

Brooklyn Journal of International Law

Volume 29

Issue 3

SYMPOSIUM:

Creating and Interpreting Law in a Multilingual
Environment

Article 3

2004

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Recommended Citation

Pierre-Andre Cote, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 Brook. J. Int'l L. (2004).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol29/iss3/3>

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BILINGUAL INTERPRETATION OF ENACTMENTS IN CANADA: PRINCIPLES V. PRACTICE

*Pierre-André Côté**

I. INTRODUCTION

Canada's experience with the interpretation of bilingual laws goes back a long way. For example, the Civil Code of Lower Canada, which came into force in 1866, contained a provision to guide interpreters in the resolution of problems caused by differences in the French and English versions of the Code.¹ Canadian courts have established a method for dealing with problems of interpretation of bilingual laws by building on the experience of many generations of jurists.

Anyone wishing to become familiar with the interpretive method would normally turn to a textbook on statutory interpretation, like my colleague Ruth Sullivan's excellent fourth edition of Elmer Driedger's *Construction of Statutes*.² Professor Sullivan provides an accurate description of the way bilingual statutes ought to be interpreted, based on numerous judicial *dicta* and decisions, most from the Supreme Court of Canada

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1 Civil Code of Lower Canada § 2615 (1866) (Can.):

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 text, 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, that version shall prevail which is more consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining such intention.

Id.

2. RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES (4th ed. 2002).

and some going back to the 19th century.³ As accurate as that description may be, however, I believe Professor Sullivan would agree that it does not necessarily reflect how bilingual legislation is actually interpreted in day-to-day legal practice in Canada. In fact, there are few areas of Canadian law where the contrast between “law in the books” and “law in practice” is more obvious.

While applicable legal principles require a bilingual reading and interpretation of bilingual legislation, practitioners are usually satisfied with an unilingual approach to bilingual texts. The purpose of this Article is to substantiate and illustrate this assertion and to examine some of the reasons for this situation. To do so, it will first summarize briefly the legal principles governing the interpretation of bilingual legislation in Canada, and then examine the various ways in which legal practice deviates from these principles.

A. Principles

Canadian courts have, over the years, developed principles of interpretation addressing the unique challenges presented by legal norms enacted in two different but equal linguistic versions. From these principles flow a method for interpreting bilingual texts, which can be presented through four methodological principles.

1. First principle: Bilingual statutes should be given a bilingual interpretation.

The Canadian Parliament enacts legal texts, not legal norms. The rules or norms have to be constructed by the readers of those texts, taking into account numerous factors, starting, of course, with the text of the law. This process of constructing legal norms which starts by reviewing the text of the law is what I mean by “interpretation.”

Since both linguistic versions of bilingual legislation constitute authentic expressions of the law (in effect, it might be better to say that they form together but one bilingual and authori-

3. See *id.* at 73, 94.

tative text of the law),⁴ someone cannot claim to correctly interpret a bilingual legislative text if they ignore one half of the text being interpreted. Thus, bilingual legislation requires bilingual interpretation, that is, an interpretation that takes into account the complete text of the law, which includes both an English and a French version.⁵

If we could be sure that there were no discrepancies between the two versions, we could arguably make do with an unilingual approach to bilingual texts. Since these discrepancies are present and even unavoidable, the only conclusion is that the best and most prudent way to interpret bilingual legislation is to consider both versions.

2. Second principle: In interpreting bilingual statutes, both versions should be attributed the same importance or weight.

Not only are both versions of a bilingual statute or regulation authentic, they are also to be considered as *equally* authentic.⁶ Equality of both versions carries, of course, enormous symbolic significance: neither French nor English speakers want to be considered second class citizens. On a more practical level, what has been called the “equal authenticity rule” states that both versions should contribute equally to the meaning of a given provision.⁷ For example, even if one version is known to

4. See, e.g., Roderick A. MacDonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 160–61 (1997):

Just as drafters of bilingual legislation are engaged in the translation of a single juridical idea into two natural languages, interpreters would come to accept that knowledge of one version alone is an insufficient point of reference for understanding the idea in question. They would understand legislative texts as fully embracing both English and French connotations and contexts, and as necessarily meaning what both versions say. No longer would it be possible to speak of two texts being equally authoritative. To the extent that any formulation of a legal rule can be authoritative, it will be necessary to speak of one authoritative bilingual text in French and English.

Id.

5. See SULLIVAN, *supra* note 2, at 77–78.

6. See SULLIVAN, *supra* note 2, at 74–77 (emphasis added). See also *R v. Cie Imm. BCN Ltee*, [1979] 1 S.C.R. 865, 871 (acknowledging that § 8(1) of the 1970 Official Languages Act specified that both English and French versions of legislative enactments were “equally authentic”).

7. See SULLIVAN, *supra* note 2, at 74–77.

be simply a translation of the other, this is not, *per se*, an acceptable reason to give it less consideration.

3. Third principle: Discrepancies in the two versions are to be treated as any other ambiguity and, subject to the fourth principle, must be resolved by resorting to the usual method of interpretation.

Where the reading of both the French and English versions reveals differences of meaning, the problem should be approached as a problem of ambiguity. Even though, there are two linguistic versions, there can be but one valid rule associated with a given provision in relation to particular facts. A choice thus has to be made, and the version to be favored will be determined by taking into account all the factors usually relevant to the ascertainment of statutory meaning. In the conventional rhetoric of statutory interpretation, it is said that the version which best reflects the "intention of Parliament" should prevail.⁸

The "literal meaning" of each version still retains some relevance, in that the words used in both versions of the provision being interpreted will determine the semantic possibilities of the text.⁹ The "ordinary" or "technical" meaning, however, cannot be a factor in the selection of the best interpretation because, in cases of divergence, both versions, being of equal weight, cancel each other out as it were, at least at the textual level.¹⁰

4. Fourth principle: In case of discrepancies, the meaning shared by both versions, if one can be found, constitutes a factor which should be considered in the interpretation of the provision, in addition to all the other relevant factors.

When the two versions do not express the same thing, one should try to reconcile them. In order to do that, Canadian courts will look for the meaning that can be attributed indis-

8. Doré v. Verdun (City of), [1997] 2 S.C.R. 862, 879. See SULLIVAN, *supra* note 2, 87–90.

9. See SULLIVAN, *supra* note 2, at 74–77.

10. See *id.*

tinctively to the two versions, the meaning which is shared by the two, the meaning that is common to both of them.¹¹

Sometimes, such a meaning cannot be found, and the interpreter will have to forgo textual considerations and resort to other means of resolving the ambiguity.¹² In other cases, one version is ambiguous, equivocal, and the other is clear, unequivocal.¹³ The clear version should be preferred. In a third category of instances, one version has wider meaning than the other: the version with the narrower meaning, which is shared by both versions, would then be favoured.¹⁴

When a shared meaning can be found, it constitutes merely a supplemental factor in the search for the best meaning of the provision. It will, however, be ignored if it is felt that it does not correctly reflect the intention of Parliament.¹⁵

The four principles just described would most likely be followed today by the Supreme Court of Canada in attributing meaning to a bilingual statute. Interpretation, however, is not a monopoly of the Supreme Court's. Interpretation is part of the every day activities of jurists, and there are many reasons to believe that the method required by these principles is seldom followed in practice.

B. Practice

When a subject has been as well studied as the legally accepted method for interpreting bilingual legislation in Canada,¹⁶ research is made easy. The situation is different when dealing with law in practice. Unless you can rely on empirical research, the task is a lot more difficult.

To my knowledge, such empirical research into the interpretive practices of Canadian jurists simply does not exist. This absence is in itself surprising. Could it be that, as proud as we Canadians may be of the principles our courts have developed,

11. *See id.* at 81–87.

12. *Id.* at 90–92.

13. *Id.* at 82–83.

14. *Id.*

15. *Id.* at 87–90.

16. *See generally* SULLIVAN, *supra* note 2; *see generally* RÉMI MICHAEL BEAUPRÉ, *INTERPRETING BILINGUAL LEGISLATION* (2d ed. 1986); *see generally* PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* 323–32 (Katherine Lippel & Douglas J. Simsovic trans., 3d ed. 2000).

we are a bit embarrassed by the way these principles are in effect implemented in day-to-day legal practice? English-French bilingualism is a touchy matter in Canada, and certain subjects may be thought to be better left untouched.¹⁷

Absent such empirical research, I have had to draw, for this Article, on some 40 years of experience first as a law student and later as a lawyer and law professor in Montréal, on conversations with colleagues at the Université de Montréal and at the law firm with which I am associated and, obviously, I have drawn also on what I could find in books, essentially in law reports and law review articles. In a country as vast and diverse as Canada, this approach is obviously flawed in some way. One can safely say, for example, that the interpretation of bilingual legislation is bound to be conducted differently in Montréal and Toronto. One takes place in a largely bilingual environment where the majority is French-speaking and the other in a largely unilingual English-speaking community.¹⁸ Again, the day-to-day practice of bilingual interpretation by different jurists in the same linguistic, social and cultural environment may vary considerably as a function of individual linguistic skills and areas of practice.

My point of view is thus based largely on experience, intuition and educated guesses. This Article proposes hypotheses for further empirical research. I hope that, even in this form, it will be found useful.

In my opinion, the method of interpretation suggested by the four principles described earlier is seldom applied in Canadian legal practice. By legal practice, I am not referring only to interpretation by the courts: every time a meaning is attributed to an enactment by its reader, the text is being interpreted. Bilingual legislative texts are rarely interpreted in Canada according to the method identified by the courts as the method to be followed.

17. See, e.g., Thomas W. Simon, *Minorities in International Law*, 10 CAN. J.L. & JURIS. 507, 518 (1997).

18. See Statistics Canada, *Population by Knowledge of Official Language, Census Metropolitan Areas (2001)*, available at <http://www.statcan.ca/english/Pgdb/demo19b.htm> (last visited Feb. 28, 2004). In Montréal, 53% of the population knows both official languages and 91% of the population speaks French. *Id.* In Toronto, only 8% of the population knows both official languages and 96% of the population speaks English. *Id.*

The deviations from the principles observed in practice take essentially three distinct forms. There are many reasons to believe that, in the majority of instances, only one version is considered. This approach reflects what has been called “legal dualism.”¹⁹ In other instances, the version which is not the one in day-to-day use will be viewed only as an aid to interpretation. This is what I will call “occasional bilingualism.” Finally, when the two versions are considered, they may not be accorded the same weight. I will call this “unequal bilingualism.”

1. Legal dualism

The term “legal dualism” was used by Roderick MacDonald to describe a situation where official bilingualism translates, in practice, into two legal unilingualisms.²⁰ Paradigmatic instances of this situation would be an English-speaking lawyer in Vancouver using exclusively the English version of the Criminal Code of Canada, a bilingual federal statute, or a French-speaking lawyer in Québec City relying exclusively on the French version of the Civil Code of Québec, a bilingual Québec law. The method of interpretation favoured by this approach is simple: choose one version of the statute...and adhere to it, regardless of the outcome. The “other version” is completely ignored, creating a unilingual interpretation of a bilingual text.

At no time in my career have I been made more aware of legal dualism than one morning a little more than 20 years ago while I was preparing a lecture on a Supreme Court of Canada decision that was to become probably the leading case in modern Canadian Administrative Law.²¹ The case dealt with the question of judicial control of interpretations, by an administrative agency, of the statute the administrative agency was entrusted to apply. The Supreme Court decided that the text interpreted by the agency was ambiguous (there were, in the opinion of the Court, at least four different interpretations that could be sustained), that there was not one interpretation that could be said to be “right” and that since the conclusion arrived at by the agency was not “so patently unreasonable that its construction

19. See MacDonald, *supra* note 4, at 154.

20. *Id.*

21. C.U.P.E. v. N.B. Liquor Corporation, [1979] 2 S.C.R. 227.

cannot be rationally supported by the relevant legislation," intervention by the Court was not warranted.²²

Since I teach in French, I naturally was preparing my lecture by reading the French version of the Court's decision, which contained the official French version of the Province of New-Brunswick statute being interpreted.²³ Reading the French version many times, I simply could not find the ambiguity at the center of the controversy, and for good reason: the French text was unequivocal...but nobody seemed to have noticed, not even the members of the Supreme Court.

It is true that case was decided 24 years ago and a unilingual reading of a bilingual statute would certainly not happen today at the Supreme Court level. Recent experience shows, however, that it is still the practice of some lawyers and judges, even at the appellate level, to rely on one version only. In the recent case *R. v. Mac*,²⁴ the Supreme Court of Canada, realized that the French version of the Criminal Code of Canada (a federal and thus bilingual statute) had not been considered in the courts below. The Court rescheduled the hearing in order for the parties to make submissions taking into account the French version. The Court eventually ruled by giving considerable weight to that version.

To reduce the possibility of parties before the Supreme Court simply ignoring one version of a bilingual legislative text, the new *Rules of the Supreme Court of Canada* enacted in April 2002 now require the reproduction in the factum and in the book of authorities of both versions of all legislative texts that, by law, have to be printed in both languages.²⁵ When the Supreme Court has to resort to its rule-making powers in order to incite litigants to take into account both versions of bilingual legislative texts, one can easily imagine what goes on in everyday legal practice.

Among the causes of legal dualism, MacDonald identifies what he calls "rampant unilingualism among legal elites."²⁶ To

22. *Id.* at 237.

23. This official nature of the French version flowed at the time from the Official Languages of New Brunswick Act, R.S.N.B. ch. O.1 (1973)(Can.).

24. *R. v. Mac*, [2002] 1 S.C.R. 856.

25. Rules of the Supreme Court of Canada, SOR/DORS/2002-156, C.Gaz., pt. II, vol. 136, no. 9, s. 42(2)(b) (April 24, 2002).

26. MacDonald, *supra* note 4, at 156.

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interpret bilingually bilingual texts, it evidently helps to have at least a passive knowledge of French and English. As the following table published by Statistics Canada indicates,²⁷ bilingualism in Canada is generally not at a high level, except in the two provinces of Québec and New-Brunswick, where members of the French-speaking minority are concentrated.

English-French Bilingualism				
	1971	1981	1991	2001
Canada	13.4%	15.3	16.3	17.7
Newfoundland and Labrador	1.8	2.3	3.3	4.1
Prince Edward Island	8.2	8.1	10.1	12.0
Nova Scotia	6.7	7.4	8.6	10.1
New Brunswick	21.5	26.5	29.5	34.2
Québec	27.6	32.4	35.4	40.8
Ontario	9.3	10.8	11.4	11.7
Manitoba	8.2	7.9	9.2	9.3
Saskatchewan	5.0	4.6	5.2	5.1
Alberta	5.0	6.4	6.6	6.9
British Columbia	4.6	5.7	6.4	7.0
Yukon Territory	6.6	7.9	9.3	10.1
Northwest Territories	6.1	6.0	6.1	8.3
Nunavut	–	–	–	3.8

A comparison of metropolitan areas by language of population confirms the vast differences between, for example, Toronto, where the level of bilingualism stands at 8%, Vancouver, where 7.5% of the population is bilingual and Montréal, where bilingualism stands at 53%.²⁸

27. Statistics Canada, 2001 Census, English-French Bilingualism, available at www.12.statsca/english/census01/teacher's_kit/activity8_table5.cfm (last visited Apr. 2, 2004).

28. Statistics Canada, 2001 Census, Population by knowledge of official language, census metropolitan areas, available at www.statscan.ca/english/Pgdb/demo19b.htm (last visited Apr. 2, 2004).

Now, one may argue that these statistics do not reveal the level of bilingualism in the legal profession, where, it can be surmised, practitioners tend to be more educated and bilingualism more important considering, in particular, its role in legislation. It is not easy to obtain information about the language characteristics of the Canadian legal profession. The best I have been able to do is to look at the membership of the Canadian Institute for the Administration of Justice,²⁹ which, as of August 26, 2003, had 1,054 members, 55% of which are judges of various Courts in Canada, the rest being essentially members of the Bar from across Canada.

Among those 1,054 members, 799 (76%) declare themselves to be English-speaking. Of that number, 46, or 6%, are bilingual. Of the 255 French-speaking members (24% of the total membership), 161 or 63% are bilingual. The hypothesis that bilingualism is more frequent in the legal profession than in the general population is true of the French-speaking jurists, but not for the English speakers.³⁰

The nature of the tools Canadian practitioners use on a daily basis to access the text of legislation constitutes a cause as well as a consequence of legal dualism. In English Canada, the French version tends to be omitted from annotated codes and statutes. If you open, for example, any edition of the celebrated *Martin's Annual Criminal Code*,³¹ you will not find anywhere the French version of the Criminal Code or of related statutes, although all were bilingually drafted, adopted and published, and even though those texts are all supposed to be subject to a bilingual method of interpretation. The same could be said for most annotated federal or constitutional statutes published in English Canada.³²

29. For more information on the Canadian Institute for the Administration of Justice, see <http://www.ciaj-icaj.ca>.

30. I wish to thank Mrs. Christine Robertson, executive director of Canadian Institute for the Administration of Justice for this information.

31. EDWARD L. GREENSPAN, Q.C. & MARC ROSENBERG, *MARTIN'S ANNUAL CRIMINAL CODE 2004* (2004).

32. See, e.g., L. W. HOULDEN & GEOFFREY B. MORAWETZ, *THE 2003 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT (2003)*; MAHMUD JAMAL & MATTHEW TAYLOR, *THE CHARTER OF RIGHTS IN LITIGATION (2003)*.

French-speaking authors tend to publish federal and Québec codes and statutes in both languages,³³ although there are more and more exceptions.³⁴ In 1977, the Québec government ceased to publish the French and the English versions of its statutes side-by-side, so bilingual interpretation of Québec statutes has since then become more difficult. However, commercial publications of bilingual editions of the Civil Code, of the Code of Civil Procedure and of other statutes in some measure alleviate the problems created by the physical separation of the French and English versions in governmental publications.

When a lawyer works in daily practice with the unilingual text of a bilingual statute, an interpretation process resting on both official versions is not necessarily excluded, but chances are that approach will not be resorted to except where special circumstances require it. I call this “occasional bilingualism.”

2. Occasional bilingualism

Interpretive principles require that bilingual interpretation be systematic. Since both versions should serve as a starting point for construction of legal norms, both have to be taken into account every time a statute is given meaning. In everyday practice, however, and this certainly characterizes the approach dominant in the bilingual environment of Montréal, only one version is in daily use and the other version is looked at occasionally, when special circumstances seem to justify it. This happens, notably, when there is a need for confirmation of the meaning of the dominant version, or when that version’s meaning is doubtful and requires clarification. It goes without saying that this approach is encouraged when the French and English versions are not published side-by-side, but in separate documents.

The law firm where I act as counsel has an important municipal law practice. Municipal legislation is within the jurisdiction of the province.³⁵ Québec municipal legislation is first

33. *See, e.g.*, YVON MARTINEAU, *MANUEL DES CORPORATIONS DU QUÉBEC* [MANUAL OF QUÉBEC CORPORATIONS] (1994); GEORGE T. ROBIC, ET. AL. *CANADIAN COPYRIGHT ACT ANNOTATED* (2003).

34. *See, e.g.*, THERIAULT & FORTIN, *DROIT DES VALEURS MOBILIÈRES* [THE LAW OF TRANSFERABLE SECURITIES] (2001).

35. *Constitution Act 1867* (U.K.), 30-31 Vict., ch. 3, s. 92(8).

drafted in French and then translated into English.³⁶ Lawyers practicing municipal law tell me that they tend to use the French version in daily practice, but, since they are generally bilingual, that they will turn to the English version only when special circumstances justify it.

There is reason to think that this opportunistic use of bilingualism is not limited to Québec jurists. Many years ago, as I was reading a law review article about the interpretation of the then recently enacted Canadian Charter of Rights and Freedoms,³⁷ I was shocked to read that, among the sources the author said one could look at to assist in the interpretation of the Charter, the French version of the Charter figured in sixth place!³⁸ This is especially troubling, considering that the English and French versions of the Charter are declared to be “equally authoritative” by Section 57 of the Constitution Act, 1982.³⁹

The recourse to the other version simply as an aid to interpretation can be criticized as not being compatible with the equal authenticity rule, but one wonders whether a systematic bilingual approach is possible in daily legal practice. Even where knowledge of both official languages is not an obstacle to a bilingual method, it seems that, inevitably, one version will tend to dominate and the other will be relegated to an auxiliary role. This reflects a kind of practitioner’s custom or working habit which is very hard to change. If we take as an example the interpretation of Québec municipal legislation, the statutes are drafted in Québec City in French in a French-speaking environment.⁴⁰ The texts are discussed in the Québec National

36. LUC GAGNÉ, *LE PROCESSUS LÉGISLATIF ET RÉGLEMENTAIRE AU QUÉBEC* [THE LEGISLATIVE AND REGULATORY PROCESS IN QUÉBEC] 29–31 (Yvon Blais ed., 1997). Nicole Fernbach, *Getting the Message Across in Languages Other than English: The Canadian example* [sic], Presentation to the Fourth Biennial Conference of the PLAIN Language Association International (September 27, 2002) at <http://www.nald.ca/PROVINCE/ONT/PLAIN/message/1.htm>.

37. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

38. Robin Elliot, *Interpreting the Charter—Use of Earlier Versions as an Aid* U.B.C.L. REV. (Charter Edition) 11, 12–13 (1982).

39. CAN. CONST. (Constitution Act, 1982) pt. VII (Canadian Charter of Rights and Freedoms), §57.

40. GAGNÉ, *supra* note 36, at 29–31.

Assembly in their French version only.⁴¹ The English version is a translation. The practitioner working with the French version of the Cities and Towns Act,⁴² for example, knows this. What is the incentive to look systematically at the English version? Either it says the same thing as the French, and it may be seen as useless, or it contradicts the French, and it is possible that the French version will be preferred by a court as being the original and thus best version.

One thing seems sure: if occasional bilingualism did not work well in practice, it would very likely be abandoned. Occasional bilingualism may be an error, but *error communis facit jus*. The same could be said of the unilingual interpretation of bilingual texts in many parts of Canada: as long as everybody in a given milieu ignores the French or the English version, there is no real practical problem.

I have just hinted at the possibility that the Québec Courts may favour the original version of a statute over its translation. This illustrates the third manner in which practice may deviate from principles.

3. Unequal bilingualism

The French and English versions of Canadian bilingual legislation are supposed to be equally authoritative.⁴³ To this equality at the normative level, however, does not always correspond an equality at the factual level.

For example, it would seem obvious that when a text was first conceived in one linguistic version, then drafted, discussed in Parliament and adopted in that version, the other version being simply a translation of the final draft, more weight in interpretation to the version considered as the original will usually be given. As Roderick MacDonald points out, legal bilingualism is not really compatible with the production of dual versions by a process of translation.⁴⁴ Even when both versions have been drafted as originals, the simple fact that the ministerial in-

41. Debates of the Québec National Assembly can be consulted at www.assnat.qc.ca.

42. City and Towns Act, R.S.Q., ch. C-19 (Can.).

43. See *supra* note 7 and accompanying text (discussing the equal authenticity rule).

44. See MacDonald, *supra* note 4, at 148.

structions preceding the drafting process result from discussions that have taken place in one language only and are themselves drafted in that language will be detectable by interpreters, who will accordingly tend to attach more weight in their approach to the statute to the version drafted in the language of the ministerial instructions.⁴⁵

The process of ordering both versions in terms of their reliability or persuasive weight is rarely apparent in case law, because it contravenes the equal authenticity principle, but it is not completely absent. In one of the leading cases on the interpretation of bilingual legislation, *R. v. Compagnie Immobilière B.C.N.*, the Supreme Court compared the wording of the French and English versions of a federal tax regulation.⁴⁶ At the time, the French version of those regulations as well as the French version of the Income Tax Act⁴⁷ were translations of the original English version. In giving precedence to the English version, the Court underlined the fact that, while the English version of the Act used consistently the same words in relation to the problem before the Court,⁴⁸ the French version used different words in a seemingly arbitrary fashion.⁴⁹ This was sufficient to suggest that the French version, although official, was unreliable and should not prevail in cases of conflict with the English version.

More recently, the Supreme Court issued its first decision interpreting the new Québec Civil Code⁵⁰ in the case of *Doré v. Verdun (City of)*.⁵¹ Section 2930 of the Code contained a divergence between the French and English versions.⁵² The Québec Court of Appeal had given precedence to the French version.⁵³

45. *See id.*

46. *R. v. Compagnie Immobilière B.C.N.*, [1979] 1 S.C.R. 865.

47. Income Tax Act, R.S.C. ch. 148 (1952)(Can.).

48. *See Compagnie Immobilière B.C.N.*, [1979] 1 S.C.R. 865, 870–77 (discussing the expressions “disposition,” “proceeds of disposition,” and “disposed of”).

49. *Id.* at 871–74 (noting that in section 20 of the English version of the Income Tax Act, the expression “disposed of” appeared thirteen times. In seven of those occurrences, the French equivalent was “*disposé*,” and in six, “*aliéne*.”)

50. Civil Code of Québec, S.Q. ch. 64 (1991)(Can.)

51. *Doré v. Verdun (City of)*, [1997] 2 R.C.S. 862.

52. *Id.* at 880.

53. *Id.* at 878–79.

As one of the reasons for this choice, the appellate judge stated that the English version of the Code was “merely a translation” of the original French version, a translation that “did not meet with everyone’s approval” and suggested that it should not be given equal weight because of its unreliability, citing the well known Italian aphorism: *Traduttore, traditore* (Translator, traitor).⁵⁴ This approach was clearly rejected by the Supreme Court of Canada, where Mr. Justice Gonthier, while acknowledging that it was “unfortunately true” that the English version of the Code was a translation, stated that this fact could not be used to set aside an argument based on that version because to do so would be incompatible with the equal authenticity and equal status of both versions mandated by the Constitution.⁵⁵

The fact that a version does not appear to be as reliable as the other because it is a translation is probably not the only circumstance where unequal bilingualism may be encountered. Some areas of Canadian law are inextricably linked by history with one language and even if both linguistic versions are drafted as originals, one version will tend to dominate. According to professor (and now dean) Nicholas Kasirer of McGill University, “the Anglo-Canadian tradition in criminal law is deeply rooted in the English language” and the application of the equal authenticity principle in this area of Canadian law “is a myth that no-one really believes, but that everyone swears by.”⁵⁶ Québec criminal lawyers are quite aware of this, and colleagues who teach criminal law in French tell me that they feel the English version of criminal legislation tends to dominate even in the French-speaking interpretive environment.

Considerations of fairness may also impact on the weight given to a linguistic version of a statute. For example, Canadian Law recognizes the importance of giving citizens fair notice as to what conduct is prohibited under pain of criminal penalty.⁵⁷ Canadian Constitutional Law also considers that lack of

54. Verdun (City of) v. Doré, [1995] R.J.Q. 1321 at para. 24.

55. Doré v. Verdun (City of), [1997] 2 R.C.S. 862, 878–79.

56. Nicholas Kasirer, *The Annotated Criminal Code en Version Québécoise: Signs of Territoriality in Canadian Criminal Law*, 13 DALHOUSIE L.J. 520, 553 (1990).

57. See generally R. v. McIntosh, [1995] 1 S.C.R. 686.

fair notice may invalidate a statute that is excessively vague.⁵⁸ In a criminal trial, if the version drafted in the language of the accused does not reveal an offense while the other does, a judge might well feel justified, on grounds of fairness, in giving precedence to the version the accused, his lawyer, the jury, and eventually, the judge himself, are able to read and understand.

The Supreme Court of Canada has recently decided a case from Québec⁵⁹ where the French version of the Criminal Code described an offense more narrowly than the English one, with the result that the conduct of the accused could be seen as being prohibited by the English version, but not by the version drafted in the language of the accused, a French-speaking resident of Québec City. Even though, in the opinion of the Court, the English version best reflected Parliamentary intent and the French version contained a drafting error, the French version was preferred, essentially on grounds of fairness.⁶⁰

II. CONCLUSION

At first glance, the state of bilingual interpretation of statutes in Canada seems to be a cause for concern. The recommended method for giving meaning to bilingual statutes appears to be rarely followed in everyday legal practice. I believe, however, that this situation, though it could certainly be made better, is understandable.

First, it must be remembered that bilingual drafting of statutes reflects a constitutional or legal policy of making written law equally accessible to English-speaking and French-speaking Canadians. Equal authenticity says to members of both language-groups that they are entitled to rely on the version written in their own language. Bilingual drafting is premised on the fact that a majority of Canadians are either French or English-speaking and suggests that members of both language groups are entitled to rely exclusively on the version drafted in their own language.

The principles developed by the courts, however, state that the best way to give meaning to a bilingual statute is to take

58. See generally *R. v. Pharmaceutical Society* (Nova Scotia), [1992] 2 S.C.R. 606.

59. *R. v. Daoust*, [2004] S.C.C. 6.

60. See *id.* at paras. 35 and 37.

both versions as a starting point, which requires some degree of bilingualism on the part of the interpreter. One cannot fault the courts for arriving at the conclusion that the best and most prudent way to interpret bilingual legislation is to give equal consideration to both texts. How could they decide otherwise? The idea that the language of the parties would determine which version the courts should consider in giving meaning to a text is untenable, because it means that in the case of discrepancies, there would in fact be two valid rules that could be constructed from a single provision, and, furthermore, that these rules would apply differently depending on the language spoken by the Canadian in question.

Is there a way to reconcile the reality of a mainly unilingual legal profession with the requirements of institutional bilingualism? Maybe the solution is to think of the judge-made principles relating to the interpretation of bilingual statutes not as stating conditions for an interpretation to be valid, but as simply suggesting the best way to proceed. Interpretation by the Courts and interpretation in day-to-day legal practice take place under vastly different conditions. The constraints of time, money and limited human resources and skills that characterize everyday or routine interpretations are rarely present in judicial interpretation, especially at the highest levels.

For example, Canadian courts have recently accepted the view that examining Parliamentary or legislative history is an appropriate way of interpreting statutes, as it may give useful insights into the context surrounding the adoption of a given text. One can certainly assert that an interpretation which takes into account the Parliamentary history of a provision is to be preferred to one that ignores it, but this does not justify the conclusion that an interpretation which is arrived at without having resort to this kind of information is necessarily invalid or improper. The same could be said for a great number of elements that are considered relevant to the interpretation of a statute, like the previous state of the law, the content of related legislation and doctrinal writings on the interpretation of a specific provision.

All information comes with a cost, and practitioners will tend to balance this cost against the perceived advantages provided by the information eventually obtained. The result of this balancing operation will evidently vary widely based on circumstances. From judicial interpretation, especially at the appel-

late level, we expect the best level of information to be brought to bear on the results, and a lawyer preparing a factum for the Supreme Court of Canada on the interpretation of a statutory provision would be well advised not to ignore any element considered relevant by the Court, including, evidently, the two versions of the statute.

This situation is very different from what happens in routine interpretations during daily legal practice. The constraints of everyday practice simply do not allow for the gathering of the same quantity of information as what may be considered to be the best. Practitioners must often be content with a satisfactory level of information, with what is “good enough” as opposed to what is best. More often than not, this may mean that only one version of a bilingual statute will be considered, but when the meaning of that version seems in need of confirmation or clarification, the other will be consulted if the cost of doing so is perceived to be reasonable in comparison with the advantages. This cost will vary, notably, with the linguistic skills of the interpreter and whether the other version is easily accessible. The perceived advantages will depend in particular on the value the environment in which the interpretation occurs places on a bilingual approach to statutes.

Mainly because of the linguistic characteristics of the interpreters and of the working habits of the legal profession, the assignment of meaning to bilingual statutes in Canada is, in my opinion, only exceptionally done by a systematic and careful examination of both French and English versions. The gulf between theory and practice thus runs deep and, given the obstacles in the way of a truly bilingual approach to statutes in everyday legal practice, there is little reason to believe that this situation will change significantly in the foreseeable future, despite the real efforts of the Supreme Court of Canada to promote such a change.