow, J.A. in Film Technique were rejected by the Supreme Court; the basic context rule of statutory construction was affirmed by the

Supreme Court as overriding even when applied to the construction of federal bilingual legislation:

" ' It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act. '

14.92

' Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter.'

14.93

Clearly, this basic rule of statutory construction is still in effect; it has not been repealed by the enactment of s.8 of the Official Languages Act. "

14.94

To apply the context rule, the Supreme Court proceeded as follows:

I Context of the Income Tax Regulations

" The expressions 'disposed of' or 'aliénés' as found in Regulation 1100(2) should therefore not be interpreted in the isolated context of the Regulation itself as if it stood alone and independently from the statute under which it was passed. Its true meaning

should rather be gathered from a consideration of all relevant statutory or regulatory provisions under which the scheme of capital cost allowances was established and regulated and of which the terminal loss provisions of Regulation 1100(2) are but a part. "

14.95

The Court then referred back to the rules respecting the operation of the capital cost allowance system in s.20 of the Act, in Regulations 1100 to 1205 and Schedules B, C, D, E and H, all passed under s.11(1)(a) and (b) of the Act.

In the interpretation clause of s.20 of the Act, the Court found that whereas most words were defined to "mean" something, the terms "disposition of property" and "proceeds of disposition" were said to "include" certain things. These latter definitions were said, therefore, not to be exhaustive, so that the two terms were to be given their normal meaning in addition to their statutory meaning. Since the expressions "disposed of" and "aliénés" used in Regulation 1100(2) are not defined by it, they must be ascribed the meaning that conforms with that of their companion expressions

"disposition of property" and "proceeds of disposition" as defined in s.20 of the Act. 14.96

II Internal Harmony between the Regulations and the Act -- Comparing the English with the French

To show how wrong the Federal Court of Appeal was to jump to the conclusion it had, based on the apparent difference between the English "disposed of" and the French "aliéné", the Supreme Court took pains to underline the internal inconsistency of the French version itself:

While the expression "disposed of" was used in 13 provisions of s.20, the French "disposé" was used in 7 of the provisions, while "aliéné" was used in 6 provisions. The same difference appeared in the use of the English "disposition"; sometimes "aliénation" appeared, other times, "disposition" in the French. Even the expression "proceeds of disposition" varied from "produit d'une disposition" to "produit d'une aliénation" in s.20 of the French.

Thus the Supreme Court was able to conclude

on a reading of one section of the Income Tax Act in both its English and French versions:

" A detailed examination of these provisions has convinced me that the expressions "disposition", "proceeds of disposition" and "disposed of" must, throughout, receive the same meaning respectively, regardless of the fact that in a limited number of cases the French text taken in isolation would convey a more restrictive meaning. Such a narrow meaning cannot however be held to control the much broader meaning of the English expressions, especially when it is apparent that such was not the intent, quite the contrary. "

14.97

III The Ratio Legis

To confirm its conclusion, the Court referred to elements of the legislative scheme, giving two examples, one of which is set out here:

Section 20(5a), dealing with the tax treatment of the proceeds of a policy of insurance payable for damage caused to property of a prescribed class, referred to such proceeds in the French version as "produit d'une aliénation", clearly an inapt expression of what are meant to be "proceeds of disposition", such proceeds being included in the definition of that term

in s.20(5)(c) and the definition of its counter-
part -- "produit d'une disposition". 14.98

IV Internal Harmony between the English & French
versions of the Act

Only after this process of reasoning,
relating the terminology of the regulation in
its French and English versions back to the Act
and to its ratio legis did the Supreme Court of
Canada conclude that the French words "produit
d'une aliénation" or "aliéné" should not be
so construed as to restrict the meaning of the
English version.

The formula thus still stands:

$$A^e_{\circ} + B^e + A^f_{\circ} = B.$$

The troublesome words in the French version
were in effect changed by the Court to "produit
d'une disposition" and "disposé", much in the way
the courts had acted in Grey v. Pearson and
Food Machinery to reconcile the words to their
context, including the purpose and scheme of the
enactment.

V Applying the Conclusion

Once the discrepancy between the two versions of the relevant section in the Act was solved, it was a small matter for the Court to apply the solution to a proper reading and application of Regulation 1100(2):

" This conclusion is also applicable to the words 'disposed of' as used in Regulation 1100(2); in the absence of some clear indication to the contrary, this expression must be given the same meaning in the Regulation as in the substantive provision of the Act which it is intended to supplement. The expression 'disposed of' in Regulation 1100(2) must be construed as if there was in the French 'disposé' as in numerous provisions of s.20 ..."

14.99

Once the bilingual construction issues were resolved, the Court proceeded to apply the regulation in light of the broadest possible dictionary and statutory meanings of the terms in question, and in light of the civil law institution of the emphyteutic lease. In the result, the judgment of the Federal Court of Appeal was set aside and that of the trial division
14.991
restored:

C. Language Versions in Conflict (s. 8(2)(d))

"s.8(2)

(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."

1. Introduction

This provision has yet to be interpreted and applied authoritatively. We express the opinion, however, that it translates generally the approach set out prior to 1969 by Thorson, P. in Food Machinery Corp. v. Registrar of Trade Marks.¹⁵

It is not clear why the Supreme Court has not ventured to take advantage of this provision expressly, for the opportunity has arisen in at least two instances, which are discussed below.

2. Language Versions in Conflict & the Rule to Avoid Repugnancy: Reconciliation by Variation (Re Black & Decker Manuf. and the Queen)

The year 1973 brought on an historic decision of the Ontario Court of Appeal -- historic in that it was the first time that this most esteemed of anglophone courts had attempted to come to grips with a federal statute by means of the same dynamic bilingual approach that the Supreme Court of Canada had established over forty years earlier.

In Re Black and Decker Manufacturing Co. Ltd. and the Queen, the Court of Appeal had to decide whether a newly amalgamated company could be prosecuted for the sins of the amalgamating companies. The relevant portions of the Canada Corporations Act, R.S. 1970, c. C-32, read as follows:

s. 137(13)

" (b) the amalgamated company possesses all the property, rights, assets, privileges and franchises; and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

art. 137(13)

b) la compagnie née de la fusion possède tous les biens, actifs, prérogatives et concessions de chacune des compagnies constituantes, et elle est assujettie à tous les contrats et engagements, et est liée par toutes les dettes et obligations, de chacune d'entre elles.

(14) All rights of creditors against the property, rights, assets, privileges and franchises of a company amalgamated under this section and all liens upon its property, rights, assets, privileges and franchises are unimpaired by the amalgamation, and all debts, contracts, liabilities and duties of the company thenceforth attach to the amalgamated company and may be enforced against it.

(14) Les droits des créanciers à l'encontre des biens, des droits, des actifs, des prérogatives et des concessions d'une compagnie née d'une fusion sous le régime du présent article et les privilèges sur les biens, les droits, les actifs, les prérogatives et les concessions ne sont nullement atteints par la fusion; les dettes, les contrats, les passifs et les fonctions de la compagnie deviennent tous, dès lors, ceux de la compagnie née de la fusion et peuvent être exécutés contre elle. "

The narrow issue was, according to Arnup, J.A. speaking for the Court of Appeal, "whether s-s. (13) (b) of s. 137, in making the new company 'subject to all the liabilities' of each of the old companies, imposes upon the new company criminal liability of one of the old companies". Without referring specifically to the Official Languages Act, Arnup, J.A. finds significance in a comparison of the French version with the English:

" The words used in para. (b) as the French equivalent of "liabilities" is "engagements", and the equivalent of "liabilities" in s-s. (14) is given in French as "passifs". My brother Jessup, whose knowledge and grasp of the French language is much greater than mine, has pointed out to me that both "engagements" and "passifs" are *commercial* synonyms for the English word "liabilities". In his view, if a connotation of *criminal* liability had been intended the French synonym would have been the word "responsabilités". "

This, along with the absence of express language imposing a penal sanction, was enough for the Court of Appeal to hold that criminal responsibility did not pass with the amalgamation.

The Supreme Court of Canada overruled the Court of Appeal on the ground that it had misapprehended the nature of an amalgamation. It did not, however, fault the Court of Appeal's attempt at cross-construction of the two language versions. It is indeed unfortunate that the Supreme Court, in its written reasons, did not direct itself to the difficulty raised in the court below with regard to the meaning of the English as opposed to the French version. The Supreme Court should at least have concluded that the Court of Appeal was right in its interpretation of section 137 as far as it went. One might well accept that section 137 was not intended to be exhaustive of the matter of amalgamation since, as the Supreme Court explained, amalgamating corporations are meant to continue and not to form a new and different entity. The issue then as posed in the court below was incorrect, since there was no question of a "new" corporation paying for the sins of the old.

Dickson, J., writing for the Supreme Court, seems to toy with the issue raised below by comparing the two language versions of another subsection while demonstrating how misleading presumptions and reverse presumptions can be, depending on how they are used:

" (iv) the French version of s. 137(1), perhaps better than the English version, serves to express what has occurred, "Deux ou plus de deux compagnies ... peuvent fusionner et continuer comme une seule et même compagnie". The effect is that of blending and continuance as one and the selfsame company;

(vi) if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code* or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary. "

17

But what of the issue raised below? Was the Court of Appeal wrong in its view of the meaning of the French version of paragraph 137(13)(b) and subsection 137(14)? Dickson, J. refused to meet the question head-on:

" It was also submitted that if the amalgamating companies continue in amalgamation, in all their plenitude, then ss. 137(13)(b) and 137(14) are mere surplusage. I would not so regard them. These sections spell out in broad language amplification of a general principle, a not

uncommon practice of legislative draftsmen. If ss. 137(13)(b) and 137(14) are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so, by what authority? Do they continue in a state of ethereal suspension? Such metaphysical abstractions are not, in my view, a necessary concomitant of the legislation. The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution. "

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Dickson's conclusion that the provisions are supportive and all-embracing only begs the question: but what of the French version which patently is NOT all-embracing in its meaning? There is surely a point where even a court cannot make a word say what it will not. What the Supreme Court should have done is to adopt the technique pioneered by Thorson, P. in Food Machinery and since codified in s. 8(2)(d). To avoid repugnancy with the concept of amalgamation, the Court should have varied the commercial terms "passifs" and "engagements" in the French version to the more all-embracing "responsabilités".

3. Resort to Legislative History: Revising the Revision

In the case of Regina v. Popovic and Askov, the Supreme Court of Canada in 1975 demonstrated another technique for uncovering the intent of Parliament in a bilingual statute whose versions differ in a material way.

Without actually citing the Official Languages Act, Pigeon, J. seems to do what section 8, paragraph (2)(d) appears to intend. In a cool step-by-step analysis, he proceeded to dismantle a century of awkward revisions, redrafting, rearrangements and retranslations, all of which were meant not to change the substance of the original provision in question but which had in fact rendered it quite unintelligible on its face.

The short question was whether a reference to "burglary" in the constructive murder section of the Criminal Code included the crime under section 306 of breaking and entering a place other than a dwelling-house. The short answer was no, but this was reached only after careful reference through the statutory evolution of the constructive murder section and its incorporation of "burglary"

back to the original Code of 1892.

Layer I: The original Code set out basically the same constructive murder provision as the present Code, but its use of the word "burglary" clearly referred to another section where the "offence called burglary" was set out and statutorily defined. The constructive murder section in the original Code did not therefore refer to common law burglary.

Layer II: In the 1906 revision, the phrase "offence called burglary" was dropped, so that there did not appear to be any statutory burglary to which the constructive murder section referred. Moreover, the French version used "effraction de nuit", meaning any break-in by night:

" Thus, if the two versions of s. 260 of the 1906 Code were now read literally, the result was a major change concerning "burglary" in both versions but in opposite directions. In the English, it would be restricted to common law burglary instead of statutory burglary as defined in the Code of 1892, in the French, it would be broadened to include any break-in by night. "

19

Pigeon, J. found that neither Parliament nor the statute revision commission intended to effect any change of substance from the initial

Code. He concluded at this stage:

" On account of the discrepancies between the two versions of the 1906 *Criminal Code*, the conclusion should be that no change of substance was intended, and there were only misguided attempts at improvements in drafting which resulted in making the *Criminal Code* seriously defective in both languages. "

20

Layer III: As for the 1927 revision, the English version ("burglary") remained unchanged while the French was changed to read simply "effraction", meaning "break-in" rather than something closer to burglary. Again, Pigeon, J. found no substantive change to be intended; "burglary" referred to in the English version of the constructive murder section was held to mean "the offence called burglary" that had been defined in the 1892 Code. This is a straight-forward application of section 8, paragraph (2)(d) of the Official Languages Act, although Pigeon, J. did not expressly refer to it.

Layer IV: To make matters even more complicated, the section that in the original Code had defined burglary and had since lost the tag of "the offence called burglary" was consolidated in 1950 with the offence of housebreaking and another unnamed offence. Pigeon, J. again found

that this alone could not widen the scope of the word "burglary" incorporated in the constructive murder section:

" In s. 260 [constructive murder] the crucial word is "burglary". For the reasons previously given, this word meant, when the 1950 amendment was made, burglary as defined in the *Code* of 1892. To alter the scope of s. 260 and to make it applicable also to what was then known as "housebreaking" plus another unnamed offence, there would have to be some indication of Parliament's intention to effect such a change. Constructive murder is a most serious offence at that time carrying the death penalty, now mandatory life imprisonment. I can find no indication of such intention. "

21

Layer V: With the revision in 1953-54, the constructive murder section was only rearranged and restructured. The English version was substantively unchanged whereas the French version became "un vol avec effraction". The all too wide "effraction" had now been inappropriately narrowed. The conflict was again solved by relating the tag "burglary" in the English version back to its definition in the original Code.

" In s. 228 of the *Criminal Code*, 1892, the expression "effraction nocturne" was unequivocal only because, in s. 410 defining burglary, this was said to be the name of the offence. But, the expression "vol avec effraction" in the French version of s. 202 (now s. 213) of the present *Criminal Code* does not describe an offence known as such anywhere in our *Code*. The only possible conclusion is that this expression as used in the French version is imprecise and ambiguous. "

22

Thus Pigeon, J. was able to trace a provision whose two language versions differed in a most peculiar way. Preference was given to the English version, which provided a meaningful tag ("burglary") that could be related back to a definition in the Code of almost a century before. In this way, he was best able to ensure the attainment of the objects of the enactment according to its "true spirit, intent and meaning" (paragraph 8(2)(d)).²³

And so, it may fairly be concluded that paragraph 8(2)(d) of the Official Languages Act by no means diminishes traditional techniques of cutting through ambiguity to get at legislative intent. Retracing the statutory evolution of a provision can indeed help to identify which version is to be given preference over the other, where this is necessary.

4. Anomalies Between Versions: Identifying and Correcting Mistakes of Parliament and Statute Revision Commissions

24

In Re Price the courts once again proved the usefulness of a second version of the law where it appears that a provision is defective on its face. ²⁵ The provision in question was s. 3(2) of the Narcotic Control Act, R.S.C. 1970, c. N-1, which read:

" Every person who violates subsection (1) is guilty of an indictable offence and is liable
(a) upon summary conviction for a first offence ... and for a subsequent offence to a (fine or imprisonment or both); or
(b) upon conviction on indictment to imprisonment for seven years. "

Clearly, the inclusion of the word "indictable" in the umbrella clause was a mistake, for it rendered the rest of the provision meaningless. The availability of a second version, however, provided an immediate and useful check for the reader, since the French version left out the equivalent of "indictable". As if this were not enough, the Court was able to point to the original Act as passed, prior to the 1970 revision, where the English agreed with the French of the R.S.C. version. Thus preference given to one language over the other could be justified under s. 8(2)(d) of the Official Languages Act. ²⁶

D. Special Cases

1. Treaties as part of Canadian law

Since 1969, an exceptional decision rendered by the Québec courts illustrates the difference in the result that may be obtained through bilingual construction as opposed to unilingual construction of a treaty forming part of Canadian law.

Armand Mekies v. Directeur du Centre de Détention Parthenais et al. (also *sub nom.* A.-G. of Canada v. Armand Mekies) was a case involving an application for the issue of a writ of *habeas corpus*. The applicant, a Canadian citizen, was being detained for eventual extradition to France under warrants issued pursuant to Canada's Extradition Act, and sought his release on the basis of an extradition treaty entered into by Great Britain and France in 1878.

An interpretative problem at the heart of the case was caused by a difference between the two language versions of article X of the Extradition Treaty in which it had been drafted.

The two versions read as follows:

" If the fugitive criminal who has been *committed to prison*, be not surrendered and conveyed away within two months after such *committal*, or within two months after the decision of the Court upon the return to a writ of *habeas corpus* in the United Kingdom, he shall be discharged from custody, unless sufficient cause be shown to the contrary.

Si le fugitif qui a été *arrêté* n'a pas été livré et emmené dans les deux mois après son *arrestation*, ou dans les deux mois après la décision de la Cour sur le renvoi d'une ordonnance d'*habeas corpus* dans le Royaume-Uni, il sera mis en liberté, à moins qu'il n'y ait d'autre motif de le retenir en prison. "

(italics added)

The English version was said to be ambiguous in that it would have the period of detention computed from the day the fugitive is "committed to prison". This could mean either the arrest and incarceration of the fugitive by virtue of the warrant issued in Canada upon the request of France, or it could refer to the committal of the fugitive after the court decides that the evidence produced justifies the extradition.

The French version, on the other hand, was much clearer. It speaks of "l'arrestation", the arrest of the fugitive, and not of his committal

to prison. That can only relate to the first hypothesis suggested in the English version, and excludes the suggestion that the two months is to be computed after a court's eventual decision on the sufficiency of evidence to extradite. 26.02

Of course, the applicant alleged that his detention, computed from the day of arrest, exceeded the two months allowed. France had not at that time pursued the extradition proceedings any further.

Ironically, the lawyer for France argued that the clearer French version should be ignored since only the English version of the treaty could be considered authentic in Canada. This argument was founded on a decision of the British High Court in R. v. Governor of Brixton Prison, ex parte Mehamed Ben Rumdan, (1912) 3 K.B. 190, where an identical question arose in the interpretation of the same article of the Treaty. The British court concluded that in England, only the English version of the Treaty is authentic, and that the court had no duty to attempt to bring the English version into harmony with the clearer French. 26.03

26.04
Thus, while there was some indication that the British court would have decided differently had they applied the French version alone, they came to the conclusion on the basis of the English version alone that the two months must be computed from the committal by the magistrate to await extradition, and not from the initial arrest under the warrant.

The Québec Superior Court held that the British reasoning does not apply in Canada, where the courts have not only the right but also the duty to look at both official texts and to interpret them in the light of one another. 26.05 The Extradition Treaty between France and Great Britain had been promulgated and published in Canada, in both languages, in the Canada Gazette, 1878, vol. 11, p. 1379 (English) and 1397 (French). It was also published in both languages in the annual statutes of Canada 1879, page ix. Moreover, as the Superior Court pointed out, section 3 of Canada's Extradition Act recognizes the paramount force of extradition treaties existing at the time of the coming into force of the Act. 26.06

26.07

The Superior Court then cited Marcotte
v. Dep. A.G. of Canada, (1976) 1 R.C.S. 108, 115,
for the fundamental principle that, in a matter
of conflict, real ambiguity or serious doubt in
a law relating to the liberty of the individual,
the court has the solemn duty to give preference
to the interpretation that favours the liberty
of the subject.

Convinced that the English was ambiguous
and the French absolutely precise, the latter
clearly favouring the liberty of the subject
while the former tended to lead to indefinite
incarceration, the Superior Court concluded
that the two months should be counted from the
arrest of the fugitive and that Mekies should
therefore be released, the period having long
since expired.

26.08

The Québec Court of Appeal was unanimously
of a similar mind in Mekies. It was also seized,
however, with the argument that the principle
invoked in the court below could not be used to
frustrate another principle, namely, that the
courts must assure the execution of international
obligations contracted in treaties. As a policy

26.09

26.10

of the law, it was argued to be of greater importance than the policy protecting the rights of individuals from intrusions by the state on their liberty.

That argument was soundly rejected by the Court of Appeal. While the Court recognized that treaties must be interpreted liberally so as to allow the signatories to fulfil their reciprocal obligations, it insisted that such obligations in the matter of extradition are subject to substantive and procedural conditions that are essential if a citizen's liberty is not to be imperilled:

" L'on ne peut s'autoriser d'une loi ou d'un traité dont les termes prêtent à équivoque pour priver une personne de sa liberté. "

26.11

The Court of Appeal decided that the interpretation applied by the Superior Court was the only one in harmony with the French version. The British judges in Brixton Prison were said to have recognized this fact, that their interpretation of the English version ran counter to the clear meaning of the French. On the other hand, the construction placed on the provision by Hugessen, J.

26.12

26.13
was not incompatible with the English version.

The Court of Appeal then approved the following principle enunciated by an early American author:
26.14

" Where a treaty is executed in two or more languages, those of the respective contracting parties, each text is regarded as an original, and as intended to convey the same meaning as the other. "

26.15

Thus despite the absence of a specific clause in the treaty designating its official version(s), that can be inferred from the language(s) in which the treaty is executed. As a result, it would seem to be no impediment for bilingual construction that such a clause is absent or even that there is no statute implementing the treaty, once the applicability of the treaty is recognized (publication in the Official Gazette and as an appendix to the annual statutes, as well as indirect reference in s.3, Extradition Act.)

The Brixton Prison case was therefore considered to be wrong by the Québec courts, the implication being that it was wrong even in the context of British law. The present writer would

support that view, and suggest that the U.K. Court of Appeal decision in Corocraft sets out the better rule; the reasoning ^{therein} was not strictly dependent on the presence of a clause designating the language of the treaty. Knowledge of the language(s) in which the treaty is executed should suffice, and the ability for the courts to resort to the authentic version(s) of a treaty should not depend upon whether the domestic language(s) of legislation coincide(s) with the authentic version(s).

The Québec Court of Appeal expressed its own perspective to have been facilitated, of course, by Canadian legal tradition (itself ^{26.16} reinforced by the Official Languages Act): it has been a routine matter, at least for the Québec courts, to attempt to reconcile French and English in the statute books on the basis of dual authenticity. The same principle is applied to the interpretation of a treaty executed bilingually, on the basis of a presumption that the contracting parties agreed to equivalent things in their respective versions and that they would ^{26.17} not have agreed to contradictory texts.

D. Special Cases

2. Where the Common Law & Civil Law Meet (s.8(2)(c))

" s. 8(2)(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. "

So long as federal legislation is drafted in English by common law lawyers and translated into French, the problem that paragraph 8(2)(c) attempts to deal with will be relevant essentially to Québec only. See Part III for a discussion of this provision.

(The next page is #98.)

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E. Summary of Parts I & II

In Part II we have reviewed the fairly limited amount of jurisprudence that has been built around section 8 of the Official Languages Act. In the process of reviewing cases determined before and after 1969, the writer has pointed out certain shortcomings and vaguenesses surrounding the general rule to interpret bilingual legislation that may require the attention of Parliament.

1. International Obligations

Of some concern in Part I was the problem of bilingual statutes purporting to implement unilingual treaties. Nothing has happened jurisprudentially or legislatively since 1969 to clarify that specific problem. Indeed, if section 8 of the Official Languages Act is to be taken as a peremptory code of the relationship between and respective importance of the English and French versions of federal law, section 8 may well have superseded the approach fostered by the Supreme Court of Canada in Furness, Withy & Co. v. M.N.R. and may consequently pose a serious potential impediment to Canada's ability to respect international obligations. There would appear, then,

to be room for legislative reform to take into account international linguistic realities prior to 1969 so that our international agreements may be respected in full and to the letter of the authentic version of those agreements.

The Mekies decision of 1977 does not clarify this particular point, since the ~~treaty~~ treaty there was executed in two languages which, happily, coincided with Canada's two official languages. It is an interesting addition, however, for its enunciation of a clear principle regarding the implications of the language(s) of execution of a treaty on its proper construction, and for its illustration of how classic presumptions (to safeguard individual rights) may dovetail usefully with the process of bilingual cross-construction.

2. Equal authenticity -- the legislative expression of the rule

There is strong evidence, on a comparison of the reasoning of the Ontario Court of Appeal in Black & Decker and the Federal Court of Appeal in Film Technique and B.C.N. with the reasoning of the Supreme Court of Canada in B.C.N., that section 8 of the Official Languages Act leaves much to be desired as a legislative expression of the rule of equal authenticity.

While subsection 8(1) states the general rule as precisely as one would desire it, subsection 8(2) in its apparent attempt to compartmentalize, especially as between paragraphs 8(2)(b) and 8(2)(d), the processes of judicial reasoning, plays havoc with normal logic and the accepted canons of construction, to the point where the Supreme Court of Canada in B.C.N. was forced to regard subsection 8(2) as merely a "guide", reserving to itself the ultimate say on how the courts should construe bilingual legislation. (See conclusions, Part IV.)

(The next page is #105.)

OMITTED LEAVES 100, 101, 102, 103, 104, IN PAGE NUMBERING

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F. NOTES TO PART II

F. NOTES TO PART II

(Citations are shortened for the sake of convenience. See Table of Cases and Bibliography for complete legal citation. "T" references are cross-references to other pages of the present thesis.)

1. Pratte, J. for the Supreme Court of Canada in Cie Imm. B.C.N. Ltée v. The Queen, pp. 6-7.
- 1.1 Olavarria v. Min. of Man. & Imm., pp. 1037-8.
- 1.2 See note 11, this Part.
2. Driedger, The Construction of Statutes, p. 199.
3. It is interesting to note that Bill C-24, the Immigration Act, 1976, S.C. 1976-77, c. 52, cures this problem by making it quite clear in section 30 (the equivalent of section 26 of the former Act) that the right extends to a "barrister or solicitor or other counsel". The regulation in question would thus be consistent with this new wording.
4. The Professional Institute of the Public Service of Canada -- Aircraft Operations Group v. The Anti-Inflation Appeal Tribunal, p. 2.
5. ibid., p. 3.
6. ibid.
7. ibid., pp. 3-4.
8. Dep. M.N.R. (Customs & Excise) v. Film Technique Ltd. et al., p. 79.
9. ibid., pp. 79-80 (text); p. 90 (end-note).
10. ibid., p. 89.

11. The "highest common meaning" is a phrase that the present writer would use to describe the goal of the whole process of cross-construction of the two versions of a federal enactment. It is reminiscent of mathematical terms such as "lowest common denominator" and "highest common multiple". "Common meaning" is a term used by Jackett, C.J. in Dep. M.N.R. v. Film Technique Ltd., and "highest common meaning" was chosen here to reflect more accurately the intent of section 11 of the Interpretation Act, R.S. 1970, c. I-23, whereby we are obliged to give every enactment "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Such a process of searching for the "highest common meaning" of the two versions of federal legislation amounts to nothing more than the contextual approach (upon which Driedger has written the definitive work) applied to the bilingual universe.
12. Pfizer Co. Ltd. v. Dep. M.N.R. (Customs and Excise), p. 12.
13. ibid., p. 16.
14. Cie Imm. B.C.N. Ltée v. The Queen, pp. 436-7.
- 14.1 ibid., S.C.C., p. 1.
- 14.2 ibid.
- 14.3 ibid., pp. 2-3.
- 14.4 ibid., p. 3.
- 14.5 ibid., pp. 3-4.
- 14.6 ibid., p. 4.
- 14.7 ibid., p. 5.
- 14.8 See above, T-80.2.
- 14.9 B.C.N. v. The Queen, S.C.C., pp. 6-7, Pratte, J. for unanimous bench of 5 judges.

- 14.91 See above, T-76-78.
- 14.92 Lord Herschell in Colquhoun v. Brooks, (1889)14 A.C. 493 at p. 506.
- 14.93 Lord Davey in Canada Sugar Refining Co. Ltd. v. The Queen, (1898) A.C. 735, at 741.
- 14.94 Pratte, J. for S.C.C. in B.C.N., p. 7.
- 14.95 ibid., p. 8.
- 14.96 ibid., p. 8-9.
- 14.97 ibid., pp. 9-10.
- 14.98 ibid., pp. 10-11.
- 14.99 ibid., p. 12.
- 14.991 See pp. 12-19 of case for additional reasons not relevant to this thesis.
- 15. See Part I, T-9.
- 16. Re Black & Decker, (C.A.) p. 314.
- 17. ibid., (S.C.C.) pp. 417-8.

18. ibid., pp. 421-2.
19. R. v. Popovic & Askov, p. 60.

20. ibid., p. 61.
21. ibid., p. 63.
22. ibid., pp. 64-65.

23. It should be noted that Parliament, in its Criminal Law Amendment Act, 1975, reacted to the criticism of the Supreme Court by redrafting the constructive murder section in a very precise fashion indeed -- by making specific reference to offences incorporated by their section number. Section 213 dropped all reference to burglary, replacing it with "section 306 (breaking and entering)". At the same time, so that courts would not limit the effect of these cross-references to other sections by giving undue weight to the words in parentheses, Parliament introduced, by section 2.1 of the Code, the concept of "descriptive cross references" that would have the same status as a marginal note: they are supportive of section number cross references, but are deemed to have been inserted for convenience of reference only.

24. Re Price (1973) 8 N.B.R. (2d) 620 (Q.B.)

25. Cf Part I, T-25..

26. While the Court came to the only conclusion possible, it had unusual difficulty deciding whether to invoke paragraph (c) or (d) of s. 8(2) in support. By taking an "either, or" approach to these provisions, the Court was finally not very convincing in its methodology. We think, with respect, that the Court misapprehends the purpose of paragraph (c) which is meant to transform terms used in one version that are normally incompatible with one or the other Canadian legal system into recognizable and compatible concepts. (See the Mart Steel case.) There is no such question here, as the English version is meaningless in an absolute sense, not being salvageable by any reference to the civil law or the common law system.

- 26.01 A.-G. of Canada v. Mekies, Qué. C.A., p. 363.
- 26.02 ibid., Qué. S.C., pp. 92-3.
- 26.03 R. v. Governor of Brixton Prison, pp. 195-7.
- 26.04 ibid., pp. 195 & 197.
- 26.05 Hugessen, A.C.J. in Mekies, Qué. S.C., p. 93
- 26.06 ibid.
- 26.07 ibid., p. 94; approved by C.A., p. 365.
- 26.08 ibid., Qué. S.C., p. 94.
- 26.09 Mayrand, J.A. for C.A. bench of three judges.
- 26.10 ibid., C.A., p. 363.
- 26.11 ibid., p. 365.
- 26.12 ibid., p. 363.
- 26.13 ibid., p. 364.
- 26.14 J.B. Moore, A treatise on extradition and interstate rendition, Boston (1891) Boston Book Co., vol. 1 no. 88, p. 100.
- 26.15 Mekies, C.A., p. 364.
- 26.16 ibid.
- 26.17 ibid.

27. See T-32. While Canada now treats internationally in both official languages, so that any difficulty between the two versions of a post-1969 treaty incorporated into federal Canadian domestic law will quite rightly be solved by the now well-oiled technique of bilingual cross-construction, the majority of treaties entered into prior to 1969 have only English as their authentic version and should, therefore, from an international law point of view, not be assimilated to the same technique, as the Supreme Court recognized in a decision rendered prior to the adoption of the Official Languages Act. (See Furness, Withy & Co. Ltd. v. M.N.R.)

PART III

THE QUEBEC JURISPRUDENCE

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THE QUEBEC JURISPRUDENCE¹

Introduction

While the jurisprudence relating to the bilingual approach in the interpretation of federal laws is largely confined to the Federal Court and Supreme Court of Canada, quite the opposite is the case so far as the Québec jurisprudence is concerned. There are literally countless decisions in Québec at the trial level. Indeed, it might be described as a matter of second nature for a Québec court to refer to both versions of an enactment before coming to a decision on its interpretation.

A. Interpretation by Reconciliation (Our Québec Roots)

1. The Principle: C.P.R. v. Robinson

As we stated shortly after the introduction to Part I, the idea in Dubois that one version of a provision must be read in the light of the other version and be reconciled with it wherever possible¹ appears to have originated in the Québec jurisprudence, expounded and developed by the Supreme Court of Canada. In C.P.R. v. Robinson,^{1.1} Taschereau, J., speaking for the majority, affirmed and justified the clear principle that has been with us ever since:

" ... [T]he code itself gives an unmistakable clue to the interpretation of the words as used in this article. When the English version says "bodily injuries," there is no room left for controversy. I take it that whether the article was first written in French or in English is immaterial, if there is no absolute contradiction between the two versions. In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law. It was submitted to the legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is. Here, the words bodily injuries leave no room for doubt and we must conclude that *injures corporelles* mean bodily injuries, and that bodily injuries mean *injures corporelles*. In fact that is what the two versions of the code, read together or by the light of one another, say in express terms. "

2. Robinson Applied

a) General

There are virtually countless examples of this reasoning in the jurisprudence since Robinson.³ A more modern example can be found in the Québec Court of Appeal case of Blouin v. Dumoulin, which revolved around section 53 of the provincial Motor Vehicles Act. Section 53 raises a presumption of fault "whenever loss or damage is sustained by any person by reason of a motor vehicle ..." or "quand un véhicule automobile cause une perte ou un dommage ...". The defendant claimed that the accident was caused by the victim herself, and not by the motor vehicle, so that the presumption should not arise. The Court of Appeal dismissed this contention by reference to the English version:

" The two versions of the Act must be read together. It can scarcely be said that the damage was not sustained by reason of the motor vehicle, and I am of the opinion that the word cause in the French version must be interpreted in the light of the English version. "

b) Clarifying Grammatical Ambiguity

As so often occurs with adjectives preceding more than one noun in the English language, an ambiguity was perceived in the case of Hayden Sales v. Lévesque where an issue arose as to whether a product made of fish oils was a "substitute" for a dairy product that was defined as a food product " ... in the manufacture of which vegetable oils or fats are employed ...". The French version "dans la fabrication duquel entrent des huiles ou matières grasses végétales" was held to be conclusive of the matter, for the apparent reason that the article "des" was not repeated before "matières grasses", so that "huiles" was not grammatically severed from "végétales":

" In the light of the French version of the definition of "substitute" there is, in the opinion of the Court, no doubt that in the English version the word "vegetable" qualifies both of the words "oils" and "fats". Therefore the proof being that the product contains no vegetable oils or fats, it is not a substitute as defined in the Act and consequently the sale or offering for sale thereof is not prohibited. "

3. Mistakes: Drafting and Printing Errors

In the same way that courts will "correct" misprints or draftsmen's errors in unilingual statutes where the context requires it, they will also use each language version as a check against the other in the event of divergence between them. In one case of disharmony between the two versions of a Québec statute, the Supreme Court of Canada attributed the problem to a printing error, based on the context, which clearly preferred one version over the other. Interestingly enough, this recognized approach was applied to a taxing statute:

" By a misprint in the French version of the act the word immoveables has been left out, but the context of that version itself shows that immoveables are taxable, and the English version contains the word "immoveables". "

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4: Provisions Purporting to Affect Rights

In Méthot v. Commission de Transport de Montréal, a case to decide, inter alia, whether a cause of action ^{for damages} under the Charter of the City of Montréal was prescribed, Fauteux, C.J. made a terse and unexplained statement which, although not forming part of the ratio, is interesting for its extension of the normal principles of construction to the bilingual universe:

" The conclusion I have formed is not altered by the fact of the conflict existing between the English and French versions of s. 537, and the conflict in the English versions of ss. 537 and 536a. Such conflicts in provisions exorbitant of the general law cannot justify loss of a right existing under that law. "

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The least we can say here is that it pays to read both versions when construing a provision that purports to affect rights. It may well turn out that the provision in effect is a nullity, the rights remaining intact because of a conflict or ambiguity between the two language versions.

There are at least a few earlier cases emanating from lower courts that touch on the matter of statutes affecting rights.

Thiverge v. Cinqmars was a Superior Court decision in a case where a difference was seen between the English and French versions of a taxing statute. In an obiter comment, Sir L.N. Casault, C.J. stated that a law creating a burden should be interpreted restrictively, and that if the two versions are contradictory, the version that is the less onerous should prevail.^{5.5}

In Bernier v. The Québec & Lévis Ferry Co. Ltd. et. al., one of the defendants was convicted for contempt for disobeying an injunction and was sentenced to a fine of \$100 and imprisonment for two days. The Code of Civil Procedure, in article 971, enacted that anyone refusing to obey an injunction was, according to the English version, "subject to a fine not exceeding two thousand dollars ... with or without imprisonment for a period not exceeding sixty days" while, according to the French version, was "passible d'une amende ... n'excédant pas deux mille piastres, avec, ou sans, un emprisonnement de soixante jours".^{5.6} The defendant-appellant took the bizarre stance that his sentence for two days imprisonment was illegal since, according to the French version, the court

had no discretion but to impose the full sixty days. The court dismissed this contention, after making the expected rebuke, by referring to the English version. While admitting that the argument might be plausible under the French version, the court pointed out that the English clearly set only a maximum sentence, leaving the exact period of time to the judge's discretion. As a final thought, the court declared:

" D'ailleurs, il est en principe admis qu'en matière pénale et affectant la liberté du sujet, si les textes sont différents, la version la plus favorable à l'accusé ou au délinquant, devra être appliquée. "

Maxwellian doctrine teaches that certain principles or presumptions may be resorted to as aids to construing legislative intent.^{5.8}

Driedger would qualify this by saying that such aids may be invoked only in the last resort, when the context and plain meaning of the words do not resolve the difficulty.^{5.9} There are some matters that, according to Maxwellian canons, require a more restrictive construction in cases of doubt. The judiciary have extrapolated these to the bilingual universe where, by the way, the rule in question may seem more convincing as a choice between versions of enactments and not merely between a restrictive or liberal construction of words. So it is said, in matters of taxation and penal statutes generally, where a doubt lingers after all else has been resorted to, that doubt must be resolved in favour of the taxpayer, the accused or the inmate.^{5.91}

Under the Canadian bilingual regime, where some clear support for the position of the taxpayer, accused or inmate exists in the one or the other version, that construction should prevail, irrespective of ambiguity or even conflict in the other

version, so long as it does not offend unduly the overall ratio legis, where it is apparent from a reading of the enactment as a whole.

Two Justices of the Supreme Court of Canada, agreeing with the unanimous decision of the five-member Court, put it this way, after relating an impugned by-law back to the empowering Act:

" Les deux versions du statut n'étant pas d'accord, je crois que dans ce cas on devrait prendre la version anglaise, sur le principe qu'elle est plus claire et impose une taxe moins rigoureuse et moins étendue que celle de la version française... .

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The French version of the statute would rather support the by-law, but as the English version is clearly against it, we must on general principles, determine adversely to the tax. "

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Presumably, there was nothing more in the Act to tilt the balance so as to discredit the English version and weigh against favouring the taxpayer in that case.

Of course, the principle invoked does not make an exception to the formula to resolve the problem of an ambiguous version juxtaposed with a clear one. The formula remains

$$A^e + B^e + A^f \Rightarrow A \quad \text{or} \quad A^e + A^f + B^f \Rightarrow A.$$

The above decision specifically held one of its reasons to be the clarity of the one version over the other. In the case of unresolvable conflict between versions, the one supporting a liberal construction, the other a restrictive one, there may be a very convincing argument, on general principles, including the principle of equal authenticity, for deciding in favour of the subject.

Similarly, such a rule of reason could be applied to the construction of any statute whose language raises a doubt as to its effect on the rights of the subject. In a bilingual system, where versions of the law rather than mere constructions of it are under analysis in the first instance, such a rule is naturally more compelling;

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the residual presumption against interference with vested rights is all the more certain in its application when based on a version of a statute, as opposed to a construction of it conjured up by the reader. Such a presumption, however, does not have an independent existence, but is clearly shown, as most other rules of construction, to be subsumed into or qualified by the basic peremptory formula deriving from "equal authenticity": $A^e + A^f + B^f \Rightarrow A$, itself subject to be tempered by the overall context or ratio legis.

B. Language Versions in Conflict

1. The Problem of Characterization:
Clarity and Ambiguity, Conflict and Absurdity

a) La ville de Montréal v. Ilgwu Center Inc.

The case of La Ville de Montréal v. Ilgwu Center Inc. makes an interesting study from any standpoint of statutory interpretation, but its importance is perhaps best described as one of those rare examples (after Food Machinery Corp. v. Registrar of Trade Marks) of verbal conflict between language versions of a statute. Remarks by members of the Supreme Court are again apparently obiter, but interesting enough for the approach that develops out of them. The short issue, in the interpretation of a Québec taxing statute, was whether the phrase "the actual and future lands and buildings ... on Plateau Street", the object of a tax exemption, and its French version "les terrains et les bâtiments actuels et futurs ... sur la rue Plateau" referred to present and future lands as well as present and future buildings, or just to present lands

and present and future buildings. On a purely verbal level, there is some discrepancy between the French and English versions, the French version being grammatically capable of both constructions, while the English is capable of only one, albeit absurd, construction.

Fauteux, C.J., agreeing with the majority to reject the respondent's primary conclusion, considered the construction terreins actuels et futurs as inherently

absurd and rejected it:

" The legislator is presumed to mean what he says; and there is no need to resort to interpretation when the wording is clear, as it is in this case. Indeed, while one can conceive of actual and future "buildings" of which the site is specified, as in s. 20, one can hardly conceive of actual and future "lands" on lands already so identified."

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While he found the wording "clear", such an evaluation came without express reference to the English version, which was clear and in conflict, and only after a process of elimination and some hesitancy. Even at that, he concludes:

" I might add, finally, that if, contrary to the views just expressed, we were to conclude that the provision of s. 20 of the 1954 Act was not clear, but open to

ambiguity, we would also have to conclude that respondent has not shown, as it had the burden of doing, that by clear and unequivocal words, the Legislature, in the 1954 Act, unquestionably empowered the City to grant it the exemption claimed as regards the Concord Street site."

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Thus Fauteux resorted to a Maxwellian rule that he had invoked at the outset and that seems to have clouded the issue somewhat for him:

" It is a rule that the burden of taxation must be borne equally by all, and that it is the responsibility of anyone claiming the exceptional benefit of an exemption to establish that the competent legislative authority, in clear and unequivocal language, has unquestionably granted him the exemption claimed."

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The approach of Pigeon, J., speaking for the majority, was somewhat similar. He began by stating the rule and seeking the clear exemption:

" As a rule a municipal corporation cannot grant tax exemptions: it may only exercise its taxation power over all property subject to tax without distinction, except where a statute exceptionally permits it to act otherwise. In this case the 1954 statute authorized such action only for "the actual and future lands and buildings of the ILGWU Center Inc., on Plateau Street, northwest corner of Jeanne-Mance"."

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Pigeon, J. however, sees the ambiguity that Fauteux, C.J. would not admit:

" It is true that this description involves some uncertainty on account of the words "actual and future" ..."

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This uncertainty is removed by reference to a rule of French grammar:

" It must further be noted that the repetition of the article "les" before "bâtimens" (buildings) makes the adjectives "actuels et futurs" (actual and future) referable to this word only, not to the word "terrains" (lands)."

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If he can now conclude that the French is clear, in light of normal French grammar, the English remains equally clear, but opposite:

" It is true that in the English version the words "actual and future" are placed before "lands and buildings", and so unquestionably refer to both words ... "

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The conflict, apparently otherwise unsolvable, is avoided as a final step by reference to the principle or presumption of uniform taxation and its corollary:

" ... but as this is a special act derogating from the principle of uniform taxation, I am inclined to believe that the version with the more restrictive meaning must be followed."

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Even with Pigeon's more orthodox approach to the interpretation of this bilingual statute, the case is not entirely satisfying. Fauteux and Pigeon, JJ. both invoked a tired old presumption before trying to decide what it was that the provision actually said, and in the end no system was enunciated on how to solve the obviously embarrassing discrepancy between the English and French versions. The difference in the characterization of the problem itself by the two Justices should be underlined here as a good example of the difficulties that sometime arise in even formulating the issue. Was there any need to "interpret"? Fauteux, C.J. thought not. Was there a problem of ambiguity in one version, or in both? Was there a conflict between the two versions? The Supreme Court was obviously divided on these crucial questions and certainly did not express them clearly to us. If this case cannot be interpreted

to stand for anything in particular, it may be fair, nevertheless, to say that it compares favorably with the approach pioneered by Thorson, P. in Food Machinery, and to represent it in the following formula as an example of the "Thorson gloss", as we referred to it, on the rule of equal authenticity:

$$A_a^e + A_a^f + B^f \rightarrow B$$

(Key: "A" and "B" are possible constructions.
"e" symbolizes the English version.
"f" symbolizes the French version.
"a" means "absurd".)

In words, the formula represents the following principle: even though the clear meaning of one language version may have its analogue in a "possible" construction of the ambiguous version, the clear meaning will not be deemed the true legislative intent where it is subject to objection on the grounds of an objective absurdity (absurdity as a result of the sense taken from the whole provision in its context).

1. The Problem of Characterization:

b) Roy v. Davidson

A more positive example of the problem of characterizing an interpretative issue is the early case (1898) of Roy v. Davidson. As one of the first to be asked to come to grips with such a problem, the Superior Court of Québec approached it in a somewhat conceptual vein.

The problem confronting the court was a distinct difference appearing in the language of the two versions of a section of the Charter of the city of Sherbrooke. The section allowed city council to impose penalties, including imprisonment, for the breach of "any by-law of the city", according to the English version. Unfortunately, the French version restricted the power to breaches of "des dits règlements", that is, "of the said by-laws", which clearly referred to by-laws passed for purposes enumerated in the preceding section of the Charter, and in which the by-law being contested was necessarily not

included, since the power to enact it had been given some time after the passage of the Charter provisions relating to penalties. This new power relating to early store closing hours was not accompanied by any power to impose penalties for breach, so that the city was forced to rely on the general provisions of its Charter, contested above.¹⁵

The reasoning of the district magistrate is quite seductive for its apparent reliance on orthodox principles:

" According to the French version this by-law, 152, must remain a dead letter as there are no means provided to enforce it; according to the English version any infraction of that or of any other by-law may be punished by fine or imprisonment.

As we have two official languages in this Province, both versions have force of law. These versions differ, but they do not conflict with nor contradict each other. They do not nullify each other. They are not incompatible; only, one version goes farther than the other; they are cumulative. I might liken them to two statutes in the same language, one of which gives greater power than the other.

I cannot hold that the power given by the English version to impose fine and imprisonment has not force of law, because the French version does not go so far.

My duty is plainly to enforce the more effective law, - I might say the only effective law.

Art. 13 of the Revised Statutes of Quebec says: - "The purport and object of every provision of any statute are deemed to be to remedy some evil or promote some good, whether the law commands or prohibits the doing of an act which it considers to be hurtful to the public good, or inflicts punishment on offenders. Such statute receives such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions according to their true intent, meaning and spirit."

There can be no doubt of the intention of the legislature. The M.C. (Municipal Code), Art. 1049, provides a general clause for the recovery of penalties imposed by municipal councils by imprisonment if necessary.

The present charter of the city of Sherbrooke is only a revision of the old charter, 47-48 Vic., which then gave the council power to enforce payment of penalties by imprisonment. ...

The difference in the two versions does not give rise to any ambiguity or to any doubt, consequently there is no question of interpretation, nor of that doubt, the benefit of which the defendant is entitled to in all matters involving imprisonment. "

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On appeal, the Superior Court was quite of an opposite mind on the matter and soundly rejected the seeds of any doctrine of cumulation between French and English versions in the case of a "difference" between them. The court asked the precise question -- what is the effect of a variance between the English and French versions of section 67 of the City Charter? -- in the knowledge that such a

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question should be decided as a more general question and by resort to general principle: what is the effect of variance between the English and French versions of statutes?¹⁸ The comments of White, J., speaking for the court, are relevant to this day, at least as a model for the interpretation of federal legislation:

" It is a very important question, and one in relation to which we have no satisfactory jurisprudence reported quite in point. The respondent's counsel says at argument, that the leading authors on interpretation of statutes are of very little assistance, as they are not writing on laws published in two official languages.

Our own province is almost singular in this respect. The authors do nothing more than give ordinary rules of interpretation when ambiguity or doubt exists in one language. ...

It is important that in a matter of this kind, we should find a positive rule for our guidance, if possible.

The learned magistrate did not consider the statute in question necessarily open to interpretation at all.

He adopted the theory that the variance between the two texts did not necessarily give rise to uncertainty.

He takes each text by itself and finds no ambiguity in it. He admits the French text is clear, and is restrictive in its terms. He finds no ambiguity in the English text as its terms are also clear when read alone.

Therefore, he argues, it is not a case for interpretation.

He likens the two versions to two statutes in one language, one giving greater power than the other.

He says, they are not incompatible, they are cumulative, and he therefore considers the correct rule to be to give effect to both, conceiving it to be possible to accomplish this by giving effect to that which is the greater, because it is thought the greater includes the less.

In carrying out this theory he gives effect to the English version, because it contains the French and he considers that he thereby gives effect to both.

The argument is ingenious and not without plausibility.

It loses sight however of the fact, that if the Legislature intended by the French version to restrict the power to certain cases only, its intention, instead of being given effect to, is defeated by the rule which vainly attempts to give effect to both versions.

Notwithstanding the very able opinion of the learned magistrate we are obliged to hold differently.

We hold that the variance between the two versions necessarily gives rise to uncertainty.

They cannot be likened to two statutes in the same language.

They compose but one statute, sanctioned at the same moment, and where there is a difference in the two texts, uncertainty as to the intention of the Legislature is unavoidably created; and instead of attempting to give effect to both, one or the other must prevail.

They are both of equal authority; but we must look to our own legislation to enable us to decide as to which of the two versions shall prevail in the event of such a variance existing.

Our legislature has laid down two safe, positive and simple rules, on this question, both in our civil code, and our law of procedure.

The rules in both cases are precisely the same; and the adoption of any other would be unsafe and unreliable.

Both of these rules hold, by implication, the doctrine that variance, of necessity, creates uncertainty.

The Civil Code says, art. 2615 (and art. 2, of the C.C.P. says precisely the same thing), "1st: - If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French texts, that version shall prevail which is the most consistent with the provisions of the existing laws on which the article is founded.

2nd: - If there be any such difference in an article changing the existing laws, that version shall prevail, which is the more consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention."

These are the rules adopted by the Legislature in all their legislation, affecting codification, consolidation, and revision.

Section 12, of cap. 5, of the 50 Vic., in regard to the Revised Statutes, is in these terms: - "If upon any point there be a difference between the English and French versions of the R.S., that version which is the most consistent with the acts consolidated in the said statutes shall prevail."

The same rule is to be found in the C.S.L.C., cap. 1, sec. 14.

In no case can we find the doctrine laid down that there shall be an attempt made to enforce both versions, but, on the contrary, the principle is clearly enunciated that one or the other must prevail.

This doctrine implies, necessarily, that in the case of difference there is uncertainty and doubt, as to the intention of the legislature.

Here we stand on solid foundation: we are not driven into the realms of fancy, or theory; but are plainly told, as a matter of common sense, that where there is a difference there must be doubt.

This of course immediately opens the door to interpretation.

The learned magistrate cited from the R.S. section 13, the general rule of interpretation of statutes, "That the statute must receive such fair, large and liberal construction as will ensure the attainment of its object, and the carrying out of its provisions."

This is the general rule of construction, it is true; but the learned magistrate himself tells us, that in interpreting penal statutes, involving imprisonment, and abridging the liberty of the subject, the interpretation must be restrictive.

The matter then being one open to interpretation, we must look to the two rules which have been provided for us by the legislature.

1st. - If the statute be one of consolidation, that version must prevail which is the more consistent with the acts consolidated.

Does this rule apply to the present case?

The statute in question, the Sherbrooke city charter, of 1892, is a consolidation of the original charter, granted in 1875, and amended in 1876, '79, '84, '85, and '89, and is founded upon them.

We have searched these several statutes in vain to find any power granted to the city council of Sherbrooke, to imprison for infractions of their by-laws generally.

In their original charter, 39 Vic. cap. 50, sec. 33, sub-sec. 13, the power to punish infractions of by-laws is given in these terms: - "13. For imposing a penalty of at least \$1, and not more than \$20, for any infraction of by-laws legally made." This is less power than section 69.

The section 67 of the new charter of 1892 conferring power to imprison, is a change in the law.

The acts consolidated did not contain the power.

The primary rule therefore given us by the legislature does not apply.

We must have recourse to the second rule.

"If there be a difference between the English and French texts in an article changing the existing law, that version shall prevail, which is the more consistent with the intention of the legislature; and the ordinary rules of legal interpretation shall apply to determine such intention."

Applying the ordinary rules of legal interpretation, to a penal statute, involving imprisonment and abridging the liberty of the subject, must necessarily force us to declare in this cause the French version must prevail. "

The city council was, therefore, found
to have exceeded its powers when it passed
the store closing by-law imposing imprisonment
as a penalty for its breach.²⁰

1. The Problem of Characterization

c) Summary: the pitfalls of characterizing out of context

The difficulty with principles or pre-
sumptions such as that invoked in Roy v. Davidson
is that lawyers and judges alike often fall
prey to their charms before exhausting the
normal approach of reconciliation dictated
by ordinary principles of language. Roy v.
Davidson is admirable for its orthodox approach.
The principle that the subject should have
the benefit of any lingering doubt as to the
intention of the legislator was invoked only
after the court had scrupulously analyzed the
provision in its entire context, which included
reference to its predecessor, various amend-
ments, and to other statutes in pari materia.
If, when all is said and done, there is a
genuine discrepancy between both versions,
and it can be characterized as such, in that
one version seems to say one thing and the
other version quite another, or if the other
simply omits to say anything, then there is
a real case for either finding the provision

a nullity in the first case, or imposing the least onerous interpretation in the second case.

Corporation of Coaticook v. The People's

Telephone Company was a case where counsel for the defendant invoked the principle in Roy v. Davidson without first making the effort to characterize the "difference" between the two versions. There is obviously a linguistic difference between the two versions of any statute. One version is likely not to be a word-for-word translation of the other if it is at all an effective expression of the genius or economy of the language of that version, and so "differences" are ²¹ inevitable, ^{even} if the draftsman has done equal justice to the English and French languages. The difference causing the interpretative problem must, therefore, be properly characterized before a meaningful conclusion can be reached on the construction of the provision.

In Corporation of Coaticook v. The People's Telephone Company, the issue, simply put, was

whether the Charter of the city permitted the passage of a by-law imposing a duty on telephone companies to paint their telephone poles, both present and future, or whether it applied only to those poles placed in the ground after the passage of the by-law. The English version of the Charter provision gave power to the city "to regulate the placing of telegraph, electric light or other like posts, to be erected, and order them to be painted". The defendant argued, of course, that "to be erected" meant poles erected in future only. Even though the French version had no words similar to these and so could be construed to apply to all poles, present and future, the defendant immediately invoked as a peremptory rule the principle in Roy v. Davidson that "applying the ordinary rules of legal interpretation to a legal statute, that version must be followed which is more favorable to the party liable to the penalty."²²

Lemieux, J. of the Circuit Court came to the conclusion that the French version,

although "considerably different"²³ from the English version, nevertheless conveyed better the true intention of the legislature. He came to this conclusion by first invoking section 13 R.S.Q., that relates to the basic presumption that an enactment is intended to be remedial and should be given "such fair, large and liberal construction as will ensure the attainment of its object ..."²⁴ He then declared the object of the provision (in appropriately Victorian terms) in relation to the facts of the case:

" If the purport and object of every provision of every statute are deemed to be to remedy some evil or promote some good, the statute in question will be defeated in the case, if the defendant was allowed to paint only the posts erected since the by-law and leave others unpainted.

The object of the law is that there should be uniformity in the color and the appearance of these ugly and embarrassing posts, that telephone companies are permitted to erect in cities.

The purport of the legislature was, to a certain extent, to cause those posts to be a less public nuisance and the embellishment of the town.

But the French version of the statute removes all doubt as to its general application to the posts erected before or after the by-law, and its reading will bring anyone to the inevitable conclusion that the law gave the plaintiff the power to order the painting of posts erected before or after the by-law. "

After quoting the French version, "déterminer la manière de placer les poteaux ... et ordonner qu'ils soient peints ...", which contained nothing equivalent to the words "to be erected", the court concluded by citing the principle²⁶ of language legislated in section 17 S.R.Q.:

" 17. The law is ever commanding; and whatever be the tense of the verb in which a provision is couched, such provision is deemed to be in force at all times and under all circumstances in which it may apply. "

The defendant was therefore held to painting all its posts. On appeal, the Court of Review upheld the decision and reasoning²⁷ of Lemieux, J.

(The next page is #137.)

OMITTED LEAVES 134, 135, 136, IN PAGE NUMBERING

2. Contradiction May Import Nullity

Research turned up three cases (Superior Court) that expressed the exact principle, among others, that where the French and English versions of a Québec statute are absolutely contradictory, the provision is a nullity. This is the equal authenticity rule taken to its absolute extreme in a case of language versions in conflict.

O'Farrell v. de Tilly and Bellingham v. Abbott were controverted elections cases heard by the Superior Court of Lower Canada. A technical objection was raised in both these cases that the court had no jurisdiction, because "the statute does not declare that the duties in question shall be performed by a 'Judge of the Superior Court' but by 'a Superior Judge'; and it is said, that under our law there is no officer known by that name."³²

While the English version did say "a Superior Judge", the French version said just as clearly "un Juge de la Cour Supérieure". The returned

Member argued that, nevertheless, "our law has not two texts and that the translation in French is not authority as law." This argument was soundly rejected:

" This point is of importance, and it is one in relation to which no doubt should be allowed to exist. I shall therefore advert briefly to the course of our legislation as regards the language of our law.

The Ordinances of the Governor and Council from 1777 to 1792 were, it is true, in the English language only; but all the statutes of the Parliament of Lower Canada, and all the Ordinances of the Special Council, were passed in the two languages. By the 41st section of the Union Act, however, all the written or printed proceedings of the Legislative Council and Legislative Assembly were required to be in the English language only; but this provision of law was repealed by the 11 & 12 Vict. cap. 56; and since that time the Provincial statutes are passed by the Assembly, and Legislative Council; and are assented to by the Representative of Her Majesty, as well in the French as the English language; and consequently the two versions must have equal force. When they exactly agree, they have the same effect as one; when they are contradictory, they destroy each other (emphasis mine); and when, as in the present case, an expression in one of the versions, causes a doubt, which is removed by the examination of the other; the latter must be regarded as explaining the former.

Guided by these views in the present case, I hold that the words "Juge de la Cour Supérieure" in the French text, remove any uncertainty that might have existed as to the meaning of the word "Superior Judge" in the English version of the statute. "

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Bellingham v. Abbott expressed somewhat the same reasoning. It is apparent that neither case involved a contradiction between versions, although

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they ventured to express a principle on such a hypothesis. The hypothesis became a reality in 1899 in the case of Lacerte v. Verrault. In that case, Routhier, J. of the Québec Superior Court was asked to interpret the property qualification of members of the city council of Lévis. That city's charter decreed that the required value of the property held must be \$1000, in the French version, and \$5000 in the English version! The court was careful to indicate that the rules set out in the Code (articles 12 and 2615) and in the Interpretation Act were of no assistance in such a case of clear contradiction. The court was, therefore, forced to search the precedents and, in doing so, came across only two -- Bellingham v. Abbott and O'Farrell v. de Tilly. It held them out as establishing the principle that the French and the English versions are equally authentic and that when they contradict one another, they mutually destroy one another. ³⁶ The court thus concluded that the practical result in the case before it was that there was no property qualification whatsoever to become a member of the Lévis city council!

Comment

The above Superior Court cases are decidedly weak for their reasoning since, on their facts, they cannot stand authoritatively for the principle they purport to lay down.

Indeed, the notion that an enactment might be void or inoperative on account of defective drafting may not be tenable, as a matter of principle. The courts have generally endeavoured to give effect to the intent of the legislator in accordance ^{with} the rule stated in article 11 of the Civil Code:

" 11. A judge cannot refuse to adjudicate under pretext of the silence, . . . obscurity or insufficiency of the law. "

A possible example is the case of Royal Bank of Canada v. Larue, where the Privy Council affirmed the judgment of the Supreme Court of Canada reversing the decisions of the Québec courts below, which had denied the application of a section of the Bankruptcy Act owing to inappropriate legal terminology. ^{36.1}

That case, however, did not involve a

matter of direct conflict between versions of an enactment, and until such a case is decided authoritatively, the whole issue of their contradiction importing nullity remains highly speculative.

C. Construing the Codes of Québec
(Equal Authenticity and the Civil Law Tradition)

When seeking to construe the Civil Code and the Code of Civil Procedure of Québec, jurists have access to a very useful tool that is not available in the case of ordinary statutes. Because the codes were preceded by extensive reports on the law as it stood in 1866 and, except where expressly indicated, were written to reflect such law, the intention behind the words is ultimately to be found in a very tangible manner -- by reference to the report of the Codifiers.

1. Johnson v. Laflamme: (the uneasy status of English in the Codes)

a) The majority decision (The context of the law)

The landmark case setting down the principles applicable to the interpretation of the Québec codes was Johnson v. Laflamme, rendered in 1916. An issue arose in that case as to the meaning of article 1550 of the Civil Code as it then read:

" 1550. Faute par le vendeur d'avoir exercé son action de réméré dans le temps prescrit,

1550. If the seller fail to bring a suit for the enforcement of his right of redemption within

l'acheteur demeure pro- the stipulated term,
priétaire irrévocable de the buyer remains
la chose vendue (C.N. 1662). absolute owner of
 the thing sold. "

Does this article require the vendor to bring an action for redemption in order to preserve certain proprietary rights? Sir Charles Fitzpatrick, C.J., writing for a majority of three justices of the Supreme Court of Canada, first noted that article 1550 "reproduces ipsissimis³⁷ verbis article 1662 of the Code Napoléon". He added that "at the time this article 1662 C.N. was incorporated in the Québec Code, to amend the then existing law, the words 'son action', i.e., 'action de réméré' had been^{construed} by the French courts and the most eminent text-writers to mean that the vendor may use the right of redemption, and do not imply that an action for redemption is necessary ...". The Chief Justice then referred to the report of the codifiers in some detail:

" In their Report to the Legislature the Codifiers of the Québec Code give in article 64 the *time* and *mode* of exercising the right of redemption according to the existing law and then say: -

L'article 64 énonce le temps et la manière d'exercer cette faculté de r  m  r   suivant la loi actuelle. Les commissaires croient que le changement fait par le Code Napol  on dans les r  gles sur ce sujet les simplifie consid  rablement et les rend plus convenables dans leur application et leur effet. *Ils ont en cons  quence adopt   quatre articles du Code qu'ils soumettent comme amendement    la loi actuelle. Ils sont marqu  s 64a, 64b, 64c, 64d. Ils limitent l'exercice du droit    dix ans et astreignent strictement les parties    leurs conventions sans permettre aux tribunaux de les   tendre, et sans exiger l'intervention d'un jugement pour d  clarer de droit   teint.*

It is impossible to more clearly express the intention to adopt the rule of the French Code with respect to the *mode and time* of exercising the right of redemption, Article 64c is now article 1550 C.C. It is of some importance to note that among the French Commentators referred to by the Codifiers are Dalloz, Vente, ch. 1, section 4; Troplong, Vente, No. 716; 5 Boileux, art. 1662; 16 Duranton, No. 401; all of whom agree in saying that it is not necessary to bring an action within the delay. The reference to Boileux is specially interesting because he discusses the very question we are now called upon to decide. Boileux says: -

*Mais au moyen de quels actes le r  m  r   doit-il avoir lieu? Une action en justice est-elle n  cessaire? Il suffit au vendeur de manifester par acte extra-judiciaire, dans le d  lai prescrit, l'intention d'user du pacte de rachat avec soumission de rembourser tout ce qui peut   tre l  galement d  . La loi voit avec faveur l'exercice du r  m  r  . Ainsi les mots: *faute d'avoir exerc   son action en r  m  r  * sont synonymes de ceux ci: *faute d'avoir us   du pacte de r  m  r  .**

With that quotation before them (*vide* Biblioth  que du Code Civil, vol. 12, page 383), the Codifiers adopt the language of the French Code. The fair inference, therefore, is that if the expression "son action" was ambiguous

when first used in the Code Napoléon, that ambiguity was removed and the term had acquired a fixed definite meaning in the French law when it was incorporated in the Quebec Code in 1866. Since the promulgation of that Code, as pointed out by the Chief Justice of the Court of Appeal, the courts of Quebec have invariably construed article 1550 in the same way as article 1662 C.N. had been and still is construed. "

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That would normally settle the question; however, the issue was complicated by the existence of a second language version of the same article 1550 C.C.:

" The real difficulty in this case as it was argued here arises out of the English translation of article 1550 C.C. I use the term English translation advisedly. It is said that the word "action" in the French text is ambiguous and that the language of the English version which removed the ambiguity should be adopted. I understand this to mean necessarily that the English version of article 1550 is not to be treated as a mistranslation, which it is, of the French text, but as an aid to interpret that text. For a correct translation of art. 1662 C.N. *vide* French Code Annotated by Blackwood Wright. *Vide* also: Civil Code of Louisiana, art. 2548.

It may be that for those who choose to consider article 1550 C.C. in the French text without reference either to the "doctrine" or "jurisprudence" which prevailed in France when that article was adopted from the Code Napoléon some ambiguity arises out of the use of the word "action," but the Codifiers had that so called ambiguity present to their minds, as appears by the quotation from Boileux, and the simple way to remove the ambiguity, if it existed, was to alter the

language of the French text and not to adopt the extraordinary method of removing the ambiguity in the French text by making the English version serve as a key to the true sense of that text. "

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And here we witness, if not the birth-
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pangs of our modern doctrine of equal authenticity -- rejected --, at least an interesting example of the conflict that arises from time to time between the doctrine of equal authenticity and the principles of construction peculiar to the Québec codes, a conflict that had been anticipated by the Civil Code itself:

" Moreover, the theory that is now suggested, while it has the charm of novelty, ignores completely the rule laid down by the Code itself in articles 2615 and 12 C.C. for the solution of the very difficulty that has arisen here. Article 2615 provides that if there be a difference between the English and the French texts that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded, and *if there be any such difference in an article changing the existing laws*, as in this case, that version shall prevail which is more consistent with the intention of the article. "

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The search for "the intention of the article", of course, brings us back full circle to the excursion of the Chief Justice into the minds of the codifiers via their reports:

" Which version is more consistent with the intention of the article if we take into consideration the language of the Codifiers who say that their intention was to adopt the article of the Code Napoléon, referring at the same time to the Commentators who interpret and fix the meaning of the language used ...? "

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Finally, the Chief Justice quoted the Privy Council in Exchange Bank v. The Queen, 11 App. Cas. 157, at 167, where their lordships said, speaking of article 1994 C.C.:

" If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. "

This doctrinal approach is typical of the technique attaching to the interpretation of the codes of Québec. It echoes the statements of authors and previous judgments that the Chief Justice had noted earlier in his reasoning:

" If the courts below had not followed the "doctrine" and "jurisprudence" to which the Codifiers refer, they would have set at defiance, in principle at least, the salutary advice given by the Privy Council to the Australian Court in *Trimble v. Hill*. See also *Casgrain v. Atlantic and North-West Railway Co.*, at

p. 300; Taschereau J. in *Canadian Pacific Railway Co. v. Robinson*, at page 316.

If the question was at large one would feel bound by the decisions in the French courts because, as Laurent says:

"Il est de principe qu'il faut interpréter le code par la tradition à laquelle il se rattache quand il la consacre."

(Laurent, vol. 2, 608). *Vide* also *Kieffer v. Le Séminaire de Québec*, at page 96. Dealing with the question at issue in that case, their Lordships say: -

The answer to this question must depend on the requirements of the French law, upon which the Quebec Code is founded.

Girouard J. citing a number of recent French authorities says in *Connolly v. Consumers Cordage Co.*, at page 310: -

I feel that I cannot disregard the opinions of those great jurists who are generally considered in Quebec as the best exponents of our Code. Nor can I ignore the numerous decisions of the Cour de Cassation and other French tribunals. "

b) Duff's dissent (equal authenticity)

The somewhat circuitous reasoning that article 2615 had led to was not lost on Duff, J. of the same Court. It will be remembered that Mr. Justice Duff was eventually to become the leading force behind the formal pronouncement of the equal authenticity rule,⁴⁵ as it applies to federal statutes. It is, therefore, more than a matter of passing interest to note here that this future Chief Justice of Canada had apparently thrashed out his philosophy of bilingualism in the law almost twenty years earlier, while interpreting the Québec Civil Code.

On the principle of equality of the English with the French version of the Civil Code, he was unrelenting. His rejection of the majority's doctrinal approach to the Code, in view of its English version, was categorical. While his reasoning reflects a classic statutory approach, it is rich for its understanding of the evolution of the Code and for its suggestion of things to come, at the federal level:

" Reading the two versions together without reference to any context, the construction and effect of them seem not to be open to controversy, although the words in the French version

d'avoir exercé son action de réméré,

are not so precise as to be altogether incapable of more than one necessarily exclusive meaning. This cannot be affirmed of the words of the English version

If the seller *fail to bring a suit for the enforcement* of his right of redemption, etc.,

words both apt and precise and their one necessary meaning being that which they convey on the first view, namely, that the taking of legal proceedings by the seller in a court of justice to vindicate his *droit de réméré* within the stipulated time is a condition of the enforcement of that right in the sense that default in doing so makes the title of the purchaser absolute. This, moreover, though not the only possible reading is the primary and natural reading of the French version; and the slight ambiguity presented by the terms of that version, being removed by the precise and apt words in which the condition is defined by the English version all possibly imputable lack of exactitude in the words - considered in themselves apart from the context and history of the article - disappears. ...

There being neither ambiguity in the article itself when read as a whole, nor qualifying context nor anything in the judicial application of the article in the Province of Quebec to create a difficulty, the court of appeal has found itself constrained to reject or disregard the English version and to give to the French version which is a literal transcription of art. 1662 C.N. the construction and effect which the last mentioned article has unanimously received in France in both *la doctrine* and *la jurisprudence*. "

Duff, J. then goes on to state two reasons compelling him to hold inadmissible the doctrinal approach of the Québec Court of Appeal. The second and most important of these is quoted here in extenso:

" It is not within the authority of the courts in construing art. 1550 to reject or disregard the English version. The Code as an authoritative exposition of the civil law of the Province of Quebec is founded upon statute. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of commissioners and directing that they should embody in the code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force giving the authorities on which their views should be based, but stating separately any proposed amendments. Then (the Commissioners having in due course framed their report and laid it before Parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the Commissioners as containing the existing law without amendments; directing the Commissioners to incorporate in this roll certain amendments specified in a schedule; and eliminating and altering the provisions of the Code only so far as should be necessary to give effect to these amendments; and providing that the Code so altered should, on proclamation by the Governor, have the force of law.

The Code thus produced must be read, of course, in view of the fact that it is what it is, namely, a statement made under legislative authority of a system of civil law, a statement speaking broadly, explicit as to specific rules but in some measure as to underlying principles taking effect by implication and influence; particular rules and principles which may no

doubt be misconceived or misapplied if considered in isolation from the general system of which they are elements. But the rule we are now called upon to put into effect, art. 1550, was one of those incorporated at the suggestion of the Commissioners as a new provision in amendment of the existing law, and as an amendment of the existing law it was explicitly adopted by the enactment of the legislature which gave it legal force; and in such cases the Code itself by art. 2615 (which is as follows): -

If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and the French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing law, that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention,

indicates the rule by which we are to be guided although art. 1550 is not one of those in which when properly construed there is any "difference between the English and the French texts". Now, following the ordinary rules of interpretation, is "the intention" to be ascertained? Primarily, of course, from the language employed interpreted by light of the requisite technical knowledge; and where - in such cases - that language construed of course in its entirety is quite without ambiguity and there is no qualifying context, there would appear to be only one course for a judicial tribunal to pursue: (*Robinson v. Canadian Pacific Railway Co.*, [1892] A.C. 481, at pages 487-8.) The "ordinary rules of interpretation" would hardly sanction the elimination of one version unequivocal in itself and harmonious with the natural reading of the other version in order to give to the article an operation resulting from a rather strained and less natural reading of the second version with which the rejected text could not by any process of interpretation be reconciled.

Two arguments have been addressed to us which deserve to be noticed. First, it is said that since the French version of art. 1550 is a literal transcription of an article of the Code Napoléon, the French version must be regarded as the original, and the English version as a translation. On the point of fact, I should say that was self-evident. But the English version no less than the French version is expressed in the language of the legislature or in language adopted by the legislature. Secondly, it is said that the Commissioners must be assumed to have known the course of the interpretation in France and that the report of the Commissioners shows their intention to adopt the law laid down in the Code Napoléon (art. 1662) as construed in France. The report of the Commissioners can be prayed in aid on the ground that it may be supposed to have been present to the mind of the legislature: *Eastman Photographic Materials Co. v. Comptroller-General of Patents* ([1898] A.C. 571, at pp. 575-6) and the Commissioners must no doubt be assumed to have been acquainted with the course of *la doctrine* and *la jurisprudence* in France. But in the last analysis we come to this: the Commissioners and the legislature, whatever presumptions are to be made with regard to other matters, must be presumed to have known the meaning of the words they used. Assuming then, that they had the general intention to adopt the law of the Code Napoléon - nevertheless the final and decisive statement of the effect of the concrete provision they did adopt, as they conceived it to be, is to be found in the unambiguous words of the English version. The French version reproduces the Code Napoléon; but the English version supplies a legislative interpretation which the courts are not at liberty to ignore. "

c) Summary

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The close decision in the case of Johnson v. Laflamme well illustrates that the problems inherent in the existence of two official versions of a statute or code have never been easy to resolve, and that even general rules to resolve these problems such as the rule embodied in article 2714 (formerly 2615) of the Civil Code sometimes do nothing but enhance or add a vicious circle to the original interpretative problem. It is perhaps ironic that article 2714 has a close cousin in paragraph 8(2)(d) of the federal Official Languages Act. That provision sets up the same initial hurdle that the Supreme Court was not able to clear in unison: one must first perceive a difference (a verbal conflict? an ambiguity?) between the two versions of an enactment.

In Johnson v. Laflamme, at least two Justices out of five did not see a difference at all between the two versions, once they had construed the provision in its two versions on their face. Also, while Fitzpatrick, C.J. for the majority, felt that the French version in its context was clear, Duff, J. insisted that it was, on its face, without further reference to context, ambiguous. Applying the statutory rule of construction

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is therefore a challenge in itself, which future courts will have to attempt to meet when construing problematical federal statutes.

In passing, it should be mentioned here that article 1550 of the Civil Code was amended to expressly adopt, as a matter of clarification, the reasoning of the majority in Johnson v. Laflamme. Thus doctrinal consistency in the law was reinforced by the legislature. Article 1550 now reads as follows:

" Art. 1550. Faute par le vendeur d'avoir exercé son droit de réméré dans le terme prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue.

Art. 1550. If the seller fail to exercise his right of redemption within the stipulated term the buyer remains absolute owner of the thing sold. "

2. Technical Terms of the Civil Law

a) Departure from the General System of the Law
(the problem of English as an expression of
the civil law)

In the case of Laliberté v. Larue, not strictly a case to interpret the codes alone, an issue was addressed on the meaning of a trust deed made pursuant to the Québec Special Corporate Powers Act. It was important to know whether an apartment building still formed part of the property of a company which, at the time of its bankruptcy, had been used as security to raise money by the issuance of bonds sold on the strength of a deed of the property to a trustee ceding and transferring the property as provided by statute. The liquidator in bankruptcy obtained an order for sale of the property, the legal estate, and, of course, the bondholders contended that under the trust deed the ownership of the property had passed to the trustee for the bondholders and that only the equity of redemption in the property could pass
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to the liquidator in bankruptcy.

The issue in fact arose out of an amazing scramble of common law and civil law concepts, which sometimes happens when federal and Québec law appear to compete for priority over property interests.

In a majority decision of the Supreme Court of Canada (Duff, Newcombe and Rinfret, JJ., Rinfret, J. delivering the judgment), the puzzle of the Québec statute and the federal Bankruptcy Act was neatly unscrambled by reference to general principles. Duff, J. held the view of the bondholders inadmissible because such a view would introduce into the Québec law of property "a legal institution which is virtually a new one". "If the intention had been to do that, which would be nothing short of a revolutionary proceeding, I think it would have been expressed in language quite unmistakable, language to which no other meaning could be ascribed."

This view was explained by Rinfret, J.:

" Or, il convient peut-être de souligner que le système de droit de la province de Québec ne comporte pas la conception de la *common law*

qui reconnaît le *beneficial ownership* dans une personne et le *legal title* dans une autre. Dans le Québec, les deux sont invariablement réunis sur la même tête. La propriété est unique. L'usufruit, la substitution, la fiducie, le nantissement, le gage, l'hypothèque, le privilège confèrent sur la chose des droits plus ou moins étendus (Arts. 94, 944, 981a, 1966, 1968, 1983, 2016 C.C.) mais ne transmettent jamais la propriété. Pour nous limiter aux pouvoirs dont parle le statut: "hypothéquer, nantir ou mettre en gage" (Art. 227, s.10), l'hypothèque n'accorde au créancier que le droit de faire vendre (l'immeuble) en quelques mains qu'il soit, et d'être préféré sur le produit de la vente suivant l'ordre du temps, tel que fixé dans le code (Art. 2016 C.C.). Le débiteur qui a consenti une hypothèque reste propriétaire et en possession. Le nantissement et le gage constituent un même contrat avec la seule différence que le premier s'adresse aux immeubles et le second, aux meubles (Arts, 1966, 1967, 1968 C.C.). Le débiteur qui donne en gage ou en nantissement demeure propriétaire (Art. 1972 C.C.), mais ne conserve pas la possession (Art. 1970 C.C.). En vertu du code, l'hypothèque, le gage ou le nantissement ne peuvent être créés que sur des biens présents; l'hypothèque ne s'applique qu'aux immeubles (Art. 2016 C.C.).

L'innovation apportée par le statut 4 Geo. v, c. 51, en introduisant dans les statuts refondus de 1909 les articles 6119a, 6119b et 6119c (maintenant les articles 10, 11 et 12 du c. 227 des Statuts Révisés de 1925) a donc été--et a été seulement:

- (1) d'étendre l'hypothèque conventionnelle aux biens mobiliers et aux biens futurs;
- (2) d'appliquer le nantissement ou le gage à des biens qui pouvaient également être futurs, mais surtout à des biens dont le débiteur "conservait la possession et l'usage".

Pour le reste, ce dont parle le statut, c'est l'hypothèque telle qu'elle a toujours existé, ce sont le nantissement et le gage

tels qu'ils ont toujours été conçus dans le droit français et dans le régime légal de la province de Québec. Il importe donc de noter que, dans la version anglaise du statut les mots "mortgage" ou "mortgaging" comme équivalents de "nantir" ou "nantissement", de la version française sont: ou bien une impropriété de langage qui peut malheureusement prêter à confusion ou bien l'emploi d'un mot anglais dans une acception toute autre que celle qui lui est attribuée dans le système de droit prévalant dans les autres provinces du Canada. Il n'y a pas de connexité entre le "nantissement" du droit civil et le "mortgage" de la "common law". Mais il est certain que le sens du statut est conforme à la conception du "nantissement" et opposé à celle du "mortgage", puisque le statut lui-même le déclare: Les droits que confèrent sur les immeubles l'hypothèque et le nantissement ... sont déterminés dans le code civil etc. (Voir tout l'article 12 du c. 227). Il faut donc bannir toute idée de "mortgage", dans l'acception que lui donne la *common law*, de l'interprétation du statut et, par conséquent aussi, de l'interprétation d'un contrat basé sur ce statut."

52

As the headnote summarizes the problem:

" The translation of the words "nantir" and "nantissement" by "mortgage" and "mortgaging", in the English version of the statute, is not appropriate and may be misleading; there is no connection between the "nantissement" of the civil law and the "mortgaging" of the English common law. Therefore that statute should not be interpreted according to the rules governing "mortgage" of the English common law; and the power given to the debtor by the statute to hypothecate and pledge his property as security for the payment of the bonds does not constitute a "trust" within the meaning of the equity jurisprudence, the idea of "trust" never having found place in the civil law in Quebec ... The system of civil law in Quebec does not admit

the notion of the English common law as to beneficial ownership residing in one person and legal title in another. In Quebec, both are invariably united upon the same head, the right of ownership being indivisible. "

53.

The problem of English as an expression of the civil law is aptly demonstrated by the case of The Exchange Bank of Canada et. al. v. The Queen. One question in that case concerned the interpretation of article 1994 of the Civil Code, dealing with the priority of claims as between the Crown and private competing creditors in respect of debts due from a company in liquidation. The relevant portion of article 1994 of the Civil Code reads as follows:

" 1994. Les créances privilégiées sur les biens meubles sont les suivantes, et lorsqu'elles se rencontrent, elles sont colloquées dans l'ordre de priorité et d'après les règles ci-après, à moins qu'il n'y soit dérogé par quelque statut spécial: ...

10. La Couronne pour créances contre ses comptables.

1994. The claims which carry a privilege upon moveable property are the following, and when several of them come together they take precedence in the following order, and according to the rules hereinafter declared unless some special law derogates therefrom: ...

10. The claims of the Crown against persons accountable for its money. "

The ultimate question in the case was whether the Crown, being an ordinary creditor of the bank which had been put in liquidation, was entitled to priority of payment over its other ordinary creditors.⁵⁴

Lord Hobhouse, speaking for the Privy Council, first found that the Crown was bound by the Code, that the subject of priorities was exhaustively dealt with by it, and that the law relating to property in Québec must be taken to be the Coutume de Paris.⁵⁵ Having made this latter determination, inquiry was directed to the question whether the French law gave to the King a priority in respect of all his debts or in respect only of those due from "comptables", that is, officers who received and were accountable for the King's revenues.⁵⁶ French law was found to give only this latter restricted priority.⁵⁷

The Court then turned to article 1994 itself. The difficulty arose over the meaning of "comptables", read in light of the English "persons accountable for its moneys". It was

contended by the Crown that this language, on its face was broad enough to include all other creditors of the bank, so that the Crown had absolute priority over them. This contention was rejected because of the technical meaning of "comptables" under the Coutume de Paris:

" That the word "Comptables" is a technical term of French law, denoting officers who receive and are accountable for the King's revenues, has been abundantly shown from the Law Treatises cited at the Bar. It has not been shown that in legal documents the word is ever used in the general sense of "debtor" or "person responsible". It stands in the Code as it is likely a term of art would stand, as a noun substantive, which explains itself to lawyers by itself, and does not require the addition of any explanatory words, such as in the English version are found necessary because there is no corresponding English substantive. The draftsmen of the Code were working on the existing basis of French law. They were in the main mapping out a system of French law. It would be a marvellous thing indeed if persons so engaged were to use a technical term with a definite meaning well-known to French lawyers, and precisely adapted to the position it occupies in the Code, and yet should intend to use it in some other sense, which is not its technical sense, for which it is not shown to be ever used, and for which other words are used. "

58

Lord Hobhouse then enunciated a principle relating to the construction of the bilingual codes that has worn well in the jurisprudence:

" If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. "

59

The Court did not, however, after consulting the French law, consider this a case where such a difference arose:

" The expression "persons accountable for its moneys" is not calculated to convey to the mind of an English lawyer the notion of an ordinary debtor or of a banker. As between a banker and his customers, he, by English law, is an ordinary debtor, and the amount which he owes them is not "their" money, nor is he "accountable" for it in any but a popular sense Their Lordships ... cannot see why, if the draftsmen of the English version intended to speak of debtors, they should not have used the common term for the purpose. Or rather they would have used no term at all, but would simply have mentioned the claims of the Crown, as they have mentioned the claims of the vendor and the lessor. In fact the terms used are strong evidence that in this passage the English version is really a translation from the French, and that in translating a French technical term for which there is no English equivalent, the draftsmen have used the best periphrasis they could think of. Their words are quite applicable to a "Comptable," i.e., an officer collecting revenue, bound to earmark the funds, to account for them, and not to use them as his own. "

60

2. Technical Terms of the Civil Law

b) English Mistranslations

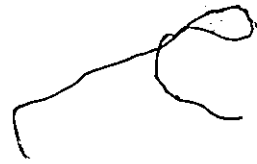
Rémillard v. Couture was an example with a difference. On the issue of whether a deed of gift inter vivos was in substance a kind of donatio mortis causa, and therefore void under article 758 of the Civil Code, the Superior Court of Québec noted that, according to the deed, certain fruits of the gift would be directed in a certain way on the death of the donor and that the English version of article 758 voided gifts "made so as to take effect only after death". The Court was able to resolve the matter by regarding the troublesome English version of the particular provision as a mistranslation and adopting the English translation used in several other articles where the term "à cause de mort" appears:

" Since the French version of that article is in the words *à cause de mort*, since the same words appear in the French version of many other articles and are translated in the English version of these last mentioned articles by the words "in contemplation of death", and since the law on this whole subject

is of French origin and the French text is therefore to be preferred (art. 2615 C.C.), the Court comes to the conclusion that art. 758 C.C. is to be construed as being intended to void only gifts made "in contemplation of death", which is something quite different from a gift which only uses the date of death of the donor as the point of time at which a condition or term thereof will be fulfilled. Hence, to be forbidden and void under art. 758 C.C., a gift must be made because of death and conditional upon death, not merely coincidental with it. "

61

One of the reasons stated above for preferring the French was "since the law on this whole subject is of French origin and the French text is therefore to be preferred (art. 2615 C.C.)." This of course misstates the rule in article 2615 but it is a fairly typical example of how some lower courts have misconstrued a legislated rule of interpretation in their zeal to protect the civil law tradition in Canada. Such an approach would be more convincing if the French version duplicated a provision of the Code Napoléon and the English version differed in some respect from the French. 62
Indeed it has turned out in a number of cases that the English version reflected more accurately the intention of French law, as



expressed by the Codifiers, than the French version. For example, in Friedman et al. v. Caldwell et al.,⁶³ it was found that the English version better reflected the intention of the Codifiers, who had, in the instance under discussion, copied only in part the corresponding provision of the Code Napoléon. The English prevailed for similar reasons in the cases of Naud v. Marcotte⁶⁴ and Chouinard v. Raymond.⁶⁵

⁶⁶
Mignault cites a Court of Appeal case, Harrington et al. v. Corse,⁶⁷ where the meaning of the rule in article 2615 was discussed. The case dealt with a provision that was clearly identified in the Code as new law, that is, not a codification of the law as it existed in 1866. Mr. Justice Ramsay stated the principle that, all things being equal, he would adopt the text that "was nearest to the old law". The case is more interesting for its comment on the purported rule, apparently invoked in Rémillard v. Couture, supra, and elsewhere that, when it is a matter of French law that calls for interpretation, one must follow the

French text, and when the provision is derived from English law, the English version must prevail. Such a "rule" was admitted by the court only in the very limited case of technical terms obviously deriving from the one or the other legal system.⁶⁸ This, it will be remembered, was the approach of the Privy Council in Exchange Bank v. The Queen, quoted in Johnson v. Laflamme, above. It is interesting, once again, to note that in Harrington et al. v. Corse, the Court of Appeal adopted the English text for the stated reason that it complied more closely with the corresponding article of the Code Napoléon.

With regard to the point in Rémillard v. Couture that the English version was a translation, it should be noted that despite the rule of equal authenticity that the courts generally have espoused in Québec, there was often room for the court to reject one of the versions as a mistranslation, where this was clearly so. The practical problem is, of course, that in most cases it will be impossible to identify which version is original and which is a trans-

lation, as Mignault pointed out, especially since, in the legal sense, both are meant to be original. Barring the development of a case of judicial notice being taken of the fact that laws are, as a rule, originally drafted in French in Québec and in English in Ottawa, the interpretative technique of identifying the translation will not normally be invoked unless the provision in question, in one of its versions, employs a technical term that is identifiable exclusively with either the civil law or the common law tradition. This is why the courts in Rémillard v. Couture, Laliberté v. Larue, and Exchange Bank of Canada v. The Queen came to the conclusion they did, and why the Privy Council could say in Johnson v. Laflamme:

" If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. "

3. Conforming to the French Jurisprudence through the Equal Authenticity Rule: Backer v. Beudet

It must be an exceptional case where the equal authenticity rule can be used to accomplish doctrinal consistency with France. In the case of Backer v. Beudet, an interesting question arose as to the interpretation of an article of the Civil Code that imposes a rebuttable presumption of negligence under certain circumstances. Article 1055 read as follows:

" Art. 1055. The owner of an animal is responsible for the damages caused by it, whether it be under his own care or under that of his servants, or have strayed or escaped from it.

He who is using the animal is equally responsible while it is in his service.

Art. 1055. Le propriétaire d'un animal est responsable du dommage que l'animal a causé, soit qu'il fût sous sa garde ou sous celle de ses domestiques, soit qu'il fut égaré ou échappé.

Celui qui se sert de l'animal en est également responsable pendant qu'il en fait usage. "

In this case, the owner of the animal had given up its care to another person. The question, then, was whether liability under article 1055 is alternative or cumulative. The French version was said to be capable of either interpretation. The jurisprudence attaching to the original Napoleonic Code provision, very similar to the Québec provision,

held that the liability in question was alternative, so that the presumption of liability did not arise with regard to an owner who had relinquished the care of an animal to another person who was not his servant. Pigeon, J., speaking for the Supreme Court, came to the same construction of the Québec Civil Code provision by referring to a more precise English version:

" If one looks at the English version, however, it can be seen that it states the second alternative applies only when the animal has escaped from *such* care ("have strayed or escaped from it"). In Quebec as in France, therefore, the text-books and decisions to the effect that the owner's liability attaches to the legal care, and that it therefore disappears when this legal care passes to a third party, must be taken to be correct. "

4. Resort to Legislative History

The Québec Municipal Code has a rule (article 15) similar to the rule in article 2714 of the Civil Code to resolve differences between the English and French texts of the Code:

" Art. 15. Lorsqu'il y a une différence entre les textes français et anglais du présent code, dans quelque article fondé sur les lois existantes à l'époque de sa promulgation, le texte le plus compatible avec les dispositions des lois existantes doit prévaloir.

Si la différence se trouve dans un article modifiant les lois existantes, le texte le plus compatible avec l'intention de l'article d'après les règles ordinaires d'interprétation légale, doit prévaloir.

Art. 15. If, in any article of this code founded on the laws existing at the time of its promulgation, there is a difference between the French and English texts, that version shall prevail which is most consistent with the provisions of the existing laws.

If there be any such difference in an article amending the existing laws, that version shall prevail which, according to the ordinary rules of legal interpretation, is most consistent with the intention of the article. "

In the case of la Corporation d'Aqueduc de St. Casimir v. Ferron, an issue was raised as to the meaning of the requirement of a majority vote under article 122 of the Municipal Code. Did it refer to a majority of the members present or to a majority of the votes cast? The English used

the clear phrase: "a majority of the votes of the members present", while the French referred only to "la majorité des membres présents". Turning back to the previous Code of 1871 brought out the same difference; and that Code contained the same rule for resolving differences between versions. Resort, therefore, was had to an 1855 Act in force in Lower Canada that contained substantially the same provisions. There, finally, it was ascertained that the French version agreed with the clear English "a majority of the votes of the members present", so that in this case, the English version of the present Code was favoured as consistent with the law existing at the time of codification.

D. Federal Legislation and the Civil Law

1. Reconciling Federal Legislation with the Civil Law System

s. 8(2)(c) Official Languages Act

" 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. "

In the case of Mart Steel Corporation

v. The Queen, an issue arose in 1974 as to the meaning of "tort" in the Crown Liability Act where the Crown was said to be liable in respect of a tort committed by its servants. The Crown argued before the Federal Court in Montréal that the Act, by using the word "tort", was intended to have no application in the province of Québec, where the concept of "tort" is foreign. The argument was easily dismissed by reference to the definition of "tort" in the Act, which included the Québec "délit" or "quasi-délit", and by reference to the French version which used the term "délit civil", defined also to mean "délit" or "quasi-délit" in respect of any matter arising in Québec

Because of precise drafting, there was no need in this case to invoke paragraph 8(2)(c) of the Official Languages Act; however, one can easily see how useful that provision might prove.

Without the statutory definition of "tort" deeming the common law concept to be equivalent to the civil law concept of "délit" in respect of any matter arising in Québec, one would have had recourse to the Official Languages Act, which under paragraph 8(2)(c) deals effectively with the potential conflict arising out of the principle of equal authenticity when common law and civil law institutions are invoked in a federal statute.

There remains the problem, not contemplated by s. 8(2)(c), of applying common law concepts to Québec where these have not been transformed in the French version, or ^{in the} definition section of either version, to recognizable civil law terms. There is nothing in the Official Languages Act or Interpretation Act that would specifically allow such transformation in the interpretative process where the draftsman had himself neglected to do so by express language. Nevertheless, there is some precedent to suggest that the courts will do this within their normal processes of construction.

2. Where the Common Law and Civil Law Meet: A Canadian Corollary

The presumption against changing the general system of the law has particular importance in a "bijural" system such as Canada's. Federal statutes have the peculiar task of deriving from and serving two legal systems -- common law and civil law. In their application to Québec, for example, it is quite to be expected that federal statutes will be interpreted, wherever possible, so as to work within the framework of civil law institutions and principles. Where technical terms are used in federal statutes that are unrecognizable in the civil law context, the Court attempts to ascertain what the legislator had in mind, by reference to the applicable (common law) legal system, and by extrapolating the intent so ascertained to the other legal system (civil law).

For example, in the case of In re Evaporateur Portneuf Inc.; Angers v. Malouin, the Trustee in bankruptcy applied to have a pledge and guarantee declared fraudulent and void under the Bankruptcy Act, and more specifically under sections 60, 64 and 65, which carried the general heading "Settlements and Preferences". The relevant sections used the exact phrase "any settlement of property". While

its counterpart in the French version, "disposition de biens", was prima facie wide enough to cover the facts of the case, the Court held that it did not. The French was clearly a translation and would be treated as such. Subsection 60(1) in the French version read as follows:

" Dispositions et privilèges.

60. (1) Toute disposition de biens (*settlement*) est nulle à l'encontre du syndic, si le disposant devient failli durant l'année qui suit la date de la disposition. "

By putting the English in parentheses, the legislator had shown a clear intention that the English version should receive special weight. No special meaning should be attached to the rather vague "disposition de biens". As a translation of the technical term "settlement of property", the phrase was found to be foreign to the legal vocabulary of the Québec civil law and, therefore, was disregarded.

But the Court went further:

Since the words "settlement of property" were considered a term known to the English common law, the Court went to that legal system to see whether they could cover the facts before them. It found they could not since, in the Court's view, the term "settlement of property" implied in English law an element of gratuity, which excluded an ordinary

business transaction, as in this case, between
a debtor and creditor.⁷⁸

It is true that in the case of Angers
v. Malouin, rendered independently of section
8 of the Official Languages Act, the court
disregarded the French version and applied
the English version that made particular sense
within the common law system. Nevertheless,
that case is not conclusive of the issue as to
whether the courts will apply federal laws
expressed in common law terms to civil law Québec,
since the French version of the technical pro-
vision there in question was accompanied by the
English technical word in parentheses and so was
intrinsically reduced to a mere working translation.
Moreover, the technical sense of the English version
was found not to apply to the facts of the case.

This approach, where a difference exists
between the two versions of an enactment, of
identifying a technical term in one of them with
the one legal system to the exclusion of the
other so as to ascertain the intention of Parliament
and apply it to the facts irrespective of the

legal system within which the intention is to be applied, has already been pursued in our discussion of Laiberté v. Larue, above, and has had other examples in the past fifty years. That such an approach is controversial and ^{apparently} has much to do with the structure of our judicial institutions may be underlined by reference to the case of Royal Bank of Canada v. Larue.

In the Royal Bank of Canada v. Larue, the bank asserted in the bankruptcy proceedings of its judgment creditor a privilege in the nature of a judicial hypothec under the provisions of art. 2121 of the Québec Civil Code, in respect of a judgment recovered by it and duly registered with a notice describing the real estate of the judgment debtor. The trustee, under s.53 of the Bankruptcy Act, disallowed the bank's claim to a privilege in the nature of a judicial hypothec upon the immovables (except as to the costs of registration) upon the ground that the assignment in bankruptcy subsequent to the judgment and the registration thereof, took precedence over the bank's claim to a privilege, under s.11(10) of the Bankruptcy Act.

The issue for the courts was, therefore, whether s.11(10) of the Bankruptcy Act was effective in its terms to nullify or postpone the privilege of a creditor who has a judicial hypothec under art. 2121 of the Québec Civil Code.

The Québec Superior Court and Court of Appeal (King's Bench, appeal side) were unanimous that

the Bankruptcy Act was not effective to that end. However, the majority of the Supreme Court bench and the entire Privy Council bench were of the opposite view.

On a comparison of the reasoning of the several courts pronouncing on the case, it is apparent that, with only one exception,^{79.1} the overriding consideration of the civil law judges was the duty of the courts to respect and preserve the institutions and general system of the (civil) law, while that of the common law judges was to apply the rule of construction requiring that a federal enactment should receive "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".^{79.2}

The short question at issue was whether the phrase "certificates of judgment, judgments operating as hypothecs" or "certificats de jugements et jugements opérant comme hypothèques" in s.11(10) of the Bankruptcy Act was sufficient to include the civil law "hypothèque judiciaire" as a class of judgments over which the Bankruptcy Act had priority.

The Superior Court of Québec recognized that such institutions existed in other provinces, particularly Ontario, but that they were unknown to the law of Québec:

" Nous n'avons pas, dans cette province, un mode d'exécution connu sous le nom de certificats de jugements, ni de jugements qui, par eux-mêmes et par le seul fait de leur existence, opèrent hypothèques, comme on l'entend à Ontario.

Le jugement dans notre Province, ne crée pas ipso facto et de jure une hypothèque judiciaire. Pour l'obtenir, il faut que copie de ce jugement soit transmise au registraire, avec réquisition du créancier de l'enregistrer sur les immeubles du débiteur. Il n'en est pas ainsi en Ontario. Le jugement et l'exécution, mis entre les mains du shérif, donnent aux créanciers un droit de priorité sur les immeubles du débiteur du moment que le bref d'exécution est remis entre les mains du shérif. "

79.3

The Court of Appeal, in agreement with the Superior Court, was more categorical:

" Les mots sur lesquels les appelants fondent leur interprétation "certificats de jugement, jugements opérant comme hypothèque" sont inconnus dans notre langue juridique et, par conséquent, ne correspondent à aucune réalité. ... Pourrait-on de la similitude des mots "certificats de jugement", "jugements opérant comme hypothèque", les appliquer sans danger à l'hypothèque judiciaire de notre droit civil? La chose évidemment serait

périlleuse, car on ne peut pas transporter impunément la langue juridique d'un pays aux institutions juridiques d'un autre pays possédant une législation tout à fait différente.

Comme le législateur fédéral est censé connaître la loi et les institutions juridiques de la province de Québec ... aussi bien que la loi et les institutions juridiques des autres Provinces, pourquoi, s'il avait voulu comprendre dans son énumération l'hypothèque judiciaire de notre droit civil, ne l'aurait-il pas dit et ne se serait-il pas purement et simplement servi des mots "hypothèque judiciaire", au lieu de recourir à une prétendue périphrase absolument vide de sens pour nous, et qu'on ne peut comprendre sans connaître le droit des autres Provinces pour lesquelles ces expressions peuvent avoir un sens et peuvent être appliquées, mais qui n'en ont pas dans la province de Québec, et, par conséquent, ne peuvent y être appliquées. "

79.4

Thus the Court of Appeal agreed that the language of s.11(10) of the federal Bankruptcy Act was not sufficiently clear to deprive a hypothecary creditor of his priority established under the Civil Code of Québec. The voiding of judicial hypothecs had nothing to do with any law of bankruptcy.

In a four to one decision, the Supreme Court of Canada reversed the courts below. It pointed to s.11(16) of the Bankruptcy Act that made specific reference to the province of Québec so as to indicate

Parliament's intention that s.11(10) should also apply to judgments or certificates of judgments registered against immovable property in that province. Newcombe, J., speaking for the majority of the Supreme Court, confined himself to the four corners of the Bankruptcy Act to reject the reasoning of the courts below:

" I confess, with great respect for the learned Judges below, that I am unable to follow the interpretation or the reasoning by which they qualify and expound the meaning and effect of subsec. 10 in its application to the province of Québec. I find nothing, either in this subsection or in any other part of the Bankruptcy Act, to justify the opinion that, when Parliament enacted in terms that the order or assignment in bankruptcy should have precedence of all certificates of judgment and judgments operating as hypothecs, the priority should not apply for all purposes, including distribution as well as realization of the assets. ... when sec. 51, providing for the priority of claims, is read along with sec. 11, the intention becomes manifest; I do not doubt that Parliament meant to create equality in the distribution as between ordinary creditors and judgment creditors, except as to the costs, which were to retain their priority.

Moreover, it seems impossible to exclude from the description, "certificates of judgment", "judgments operating as hypothecs", the judgments and judicial acts of the civil courts which confer hypothecs under art.2121 of the Civil Code. ... it is from the registration that

the hypothecs result, and I should think, therefore, that these judgments and judicial acts, when registered, are not inappropriately described as "certificates of judgment" or "judgments operating as hypothecs". Subsection 10 clearly was enacted for the whole of the Dominion, including the province of Québec. The word "hypothec" is apt to refer to the real right described in the Code under that name (arts. 2016 et seq.). A judgment operates as an "hypothec" in the province of Québec when it is registered upon immovable property belonging to the debtor (arts. 2034, 2121), and the "hypothec" thereby acquired is the "judicial hypothec" which, in the language of the Code, "results from judgments" (arts. 2020, 2034). "

79.5

Rinfret, J., dissenting from the opinion of his common law confrères (and Mignault, J. who joined them), agreed with the Québec courts that the language of the Bankruptcy Act, being inappropriate to the civil law, could not be said to apply so as to affect the judicial hypothec claimed by the Royal Bank. He admitted that such an interpretation was restrictive, but thought there was good reason for it: a fundamental policy of the law in matters of interpretation was to lean to the preservation of the integrity of the institutions of the (civil) law where Parliament had not clearly expressed its intent to alter them:

" Sans doute, cette interprétation est stricte, mais on ne saurait l'être trop, lorsqu'il s'agit d'accepter une prétention qui aurait pour effet de faire disparaître une garantie hypothécaire reconnue par le droit civil et dont les origines remontent à l'Ordonnance de Villiers-Cotterets (1539) et à l'Ordonnance de Moulins (1566). "

79.6

From there, Rinfret, J. picked up on the reasoning of the Superior Court of Québec as to the purpose and scheme of the Bankruptcy Act and concluded that it did not intend to interfere with the vested rights of an hypothecary creditor. S.11(10) speaks only of judgments, he said, and not of judicial hypothecs; it does not suggest an intention to extinguish a judicial hypothec or to deprive a citizen of a perfected and acquired right. In adopting this view, Rinfret, J. added that the Québec courts had avoided the bizarre result of the majority Supreme Court decision: the Act would protect conventional hypothecs, i.e., those agreed to by the bankrupt, and yet it would repudiate judicial hypothecs, i.e., those acquired under the supervision and control of officers of the law! But most importantly, its effect, according to Rinfret, J., is to

remove completely from the Civil Code the entire
79.7
chapter on judicial hypothecs:

" If the interpretation of the trustees is correct, then the whole economy of our Civil Law regarding judicial hypothecs is upset. If such a hypothec is only valid when the debtor is solvent, its usefulness is gone, and the protection it affords the creditor is illusory. If the debtor is solvent and remains solvent, a judicial or any other hypothec is of little or no value, as all creditors will be paid in full. It is precisely when a debtor is not solvent and there is not enough to pay all his creditors that the privilege which the law accords to the holder of a judicial or any kind of hypothec is of real value, and it is precisely in this case that the Bankruptcy Act suppresses it, if the trustees are right in their interpretation of such act. "

79.8

Finally, Rinfret, J. considered that it was not at all necessary to the exercise of the federal power of bankruptcy and insolvency to destroy the preference and vested right flowing from the judicial hypothec.

Thus three common law judges and one civil law judge of the Supreme Court of Canada were able to overrule the reasoning of seven civil law judges of the combined Superior Court, Court of Appeal and Supreme Court in a matter touching

the very heart of the civil law as an independent and integral system of law in Canada.

The five-member Privy Council bench unanimously upheld the majority decision of the Supreme Court of Canada. Viscount Cave, L.C., speaking for the Privy Council, decided that although the strict terminology of a federal enactment may not be appropriate to the civil law of Québec, it may be applied there if it effectively paraphrases the situation as it would be understood in Québec:

" It was stated by the learned judges of the Québec Courts that the words "certificates of judgment, judgments operating as hypothecs," were unknown in the jurisprudence of that Province, and their Lordships of course accept that statement as showing that the precise phrase used in the statute is new to Québec; but the Québec Civil Code speaks (in art. 2020) of a judicial hypothec as "resulting from" a judgment and (in art. 2121) of a judgment as "conferring" a hypothec when registered, and the expression "judgments operating as hypothecs" is a not inapt paraphrase of this language. The view taken by Lemieux C.J., in the Superior Court, that the intention of sub-s. 10 was only to transfer to the trustee of the assignment the power of realizing the property affected by the hypothec, leaving to the hypothecary creditor an effective charge on the proceeds of realization, does not

appear to their Lordships to give full effect to the enactment in sub-s. 10, that the assignment is to have precedence over the judgment operating as a hypothec; and their Lordships agree with the opinion of Newcombe, J. (who gave the reasons for the judgment of the majority of the Supreme Court), that the intention of these enactments was that the assignment should have precedence of all judgments operating as hypothecs for all purposes, including the distribution as well as the realization of the assets. ..."

(emphasis added)

Comment

In light of the controversial split between civil law judges and common law judges in Royal Bank of Canada v. Larue, one has to ask oneself if the argument made by counsel in Mart Steel should not succeed, namely, that the incorporation of the law of Québec not being effective, in that recognizable civil law institutions are not referred to, the federal enactment should not apply in Québec.⁸⁰ We are not aware of any judicial precedent interpreting a common law institution such as "tort", for example, to mean the civil law "délit" without specific statutory authority. The present writer submits that it should be inadmissible in principle to apply the approach adopted by the Privy Council and the Supreme Court of Canada in Royal Bank of Canada v. Larue, such an approach being unquestionably detrimental to the maintenance of an independent civil law system in Canada. After all, in light of that case, the most effective way of assimilating the civil law system would be for the federal legislator to simply ignore it. Unless the Bench of the

Supreme Court of Canada were made up exclusively of civil law judges to determine civil law issues, one suspects that the civil law system could be easily rendered sterile by extensive application of the approach taken by the Supreme Court and Privy Council in Royal Bank of Canada v. Larue.

The problem is far from hypothetical. In the Mart Steel case, for instance, it was pointed out that the Crown Liability Act, S.C. 1952-3, c. 30, as originally passed, did not incorporate recognizable civil law terms in the body of the statute. "Tort" was translated as "acte préjudiciable".⁸²

The roundabout cure of the draftsman was to include a definition of "acte préjudiciable/tort", which was said in the Act to mean a "délit" or "quasi-délit" in respect of any matter arising in the Province of Québec. Without the definition making the transposition, the term "acte préjudiciable" would carry no weight in Québec, nor would the word "tort". If the definition section were absent in these circumstances, we do not see how s.8(2)(c) of the Official Languages Act could render any assistance. That provision

simply deals with the conundrum of applying
an equally authentic common law English version
to Québec where there exists a civil law French
version of the enactment as well.⁸³

E. Summary to Part III
Equal Authenticity and the Integrity of the Civil Law:
A Problem of Canadian Federalism

The presumption against departures from the general system of the law, as was shown in the cases of Johnson v. Laflamme and Laliberté v. Larue, the one interpreting a code, the other interpreting a federal statute in a civil law context, particular relevance in Québec in relation to what often appears as a cultural struggle to protect the integrity of the civil law in the face of what are perceived as unwarranted intrusions of the English common law. Thus, although Québec laws are stated in English as well as in French, the equal authenticity rule has rarely been allowed to prevail over a more fundamental precept: if the law on a given subject is of French origin or, typically, is a matter inherent to the civil law and its institutions, the French text will be preferred over the English text unless the English is seen to accord more closely than the French with civil law doctrine. This defensive attitude towards the general system of the law is well known to common law jurisdictions as well, but nowhere are its consequences more sharply felt than in the jurisdiction of Québec. The result may superficially appear to betray a unilingual French approach to the interpretation of codes and

statutes in Québec, but there are enough cases where the English version proved more valuable in upholding civil law traditions to lay to rest such a conclusion. The rule that seeks out the origin of the law in question is perhaps a creature of historical necessity, but as a pragmatic, apparently effective, and culturally satisfying rule, it recommends itself to the present writer. The rule has two facets: if the law in its terms is of French origin, the French version will be given particular weight; if the law uses technical terms of English origin, as does much of the commercial law of Québec, the English version should normally be followed in case of a difference between the two versions. This is only to place a more sophisticated gloss on article 2714 (formerly 2615) of the Civil Code, and to apply it to statutes as well as to the Civil Code, although it was obviously meant to apply only to the Code.

Since 1969, the problem presented by the requirement of federal legislation to serve two fundamentally different and quite separate legal systems has taken on a somewhat sharper focus.

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That federal law must address Québec institutions and civil law principles if it is to be effectively applied in that jurisdiction should be obvious. How to go about doing this in a consistent and meaningful way while sending out the same uniform message to all parts of Canada is not so obvious. Vis-à-vis the federal Parliament, Canada is, from a legislative viewpoint, now made up of eight (8) English common law provinces, one (1) French civil law province and one (1) English and French common law province. It may be trite to repeat here that in Canada the common law has traditionally had its principal expression in the English language and the civil law has traditionally had its principal expression in the French language. And yet, there is no indication in the federal Interpretation Act or the Official Languages Act as to which legal system or systems the English

version and the French version of federal law are meant to address respectively. One has to conclude from the silence of the courts on the matter and a reading of subsection 8(1) and paragraph 8(2)(c) of the Official Languages Act that neither version in its vocabulary is meant prima facie to be limited in its scope to the one or the other of our legal systems. In other words, the French version is not reserved for Québec use only. It is meant to serve common law New Brunswick as well, which officially uses French in its statutes as an equally authentic version. The problem, then, at the federal drafting level becomes a real one: when addressing general law notions such as "tort", "professional privilege", "mortgage", "trust" and innumerable property concepts, for example, the federal draftsman has⁸⁵ a dilemma that may be formulated as follows:

- (A) Should the federal draftsman opt for common law notions and then have them "translated" in a literal sense so that the French version of federal law is meaningful in New Brunswick and meaningless in Québec? (e.g., Mart Steel Corp. v. The Queen: "tort" becomes "acte

préjudiciable" rather than "délit" or "quasi-délit".)

(B) Should he rather use common law notions in the English and comparable civil law notions in the French version, so that the French version of federal law is meaningful in Québec and meaningless in New Brunswick? (e.g., Mart Steel Corp. v. The Queen: "tort" becomes "délit" or "quasi-délit" rather than "acte préjudiciable".) As a corollary to this hypothesis, should the equal authenticity rule have a more categorical exception than paragraph 8(2)(c) to provide that

- (1) when a word or concept in a legislative provision issues from one legal system and is foreign to the other, the version of the provision in which that word or concept appears is the ⁸⁶solé authentic version of the provision, and
- (2) if the sole authentic version of the provision, so ascertained, is incapable of being applied within the framework of, say, the civil law of Québec, then the provision is void

- (a) in Québec, or
- (b) in the entire country (based on a principle that federal law purporting to apply country-wide must not be construed to discriminate between the provinces in its application to them, in the absence of express language and generally agreed constitutional arrangements)?
- (C) Should there instead be four versions of federal law, two (English and French) for common law jurisdictions and two (English and French) for the civil jurisdiction (e.g., Mart Steel Corp. v. The Queen), for instance by drafting, on the one hand, common law English and "common law French" in the body of the statute and by drafting, on the other hand, definition sections making reference to matters arising in the Province of Québec and transposing the "common law statute" to meaningful civil law terminology in referring to these matters?

These are all questions of policy that surely have some relevance in any proposed solution to the

draftsman's dilemma. A scientific analysis has not been made of the choices that federal draftsmen have made over the years on this question in federal statutes. Such a study should, of course, be the subject of ongoing research so that this fundamental problem of Canadian federalism may be given some more precise definition and solutions. Only by constant awareness of the problem at the federal level and clearly expressed solutions for the draftsman and courts alike can an autonomous civil law system retain its originality and dignity alongside the ubiquitous common law institutions and concepts invoked in Canadian federal legislation.

Addendum -- Bill 101: Where do we go from here?

The present writer thought it appropriate to attach a note on the effect of Bill 101, Charter of the French Language, assented to August 26, 1977, on the principles and approaches analyzed above.

Some may say that the ^{greater part of the} present chapter is rendered quite academic by the passage of the Charter, which purports to repeal ⁸⁷ article 2714 of the Civil Code, replacing it with the rule:

" In case of doubt, the construction placed on any Act shall be such as not to impinge on the status of the French language. "

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⁸⁹
Even if such a rule is at all useful to the Québec judiciary, it has been shown that the maintenance of the integrity of civil law traditions will often depend on the ability of the courts to disregard the French version in favour of a more consistent or compatible English. Whatever may come of it in Québec, it was the intention of the present writer to analyze major streams ^{issuing out of Québec} in the jurisprudence to complete the picture for all jurists called upon to construe bilingual legislation. Much of the Québec jurisprudence may henceforth be of ⁹⁰ purely historical value in Québec; it remains, however, a fertile source for Canadian jurists seeking to come to terms with the problems of interpreting a bilingual statute, wherever it may issue, so long as its two versions are considered original or authentic.

F. NOTES TO PART III

E. NOTES TO PART III

(Citations are shortened for the sake of convenience. See Table of Cases and Bibliography for complete legal citation. "T" references are cross-references to other pages of the present thesis.)

1. This chapter deals with the case-law interpreting Québec legislation, and federal legislation as it applies in Québec.
- 1.1 Although their decision was overturned by the Privy Council on another point, this principle was left unchallenged. See (1892) A.C. 481 or C.R. (10) A.C. 247.
2. C.P.R. v. Robinson, p. 325.
3. For example, Thiverge v. Cinqmars, p. 401
Roy v. Davidson, p. 84
Naud v. Marcotte, p. 133
Chouinard v. Raymond, p. 186
Corporation of Coaticook v. The People's Telephone Company, p. 547
Bernier v. The Québec & Lévis Ferry Co. Ltd., p. 198
Corriveau v. Mercier, p. 343
Recorder's Court of Montréal et al. v. Laval Transport Inc., pp. 698-9
Earlier cases mentioned by the authors (Mignault, Beauchamp and Gérin-Lajoie) were
O'Farrell v. de Tilly, p. 28 (extra)
Bellingham v. Abbott, p. 18 (extra).
Harrington v. Corse, p. 108.
4. Montgomery, J. in Blouin v. Dumoulin, pp. 583-4.
5. Hayden Sales v. Lévesque, p. 679.
- 5.1 Driedger, The Construction of Statutes, pp. 105-6.
- 5.2 Taschereau, J. in Central Vermont Ry. Co. v. Town of St. Johns, p. 307.

- 5.3 Supported by Abbott & Judson, JJ. on a five-member bench.
- 5.4 Méthot v. Commission de Transport de Montréal, p. 393.
- 5.5 Thiverge v. Cinqmars, p. 402.
- 5.6 Bernier v. The Québec & Lévis Ferry Co. Ltd. et al., p. 198.
- 5.7 ibid. See also Viau v. Cité de Verdun et al., p. 189, where the same principle was stated:
- " The word "other" which appears in the seventh line of the English version does not appear in the French. If this difference is material, then one must accept the version which is more favourable to the accused. This in the case of section 5, would be the English text. "
- 5.8 Maxwell, pp. 199 ff.
- 5.9 Driedger, The Construction of Statutes, p. 139.
- 5.91 Maxwell, pp. 238, 256; Driedger, ibid., pp. 148 ff.
- 5.92 Longueuil Navigation Co. v. City of Montréal & A.-G. for the Province of Québec, p. 573 (Fournier, J.).
- 5.93 ibid., p. 575 (Taschereau, J.)
- 5.94 In such a case, the writer submits that section 11 of the Interpretation Act requiring every enactment to be given a liberal construction would not be easily applicable, as it does not solve the problem of two versions in conflict. Of course, if both versions were equally ambiguous, section 11 should prevail over the common law dogma of preferring the restrictive construction: Driedger, The Construction of Statutes, pp. 148 ff.
- 5.95 Residual, in that it may be invoked only to dispel a lingering doubt; it is not a prima facie presumption: Driedger, ibid., p. 139.
6. La ville de Montréal v. Ilgwu Center Inc., p. 66.
7. ibid., p. 67.
8. ibid., p. 65.
9. ibid., p. 74.

10. ibid.
11. ibid. As an uncompromising rule of grammar, this point is somewhat debatable.
12. ibid., p. 75.
13. ibid.
14. "Possible" on the face of the words themselves, before a wider context is consulted.
15. Roy v. Davidson, pp. 84-85.
16. ibid., pp. 85-86.
17. ibid., p. 86.
18. ibid., p. 88.
19. ibid., pp. 88-91.
20. ibid., p. 92.
21. This is especially so of the French version of contemporary federal statutes, which more and more reflect an economy of expression while maintaining the clarity that the English often lacks for its insistence on verbosity and continuing attachment to archaic and pleonastic terminology. The apparent independence of the two versions in their expression and even at times in their structure can be quite remarkable.
22. Corporation of Coaticook v. The People's Telephone Company, p. 540.
23. ibid., p. 547.
24. ibid., pp. 547-8.
25. ibid., p. 548.
26. ibid., p. 549.
27. ibid., pp. 553-5.

(The next note is #32.)

32. O'Farrell v. de Tilly, p. 27.
33. ibid., p. 28.
34. ibid.
35. Bellingham v. Abbott, p. 18.
36. Lacerte v. Verrault, pp. 230-1.
- 36.1 Royal Bank of Canada v. Larue, Privy Council, p. 195.
37. Johnson v. Laflamme, p. 500.
38. ibid., pp. 501-2.
39. ibid., pp. 504-5.
40. These apparently came in C.P.R. v. Robinson.
41. ibid., p. 506. Article 2615 was renumbered in 1975 to become art. 2714.
42. ibid.
43. ibid., p. 507.
44. ibid., p. 503.
45. See The King v. Dubois, discussed in Part I.
46. Johnson v. Laflamme, pp. 508-9 and 510-511.
47. ibid., pp. 511-514.
48. Three to two, Sir Charles Fitzpatrick, C.J., Idington and Brodeur, JJ., affirming; Duff and Anglin JJ., dissenting.

49. Duff, J. at p. 513, and Anglin, J. at p. 518.
50. Laliberté v. Larue, p. 9.
51. ibid., p. 13.
52. ibid., pp. 16-17.
53. ibid., p. 8.
54. The Exchange Bank of Canada et al. v. The Queen, pp. 163-4.
55. ibid., p. 164.
56. ibid.
57. ibid., p. 165.
58. ibid., pp. 165-6.
59. ibid., p. 167.
60. ibid., pp. 167-8. The Exchange Bank of Canada et al. v. The Queen is also interesting for its decision to modify the language of article 611 of the Code of Civil Procedure so that it would read in harmony with article 1994 of the Civil Code. See pp. 168 ff.
61. Rémillard v. Couture, p. 165.
62. This was the case in Dame Hawn et Dufresne, where it was stated at page 449:

" This English text differs somewhat from the French one and as the latter is an exact reproduction of article 2054 C.N. cited by the codifiers, it is the one to be followed ..."
63. Friedman et al. v. Caldwell et al., pp. 206-7.
64. Naud v. Marcotte, p. 130.
65. Chouinard v. Raymond, p. 186.
66. Mignault, vol. I, p. 54.
67. Harrington et al. v. Corse, p. 108.

68. ibid.
69. Mignault, vol. I, p. 54.
70. Exchange Bank of Canada et al. v. The Queen, p. 167
71. Backer v. Beaudet, p. 632.
72. The Code of Civil Procedure, in article 3, has a similar provision.
73. La Corporation d'Aqueduc de St-Casimir v. Ferron, pp. 53-4.
74. Mart Steel Corp. v. The Queen, p. 66.
75. See Part I, note 4.
76. Angers v. Malouin, p. 227.
77. ibid., pp. 227-8.
78. ibid., p. 227.
79. Headnote, Royal Bank of Canada v. Larue, 7 C.B.R. 285 (S.C.C.).
- 79.1 Mignault, J., agreeing with the majority of the five-member Supreme Court bench in Royal Bank v. Larue, (1926) S.C.R. 218, at p. 219.
- 79.2 S.11 of the federal Interpretation Act, R.S. 1970, c. I-23.
- 79.3 Royal Bank v. Larue, 5 C.B.R. 560, at p. 566 (Qué. S.C.).
- 79.4 ibid., 7 C.B.R. 285, at p. 287-8 (Qué. C.A.).
- 79.5. ibid., p. 296-9 (S.C.C.).
- 79.6 ibid., p. 303.
- 79.7 ibid., pp. 303-8.
- 79.8 ibid., p. 308.
- 79.9 ibid., (1928) A.C. 187, at p. 195.

80. Mart Steel Corp. v. The Queen, pp. 65-6. Another stumbling block to this is s.8(1) of Canada's Interpretation Act, R.S. 1970, c. I-23, which states the rule that every enactment applies to the whole of Canada, unless it is otherwise expressed therein.
81. (deleted)
82. Mart Steel Corp. v. The Queen, p. 66.
83. S.8(2)(c) does not contemplate the problem of applying two common law versions of a federal statute to Québec. In fact, the judiciary in that province should be expected to balk at any attempt by the federals to legislate with regard to matters arising in Québec without due regard to her unique civil law institutions where these are a relevant consideration. An important issue arises in light of this discussion as to whether Parliament should enact in common law terms in both versions, New Brunswick being a bilingual common law province. Purists may remind us that there is no such thing as a common law term in French. The expression "common law French" or "common law French version" is used here only for the sake of convenience, referring basically to English common law incorporated into the French version of federal statutes without any attempt at focussing on civil law benchmarks. The issue is an important one, and yet, we are not sure that the government draftsman is even aware of the problem. In any case, for the time being, the solution has been largely abandoned to the whim of a translator. (See Part IV.)
84. Since s.8(2)(c) of the Official Languages Act was enacted.
85. That he may not even be aware of the problem is explored in Part IV.
86. The apparent need for such a rule became obvious in our discussion of Angers v. Malouin. It was further discussed in connection with the Mart Steel case, and in connection with the cases of Johnson v. Laflamme, Laliberté v. Larue, and Rémillard v. Couture. The approach analyzed there and recommended here reflects

article 2714 of the Civil Code of Québec, which, although now repealed for other reasons, appears to be a fairly reliable way, in a bilingual universe, (and even more apt in the federal "bijural" universe) to avoid unnecessary departures from the general system of the law.

87. Section 219, Charter of the French Language, S.Q. 1977, Bill 101.
88. Section 40 of the Interpretation Act, R.S.Q. 1964, c. 1, as enacted by s. 213, Charter of the French Language, S.Q. 1977, Bill 101. Section 9 of the Charter declares that only the French text of the statutes and regulations is official.
89. That such a rule may prove unworkable is illustrated somewhat ironically by an old case decided when (as the court thought) section 41 of the Act of Union was still in force, which made English the sole language of legislative record in the province of Canada, as it was then known. In Archambault v. Roy dit Picotte, (1852) 2 L.C.R. 25 (S.C.L.C.), the court was asked to construe a provision affecting rights that contained a typographical or clerical error:

"... provided always, that nothing in this Act contained shall operate to the prejudice of rights acquired by these parties by the laws in force at the time of the passing of this Act ..." (emphasis mine)

It was apparent from the French text that "these" should have read "third". Nevertheless, the court felt obliged to disregard the French. Mr. Justice Day, in delivering judgment, observed:

" It is a palpable error, because no parties are mentioned in the preceding clause: but what is the Court to do? It is not for us to presume what meaning the Legislature intended: we must take the text as we find it. The Opposition must be maintained, with costs."

(p. 28)

Mr. Justice Vanfelson added:

" The French version is correct: I would have been willing to discharge the *délibéré* and re-open the *enquête* in order to allow a reference to the rolls of Parliament, but my colleagues think differently."

(p. 28)

And Mr. Justice Mondelet concluded:

" The Court must take the Statute as it finds it. If there has been a typographical error, ~~it~~ is unfortunate, but it is not for us to go to the archives to see whether that is the case or not. It has been suggested we should take the French version. This would be to admit that the law has two texts which I, as a Judge, cannot do. It is astonishing that no one has thought of making the French version authority as well as the English. Nevertheless the translation in French is not authority as law. Either through wilfulness or ignorance the English text alone has been imposed upon the French Canadian population, and there is no French version having the authority of Law."

(pp. 28-29)

(Note: Mondelet, J. seems to have overlooked the fact that s. 41 of the Act of Union was repealed in 1848, three years previous to the passage of the Act he was construing. R.-M. B.)

90. There is some doubt as to the constitutionality of parts of Bill 101, Charter of the French Language. The portion of that Act dealing, inter alia, with French as the sole original language of legislation was ruled unconstitutional in Blaikie et al. v. A.-G. of Québec and A.-G. of Canada. See note 7, Part I.

PART IV

SUMMARY & CONCLUSIONS

PART IV

SUMMARY & CONCLUSIONS

A. Summary -- An Approach to the Construction of Bilingual Legislation

While one should avoid dogma when expounding on the law, which seems rarely ever "settled" unless surrounded by several and intricate wrinkles, the present thesis has amply demonstrated that the only reliable approach to the construction of bilingual Canadian legislation entails, as an initial step, a comparative reading of both official versions of the legislation, whenever it raises practical problems of application or its meaning is subject to some doubt.

Such a conclusion stems from our observation in countless decisions that, based on the peremptory rule of equal authenticity of French and English versions, a clear version of the law will normally resolve any doubt residing in an ambiguous one, and the context of a provision will normally resolve any difference between its two versions.

As a rule of thumb, we suggested a formula for this approach to the interpretation of bilingual legislation;

it was tested against several decisions and refined in the course of the thesis to read as follows:

$$(1) A^e + B^e + A^f \Rightarrow A$$

and its corollary:

$$(2) A^e_o + B^e + A^f_o \Rightarrow B$$

In summary form, they are likely to answer any variation of the problem that may arise. There may be, for example, three constructions possible on a reading of the two versions, as in

$$A^e + B^e + A^f + C^f \Rightarrow A.$$

The one construction common to both versions (A) would still prevail, so long as it is not subject to objection when the provision is so read within its total context.

The latter condition is the major premise of the above-mentioned corollary, which itself brings us back to

Driedger's approach as the final step in the equation, and the Supreme Court's decision in the B.C.N. case.

In other words, even though as an initial step in the interpretation of an ambiguous provision, a construction is found that is common to both the English and French versions, that construction must be related back to and tested against the entire context of the

provision before being settled upon. Such was the conclusion drawn from the cases of Food Machinery Corporation v. The Registrar of Trade Marks and Ville de Montréal v. Ilgwu Center Inc., and most importantly, of Compagnie Immobilière B.C.N. Ltée v. The Queen.

B. Conclusions

1. Implications of the Approach

- a) The Bilingual Approach
- b) The Bilingual & Bijural Approach

a) The Bilingual Approach

Where a peremptory rule of equal authenticity applies to the construction of bilingual legislation, as it does to all federal Canadian statutes and subordinate legislation, it has been demonstrated to be even more crucial than under a unilingual regime to consult the actual words of the legislation, and in both its versions, before coming to a conclusion as to the meaning of a provision requiring interpretation. The persistent habit of counsel pleading before even the higher courts to cite age-old presumptions or "rules" of interpretation drawn from Maxwell was criticized throughout the thesis as unproductive and irrelevant in most cases. As an approach to construing bilingual legislation, wholesale reliance on presumptions and rules of interpretation verges on the irresponsible when often all that is required

is a simple reading of a few words in the other official version appearing on the same page of the statute books. In the context of a bilingual statute, the Maxwellian rules are even less determinative of the result; a reliable result can be reached only when it is based upon a reading of the one version in the light of the other.

b) The Bilingual & Bijural Approach

and a portion of Part III
Part two canvassed the fairly limited
jurisprudence that has developed since the
passage of section 8 of the Official Languages
Act in 1969. In Part III, we took a closer
look at section 8 which, in paragraph (2)(c),
makes a rather vague attempt at recognizing
that federal law serves two masters simultan-
eously -- the civil law as well as the common law.
What it omits to say is which legal system
is meant to be served by which version, or
whether each version is meant to serve both.
As explained in Part two, that decision appears
to be left ad hoc to the decision of the draftsman,
who may not even be aware of the conceptual
problem of trying to be bilingual and bijural
at the same time in a country that has a bilingual
but English common law province as well as a
sometimes bilingual but French civil law province.

No doubt, paragraph 8(2)(c) was meant
merely to reflect the attitude and intent of
the judiciary, seen in Part three especially,
towards respecting and safeguarding the integrity

of the general system of the law from unwarranted intrusions by concepts or institutions foreign to it. However, at the same time, paragraph 8(2)(c) appears to the present writer to open a can of worms that may need more attention, so that we know in what larger context we are expected to place the French or the English version when attempting to construe a provision, and more importantly, so that federal draftsmen will have some guidance when drafting or supervising the preparation of the French version. In the summary to Part III, we expressed the opinion that the French version is not, at present, reserved for Québec use only, in the sense that it does not reflect civil law institutions exclusively of common law ones. Nor should it serve one legal system to the exclusion of the other. Whether it can serve both systems at once without offending the one or the other is a technical problem that federal draftsmen should be attending to, but do not appear to be, if the drafting process and the state of our law are any indication. Certainly, we should begin by ensuring that, first and foremost, the French version does a good job of reflecting

civil law institutions, particularly in the present climate of increasing unilingualism in Québec, with its inevitable downgrading of the general bilingual approach to construing statutes in the province.

Paragraph 8(2)(c) has the deficiency of assuming that one version or the other will be compatible with each Canadian legal system. As explained in Part III, paragraph 8(2)(c) simply deals with the theoretical conundrum of applying, for example, an equally authentic "common law" English version of a statute to Québec when the statute includes a truly "civil law" French version as well. The provision assumes that the draftsman has performed the necessary transformations and approximations in terminology in at least one of the versions; presumably the civil law transformations will be more easily left to the French version. Perhaps they will be accomplished in both versions by the use of definition sections. Section 8 should, however, go on to cover the situation where the draftsman or translator has neglected to make the transformations. Paragraph 8(2)(d),

a residual provision invoking overall context, would not be sufficient to cover the deficiency in view of well-founded judicial attitudes towards safeguarding the general system of the law. Without a rule to cover the possibility, one risks having a court decide that a provision, unmeaningful to the civil law, for example, was not meant or cannot be taken to apply in Québec. While it may be impossible to legislate a different result, since the result must always "compute" with or be understood by civil law institutions, we did suggest in our summary to Part III that some more certainty would be welcome and that it might even be useful, as a constitutional advance, to stipulate in section 8 the additional principle that if a provision is impossible of application within the context of one legal system in Canada, then it is inoperative or void in the whole of Canada. Such a rule would at least serve to keep draftsmen a little more on their toes when dealing with the French version and civil law matters, as well as ensure greater attention to these by the profession at large, in their own self-interest.

2. Legislating Rules to Interpret Bilingual Legislation

a) Introduction -- The Wisdom of Legislating Rules

In the introduction to the present thesis, some concern was expressed as to the wisdom of Parliament's attempting to legislate an approach to the interpretation of bilingual legislation in the first place. If a comparison of the post-1969 cases of ^{B.C.N.} Black & Decker and Ilgwu Center with the pre-1969 case of Food Machinery is any indication, that concern is at present not critical, since the Supreme Court, at least, has approached equal authenticity with a good deal of flexibility; the judiciary will thus continue to perform their interpretative function with their usual pragmatism, i.e., with the overall context continuing to be their primary guide. The traditional "context" approach, has apparently not been supplanted by the mechanical strictures of a legislated rule, but rather refined and updated to formalize an approach to the construction of Quebec and federal Canadian legislation that had long prevailed first among the Quebec judiciary generally and finally at the level of the Supreme Court of Canada itself.

Indeed, in the course of the thesis, it became apparent that there was room for some legislated rules. For example, it was seen in Part one in our analysis of the case of Food Machinery Corporation v. Registrar of Trade Marks that something more substantial is required, theoretically at least, than the traditional common law principles of interpretation in order to settle conflicts between equally authentic versions of the same law. Extrapolating approaches from principles that evolved in the context of a unified, unilingual common law system is not altogether appropriate here because, to set up a hierarchy between competing authentic versions of an enactment seems to require primarily a legislative rather than a judicial act.

It was suggested in Parts one and two that paragraph 8(2)(d) of the Official Languages Act may serve to answer the conceptual problems raised in our analysis of Food Machinery. There are problems with its formulation (seen below), but it does seem to accomplish the intellectual hurdle required to equate authentic versions with possible constructions, so that

a legitimate hierarchy can be set up, between, the versions without offending unduly the peremptory rule of equal authenticity. Nonetheless, a more specific rule might be appropriate for the narrow case of conflict between versions.

- b) Ambiguity or Conflict between Versions? --
The Problem with Characterization
or
How to make the question fit the rule.

This somewhat facetious heading is intended to underline the major weakness of a legislated approach to the construction of bilingual statutes.

As research progressed, the present writer felt a growing concern that an element of subjectivity had at times crept into the characterization of a problem by the judiciary, so that the solution, almost pre-ordained, rang false. Students of jurisprudence will appreciate that their greatest difficulty lies mainly in how to put the precise issue, rather than how to formulate the proper solution. The same difficulty presents itself in the application of principles, systems or approaches prescribed for the interpretation of bilingual statutes.

The judiciary have developed certain approaches and the legislator has distilled them into fairly general rules that reduce the problem of interpreting a bilingual statute to a problem that is essentially one of characterization.

Once the problem is characterized in a particular way, the solution follows pursuant to legislated rules, supposedly aided by the ordinary principles of language and rules of statutory interpretation.

For example, article 2714 of the Québec Civil Code and subsection 8(2) of the federal Official Languages Act set up a system to be followed where a "difference" is perceived between the two versions of an enactment. Numerous judicial pronouncements in relation to Québec and federal Canadian laws enunciate a system to be applied in the case of "conflict" between versions, and another to be applied in the case of mere "ambiguity". The problem, of course, is that "differences", "conflict" and "ambiguity" are all degrees of the same thing -- discrepancy or inconsistency -- and one person's "conflict" is another person's "ambiguity". This is not to suggest that an objective result is in most cases unattainable, but it does express a concern that judicial perspective may at times become blurred, if not ^{totally} impeded, by the present rather vague

statutory rules to resolve conflict and differences between two equally authentic versions of an enactment.

For instance, our analysis in Part three of the Québec jurisprudence indicated a healthy respect there for the intrinsic value of upholding the general system of the law and its institutions, even at the expense of a clear version of the law that tended to diverge from them. Of course, in such cases, there was usually available a possible construction in the competing version that could be read harmoniously with the general system or particular institution of the law in question. Nevertheless, the otherwise unnatural hierarchy established between a mere construction (harmonious with the general law, at odds with the clearer version of the provision) of an ambiguous version on the one hand, and the clear language of the other version on the other hand was apparently made possible only by the existence of a legislative provision such as article 2714 of the Civil Code, now repealed, which established such a hierarchy as a matter

of public policy, whenever a "difference" of any kind appeared between the two versions. Paragraph 8(2)(d) of the federal Official Languages Act does not go that far, or at least, it does not state any precise rule to the same effect, and it is questionable whether the Food Machinery, Black & Decker, Ilgwu Center and B.C.N. line of cases would permit the judiciary to perform such an act of conservation when construing federal law, in the interest of ensuring the integrity of either or both of Canada's legal systems.

c) Roadblocks to Judicial Pragmatism

The problem, of course, with legislated rules of interpretation is that legislation tends to limit the ability of the judiciary to reach pragmatic and perhaps more "just" solutions to issues on the facts before them; they are already faced with the double-barrelled constraints of language as a vehicle of communication. The flexibility of the judiciary to come to pragmatic solutions has been hampered in at least one instance because of our providing a legislated rule of interpretation. Part one in its chapter on statutes implementing treaties concluded with an expression of some concern that section 8 of the Official Languages Act posed a substantial impediment to Canada's ability to respect international obligations under treaties entered into prior to 1969. Part two in its summary recommended an amendment to section 8 that would provide an exception to the equal authenticity rule in those cases where past international commitments would logically require that only one of our "official" versions would

be authentic, as agreed under those commitments.

In addition, section 8 does appear to preclude the development of any pragmatic rule of construction that would permit the establishment of a hierarchy between the two versions based on which of them was the original and which was the translation. In Parts one and three, a number of cases were analyzed in which it was evident that one version was not only a translation, but a bad one to boot. Now the interpretative rule has never strictly reflected the drafting process in either Canada or Québec so as to give added weight to the original over the translation, but that option was at least open in the appropriate case. Since 1969, under the regime of section 8, such an hypothesis would appear to be out of the question, unless the "translation" could be dismissed for other reasons such as those provided by the very general approaches laid down in paragraphs 8(2) (a) through (d).

In the light of the B.C.N. case, it is apparent that the Supreme Court of Canada regards s.8(2) as a "guide" only, so that "roadblock" may not be the accurate term to describe the impediment posed by section 8 to the normal role of the judiciary to construe legislation. Nevertheless, the difficulty that some of our most eminent judges have had with a legislated rule of equal authenticity, such as article 2714 of the Civil Code of Québec (Duff, J. in Johnson v. Laflamme) and section 8 of the Official Languages Act (Federal Court of Appeal in Film Technique and B.C.N., and the Ontario Court of Appeal in Black & Decker) goes to underline that the legislator has badly misapprehended the sophisticated process of judicial reasoning in its attempt to characterize it and compartmentalize it for the purposes of the construction of enactments.

Since the decision of the Supreme Court of Canada in B.C.N., it is apparent that s.8(2)

of the Official Languages Act should at least be rewritten. While s.8(2)(d) reads as if it were a last resort ("if the two versions of the enactment differ in a manner not coming within paragraph (c)..."), clearly the same rule therein expressed applies to all problems of statutory interpretation -- it merely reiterates the context approach. As a scheme, s.8(2) is misleading, as it suggests in s.8(2)(b) that problems of interpretation may be resolved by reconciling the two versions of an enactment without further resort to the overall context of the enactment. The Supreme Court of Canada in B.C.N. underlined that such an approach is unacceptable if the court is to fulfil its duty to apply legislation so as to "best ensure the attainment of its objects", as is required by section 11 of the Interpretation Act.

In conclusion, while s.8 of the Official Languages Act purports to be an exhaustive code of the rules and approaches applicable to the construction of federal bilingual legislation,

it is apparently incomplete, and so fails as a code. It should, therefore, either be re-drafted with added precision, in line with classic judicial processes of reasoning, or better, s.8(2) should be repealed altogether, leaving the courts to evolve the rule of equal authenticity that is already proclaimed with sufficient clarity in s.8(1). The courts, before 1969, had already enunciated such a rule and applied it in a pragmatic way according to the legislative problems they were faced with. The rule was thus evolving well enough without the added impediment of a defective legislative scheme purporting to govern the judicial role of interpreting legislation. To bring harmony to two versions of federal legislation that do not cease to amaze us in their multifarious incongruities, the judiciary must be left the breadth and scope for such a task. If they are forced to focus on a defective legislative scheme, such as section 8, the judiciary as a whole may not be equal to their primary task of construing legislation so as to best ensure the attainment of their objects.

C. Concluding Questions

The following are some personal impressions on collateral issues that have arisen in the course of our analysis that, it was thought, could not be ignored before concluding our analysis of approaches to the interpretation of bilingual Canadian legislation. The comments that follow are intended to be somewhat provocative in nature, and as such do not pretend to be the result of any rigorous analysis made in the preceding pages; they are really questions having practical ramifications for the profession, the administration, and the judiciary that in future should be given some careful thought.

1. The Bottom Line: the Language Barrier

When all has been said, if that is possible, on approaches for the profession and judiciary to follow in order to interpret bilingual legislation, the protest of writer J.C.E. Wood, raised in Part one, may still echo in one's mind: but nobody understands French in most of anglophone Canada; how can we be expected to make use of the levers it offers in the process of resolving legal disputes?

Even if, philosophically, such a protest can

be dismissed at the level of the profession, it may be worth considering at the level of our institutions, and in particular, with regard to the organization of the judiciary in Canada.

The fact remains, and it should go without saying, that the majority of Canada's judiciary outside Québec, whose functions include the interpretation and application of federal legislation, are inexorably unilingual English-speaking, despite the fact that judicial appointments to most courts exercising such functions are made by the federal government. If it is unrealistic at this time to expect the federal government to use its levers of power in the manner suggested by Bill C-202,¹ for example, so as to ensure that Canadian institutions, such as the courts, evolve in a manner that fully recognizes and takes into account public policy commitments to institutional bilingualism, it is nevertheless apparent that the federal government should use its power to ensure that more of the legislation passed by Parliament is scrutinized or interpreted by courts already having a mandate and a will to function in both languages.

This points more naturally to the Federal Court than to the traditional unilingual or sometime bilingual provincial courts. The great deficiency of the involvement of provincial institutions in the application of federal law is that they are not equipped and are not evolving so as to be able to respond to the intrinsic requirements of our federal law and tradition for their orderly application. The bilingual and bicultural essence of federal legislation has been eroded by the continuing practice of anglophone Canada to treat the French version of federal legislation as a more or less dispensable appendage.

Research for the present thesis has persuaded us that the Federal Court, trial and appeal levels, has demonstrated a far better ability to come to terms with the problems inherent in bilingual legislation than any of the traditional courts in the anglophone provinces, where the French version of federal legislation has yet to be discovered. Conferring additional responsibilities on the Federal Court to ensure the orderly interpretation and uniform application of federal law would thus be a natural

step in ~~their~~ evolution. This, of course, would not mean the wholesale transfer of the administration of federal law to the exclusive jurisdiction of the Federal Court; however, it would include the creation of an extensive power of evocation in the Federal Court, so that cases deemed to require the interpretation of a bilingual federal statute whose outcome might have national repercussions could be called up from the provincial courts for disposal. It is simply untenable in 1978 to allow, for example, one province to interpret federal law solely according to the English version, another province to interpret it solely according to the French version and a third province to interpret it according to both versions. We cannot expect a uniform result to emanate from courts of disparate traditions when, as we have well demonstrated, our statutes are subject to so many and varied discrepancies between their two official versions.

Concluding Questions

2. Deliver us from Evil: the Drafting Process

The object of the present thesis has been to analyze the jurisprudence relating to the interpretation of bilingual legislation in Canada and, in the process, to demonstrate through extensive quotations of judicial reasoning, where this was available, the approach or approaches that the courts have followed in order to resolve problems arising from the existence of two versions of the law.

The problems that the courts have had to deal with have inevitably pointed to a larger question -- the origin of the discrepancies between the two versions -- and no analysis of the problems of interpreting bilingual legislation would be complete without at least a short note on the process by which legislation is formulated in Canada. For this purpose, only the formulation of federal government Bills will be looked at, to the exclusion of other bilingual Canadian legislation, because of the emphasis that the present thesis has placed on the problems of interpreting federal Acts and because of the availability of some literature on the subject.

For all intents and purposes, the legislative origins of the interpretative problems we have analyzed begin and end in the Department of Justice. That department drafts the government Bills that Parliament passes, with or without amendment. Parliament does not scrutinize Bills for their draftsmanship in any scientific way, and the nature of the institution does not encourage such a development. It appears, therefore, that the solution is not in any heroic attempts at reform of the legislative process itself.² Reform must rather be directed primarily at the pre-presentation stage, when Bills are actually drafted.

The literature is unanimous that any drafting process that relies on translation to the extent and in the manner that the federal Canadian government does in order to produce the French version of its statutes is bound to produce an unwarranted number of incongruities between the original English draft and the translation.

It was a significant observation of C.-A. Sheppard's study for the Royal Commission on Bilingualism and Biculturalism, based on an assessment of facts as at October 31, 1967, that

"... the universal practice is to draft all federal statutes in English and to translate them afterwards into French. There is no simultaneous drafting in both languages." 3

Of course, the obverse of the same coin is true in Québec, where statutes are drafted almost exclusively in French, to be translated later into English.⁴

What is apparent from the cases, though, is that the translator, who admittedly exercises a most respectable and demanding discipline, is not, as a rule, supervised effectively by the draftsman of the original version. If the draftsman were able to read and appreciate the translation, he would be able to exercise more control over it and ensure greater consistency between the French and the English. From experience, working in this way with a translator often has a positive effect on the quality of the original draft as well, in that unsuspected ambiguities discovered by the translator can be clarified by consultation and cooperation with the draftsman. The process of consultation should, of course, work both ways. As the drafting process now applies, it is apparent that most federal draftsmen whose task it is to produce important government

legislation do not have even a reading knowledge of French, or at least are not interested in using it, and much less, a general knowledge of civil law institutions. As a result, they are never in total control of the Bills for which they are responsible.

In his Rédaction et Interprétation des Lois, Me L.-P. Pigeon, C.R., as he then was, made a very telling comment on the necessity of the translator's active participation and collaboration in the drafting process:

"Rien n'est plus difficile que de déceler les ambiguïtés insoupçonnées. A cet égard, la traduction dans l'autre langue est extrêmement utile parce que celui qui regarde le texte de façon à l'exprimer dans une autre langue est beaucoup plus porté que l'auteur à percevoir ce genre d'ambiguïtés. C'est pourquoi, dans une bonne rédaction législative, il faut que le traducteur ait accès au rédacteur de façon à pouvoir lui signaler toutes les ambiguïtés que le texte peut recéler car, ces ambiguïtés, elles doivent disparaître. Si l'on ne se préoccupe pas de les faire disparaître par l'oeuvre du rédacteur, ce qui arrive c'est que souvent c'est le traducteur qui les élimine en optant pour l'un ou l'autre de deux sens possibles. Alors il fait oeuvre de législateur, et c'est ce qu'il ne doit pas faire. Il est arrivé assez souvent que les tribunaux ont interprété un texte voté par le Parlement canadien en adoptant le sens que révélait le texte français. Cependant, on sait qu'à Ottawa le traducteur n'a pas accès au rédacteur. Par conséquent, le texte français est présentement l'oeuvre du traducteur seul:

Chaque fois que ce texte a résolu une ambiguïté qui existait dans le texte anglais, c'est le traducteur qui a légiféré à l'insu du rédacteur." 5

This state of affairs continues basically unchanged today, over ten years later. The latest official data we have on this fact appears in the sixth report to Parliament of the Commissioner of Official Languages, which contains the results of a special study on the federal Justice Department. Basing his assessment on facts ascertained up to May 1976, Mr. Keith Spicer reports:

"It was in legislation that the most basic obstacles to the equality of the official languages appeared. Although the French versions of legislation have improved considerably, the general consensus was that, because bills are drafted initially in English, the French versions are still an embodiment of the Common Law approach, whereas they should not only encompass the principles of both Canadian legal systems but also reflect the intrinsic qualities of the French language." 6

The Commissioner went on to recommend a kind of affirmative action program, to be implemented by May 31, 1978, whereby the drafting of legislation would be performed equally in French as in English, preferably by a method he calls "joint drafting". 7
Of course, his recommendations do not have the force of law, and the drafting process of the federal

Justice Department is likely to remain fundamentally defective so long as the problem is not confronted and resolved on all practical fronts including manpower deployment, training of legislative draftsmen and the availability of work instruments, all of which are still basically anglophone.

If serious efforts are not made to ensure that francophone lawyers, the French language and the French version participate in a meaningful way at every stage of the drafting process, the kinds of technical problems of interpretation (canvassed in the present thesis) that in the past have had to be referred to the courts for solution are likely to continue to arise.

Concluding Questions

3. Retreating from a Bilingual Approach to Legislation

Whatever else the present thesis may have proved, and quite apart from the technical and institutional ameliorations suggested in this Part, it has left the present writer with the distinct impression that a legislative jurisdiction that has for some time institutionalized the use of two official language versions in its legislation will have great psychological and institutional difficulty in reverting to a unilingual regime, if the political climate should ever call for such reversion. The two leading instances in Canada, the Québec and the federal jurisdictions, are really obverses of the same bilingual coin. Neither jurisdiction, by merely passing a law, can escape the bilingual essence of its laws and the interpretative rules or approaches that naturally follow; for the same reasons that militate against any legislative attempt to interfere unduly in the interpretative function of the judiciary.

Part three documented a remarkable dependency by Québec counsel and judiciary on both versions

at times
and specifically on the English version to uphold
and safeguard the doctrine and tradition of the
civil law. Parts one and two likewise demonstrated
the very practical value at the federal level of
being able to have resort to a French version of
federal legislation, which often clarified the English
in such a way as to preclude the necessity for liti-
gation in the first place.

The English version in Québec and the French
version in anglophone Canada are not luxuries that
we can ill afford, but rather unseverable parts
of our national psyches that have imbued our legal
systems with a greater richness and guaranteed
their integrity better than a single language,
unaided, can ever be expected to. Where one version
fails, whether through a mistake of the legislator,
a drafting oversight, or a peculiarity of language,
to convey the true intention of the legislator,
the other version can be expected in most cases
to make that intention clear, effective and unassailable.

D. NOTES TO PART IV

D. NOTES TO PART IV

(Citations are shortened for the sake of convenience. See Table of Cases and Bibliography for complete legal citation. "T" references are cross-references to other pages of the present thesis.)

1. Bill C-202 is a private member's Bill introduced by Pierre De Bané, M.P. in the third session of the thirtieth Parliament to encourage the government to proceed with the next phase of bilingualism in Canadian institutions whereby French-Canadians would be guaranteed a functional presence in all Canadian institutions for which the federals have some responsibility, on the basis of an "equitable balance" that would be struck between the number of anglophones and francophones permitted to work out of those institutions. Bilingual staff and officers would be the rule, rather than the exception, with internal documents being drafted and circulated in English or French, but not both, according to the language choice of their respective authors and internal meetings being bilingual.
2. Ilbert stated, at page 208 of his Legislative Methods and Forms:

"The English legislature was originally constituted, not for legislative, but for financial purposes. Its primary function was, not to make laws, but to grant supplies It criticizes and controls the Administration at every step. Its legislative labours are not essentially of a scientific kind. It has never constructed, it will never construct, great codes."

He then detailed (pp. 229ff) quite ably the process through which Bills must pass, including the compromises and haste to which they are normally subject. He concluded that it is a marvel that the draftsmanship of English statutes is not much more defective than it already is.

The British Renton Report stated under the heading "Scrutiny of Drafting" (par. 18.26, p. 129):

"There is at present no formal machinery for the scrutiny of Bills during their passage through Parliament to examine their form and drafting."

The closest such machinery we have in Canada is the Standing Joint Committee on Regulations and other Statutory Instruments but, as its title implies, it limits its scrutiny to subordinate legislation, the form of which is only one small concern; moreover, the Committee is not involved at the crucial time when the legislation is being formulated.

The Renton Report concluded (par. 18.33, p. 131) that there was not any "practical scope for introducing a new scrutiny stage during the Parliamentary process", invoking the reasons of "undue strain" on the Parliamentary machine and added labours for the already overburdened draftsmen. One suspects the same conclusion would be reached here in Canada since, with two versions, the work would be doubly onerous. Parliament is mainly interested in the substance of the policy to which it will give effect. The formalities are basically left to the lawyers of the Department of Justice.

3. C.-A. Sheppard, The Law of Languages in Canada, par. 3.04, p. 111.
4. ibid., p. 117.
5. L.-P. Pigeon, Rédaction et Interprétation des Lois, p. 37.
6. Commissioner of Official Languages, Sixth Annual Report, p. 151.
7. ibid., p. 156.

Appendix

(Extract from opening statement made on the occasion of the defence of the preceding thesis, Friday, February 23, 1979, in the presence of the examining board, composed of Professor P.-A. Côté, University of Montréal, G.V. LaForest, Law Reform Commission of Canada, and the Hon. L.-P. Pigeon, Judge of the Supreme Court of Canada; the thesis supervisor, Professor E.A. Driedger and the Chairman, Dean H.A. Hubbard, Faculty of Law, Common Law Section, University of Ottawa)

You have obviously already read the thesis in detail and been provided with a summary of it. I have received your very instructive criticisms and observations on some of the inevitable deficiencies and lacunae in a work of this kind, for which I am most thankful.

I thought that, instead of rehashing what basically we know already and what has been expressed somewhat repetitiously in the thesis itself, it would perhaps be more useful now for me to try to establish for you a slightly different perspective, for the purposes of our discussion of the problems I have raised.

I felt the best way to do that would be to begin by explaining how the thesis came about, what my purpose was in writing it, and where it has led me now.

About seven years ago, I was force-fed my first course in statutory interpretation. It was called, appropriately enough, the "Interpretation of Statutes", and was meant to be an introductory course, where we learned much about the so-called rules of interpretation, the canons of construction, including the literal rule, the golden rule and the mischief rule. We learned how difficult it can be to pin down through objective analysis that very elusive "intention of Parliament", and we spoke of various aids to construction. Towards the end of the course, we dealt with a matter called "External Aids to Determining Parliamentary Intent", which included among other things, the Official Languages Act, or at least, rules enunciated by Dubois, Food Machinery, and one other case.

We learned, therefore, as a theoretical matter at least, that there did exist a rule of equal authenticity as between the two linguistic versions of the statutes and regulations of Parliament and the government of Canada. However, the exact effect or practical consequences of that rule were not readily apparent, and were not explained in any detail or brought to bear on the subject matter of the course as a whole.

Two years later, I enrolled in an elective course entitled the "Comprehension of Legislation", and it soon became apparent that, as between the "interpretation of statutes" and the "comprehension of legislation", there was a whole world of difference.

In that latter course, Professor Driedger succeeded in opening the eyes and minds of many of his students to a world that had previously been closed to them. The mystical incantations of a priori rules of interpretation were largely dismissed as misplaced or inapt in most practical situations to which legislation must be applied. In short, I perceived for the first time that legislation was accessible to me.

Now as you all know, Professor Driedger stresses the importance of context for the solution of legislative problems. Contextualizing the impugned words of a statute or regulation to determine the scope that the legislator had intended to give the words appealed to us as most eminently logical. Sadly, it took me all the years of law school before I was introduced to this rather simple thought, and before I was able to feel somewhat at home with legislation as a subject of serious study.

But the very premise of Driedger's logic troubled me: if the intent of Parliament could be ascertained only by reference to the widest possible and most relevant context, why was there no mention in his course or his writings of the role of the French version in this search for meaning, and of the hierarchy that might exist between the French version and these other contexts, let alone the hierarchy that suggested itself at times between the French and the English itself?

Naturally, I was perplexed by his silence on that issue, although I suspected the reason might be only too obvious, and by the end of the course, I was even more curious. Curiosity soon gave way to a kind of obsession with the issue, what you might call an example of a classic thirst for knowledge, since it did affect me, deeply, in my own professional concerns.

Fortunately for me, I chose to take an additional public law course that year, entitled the "Legislative Process". There I was given the opportunity for the first time to explore my thoughts on the status of French in the federal legislative process and in the judicial process of interpreting bilingual legislation. It was a particularly exciting

task for me because at that time the courts were seised with the now famous Jones¹ case attacking the constitutionality of the Official Languages Act and debating the meaning of section 133 of the B.N.A. Act itself. After writing the paper, I could not think of any more suitable title than "The Plight of Official Languages in Canada". Today, I would have it read more accurately "The Plight of Federal Law in our Legislative and Judicial Processes".

Of course, the limitations of time prevented a mere term paper from doing more than scratch the surface of a subject as vast as the one I had chosen. It was at that time that I resolved to complete the legislation programme offered here at the University of Ottawa and to attempt a thesis on the specific subject of interpreting Canadian bilingual legislation.

As a result of that intensive study, the product of which you have before you, although my previous conclusions have matured somewhat and become more nuanced with time, I have come to virtually the same overall conclusion as before, namely, that Canada in her institutions that were set up or continued in order to assure the proper administration of

federal law, has brought herself to the brink of what I perceive to be a legislative and judicial crisis, the dimensions of which are not yet wholly apparent.

The struggle in Québec by the Legislature to exercise its sovereign will in the area of the language of its own enactments, and the struggle by the judiciary of that province to defend themselves against intrusions by the Legislature into the language of their own processes is a CONSTITUTIONAL crisis, not a mere interpretative problem that the courts have to deal with on a daily basis. It indicates to me that there are very real problems with a rule that imposes equal authenticity in law where such authenticity is not reflected in any consistent legislative process, and where such authenticity is in practice wholly absent in the judicial processes, such as those engaged in by the courts of common law Canada when they supervise, construe and apply federal laws.

In this light, it is my view that the federal administration of justice has largely been stultified, insofar as that rule and those processes have not

evolved to the point where they could have been brought more into line with each other.

To my mind, it is a measure of the monumental irrelevance of recent discussions on constitutional reform by our politicians, and the profession at large, that studies to date (including those of the Victoria Conference, the 1972 Molgat-MacGuigan committee, the 1978 MacGuigan-Lamontagne committee studying Bill C-60, the Canadian Bar Association's Federal Court Report and its discussion in the summer of 1978 of its committee's report on the constitution, the Canadian Unity Task Force report and the last federal-provincial constitutional talks held here in Ottawa) have been largely silent on the question of the need for the Parliament and Government of Canada to have a more direct control on the proper administration of their own law. It appears from that silence that the question is somehow considered to be settled, by politicians of both federal and provincial governments, who content themselves with talk, largely within the existing institutional framework, of power swapping or provincial sharing of power within federal institutions as we know them. The question has hardly

been put as to the effectiveness of those institutions today in carrying out their intended purposes, or indeed the effectiveness and commitment of provincial institutions in common law Canada such as the provinces' superior and appellate courts, the provincial Bars and the law schools to guarantee the integrity of federal law and its proper administration.

Now, the better administration of federal law can only be assured where the legislator takes the means to express himself effectively, in laws that others are competent and committed to apply.

Parliament has, with the sanction of our highest Court, affirmed its desire to legislate in two languages, which it would have equally authentic. And yet, it persists in pursuing a largely unilingual English legislative process and relegating the application and supervision of its laws to provincial institutions unsuited to that purpose... The results on a reading of the present thesis are obvious: federal legislation is riddled with internal inconsistencies between its two "authentic" versions. Still, Parliament provides a rule of construction for its laws (because they are, like Québec's,

published in two languages) which, however logical a rule in theory, is inaccessible, inaccessible to the overwhelming majority of the profession outside Québec and to the very institutions called upon to apply it.²

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1. Jones v. Attorney-General of Canada et al.,
(1973) 35 D.L.R. (3d) 372 (N.B. C.A.);
(1974) 45 D.L.R. (3d) 583 (S.C.C.)
 2. See Part I, page 43 and note 99, page 61.

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