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AUTHORING BILINGUAL LAWS: THE IMPORTANCE OF PROCESS

*Donald L. Revell**

I. INTRODUCTION

Passing legislation is serious business. The task is rendered more difficult in those jurisdictions that enact their legislation in multiple languages. In such jurisdictions, complicated questions concerning statutory interpretation are amplified by possible discrepancies between or among the dual or multiple texts. The most serious question is the validity of each document. Some might argue that only the source document, assuming there is one, of a bilingual or multilingual document is truly authentic and that in the event of differences in interpretation, one should look to the source text for the “true” meaning as all other versions are “mere” or “simple” translations. This would at least be the case where there is a constitutional or statutory requirement for preferring one version over another. However, this method defeats principles of equality.

Alternatively, others argue that if a government acts in more than one language, then its acts should be taken as authentic in all the languages in which it acts. This is the position in Canada.¹ But, what is the best process by which to make legally

* Chief Legislative Counsel, Toronto, Ontario Canada. This is not an academic paper in the traditional sense. Much of what I have to say is a reflection of my personal experience. While some of it is in textbooks and other source materials, I have not relied on outside sources other than where noted. The views expressed are mine. They do not represent the views of the Government of Ontario or the Legislative Assembly of Ontario. For their assistance with the final draft of this paper, I thank David Halporn, Legislative Counsel, of my office, and Elaine Jewkes, my Administrative Coordinator. © The author retains copyright in this paper.

1. Professor Pierre-André Coté and Professor Ruth Sullivan deal with some of these matters in papers published elsewhere in this issue of this journal. See Pierre-André Coté, *Bilingual Interpretation of Enactments in Canada: Principles vs. Practice*, 29 BROOK. J. INT'L. L. 1067 (2004); Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOK. J. INT'L. L. 985 (2004). See also RUTH SULLIVAN, STATUTORY INTERPRETATION 91 (1997); RUTH SULLIVAN, SULLIVAN AND DREIDGER ON THE CONSTRUCTION OF STATUTES ch. 4 (4th ed. 2002).

equal bilingual legislation that minimizes discrepancies between the documents?

The province of Ontario has successfully written bilingual legislation since 1978. It began by translating key English statutes into French, and since 1991 all public general legislation has been enacted in bilingual form through the translation method. However, in order to fully understand the process by which bilingual legislation is authored, it is necessary to comprehend the larger picture of the entire legislative process.

Therefore, this Article will first review Ontario's overall legislative process. It will then examine in-depth the bilingual authoring processes of Ontario's Office of Legislative Counsel, followed by a discussion of two alternative models of bilingual legislation production – the co-drafting model and the double-drafting model. Finally, it will consider the importance of credibility in the bilingual authoring process and some of the factors that affect such credibility.

II. ONTARIO'S LEGISLATIVE PROCESS

Ontario follows the Westminster or British model of government.² The executive (cabinet) is chosen from the members of the majority party in the Legislature.³ While members of the opposition and government backbenchers⁴ may introduce bills, only a small percentage of such bills pass into law. Conversely, a majority of the bills introduced by the executive are usually

2. Despite following the British model, all Canadian provinces and territories have unicameral legislatures, while Canada's federal parliament is bicameral. See *Provincial Government*, in *The Canadian Encyclopedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006533> (last visited Apr. 27, 2004) (providing general information on Canada's federal government system).

3. See J.E. Hodgetts, in *The Canadian Encyclopaedia* at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0001149> (last visited Apr. 27, 2004).

4. See WIKIPEDIA (Mar. 22, 2004), at <http://en.wikipedia.org/wiki/Backbencher> (last visited Mar. 28, 2004) ("A backbencher is a Member of Parliament or a legislature who does not hold governmental office and is not a Front Bench spokespersonship in the Opposition.").

enacted.⁵ Furthermore, only cabinet ministers may introduce taxing and spending measures.⁶

From my experience,⁷ Ontario's legislative process is the model followed by the common law jurisdictions of Canada.⁸ It can be described as a series of three cycles each of which begins

5. For example, in 2001, 117 Private Members Public Bills (PMBs) were introduced, but only nine passed into law. On the other hand, forty-four Government Bills were introduced and twenty-four were enacted. Of the nine PMBs, seven were introduced by "backbench" members of the governing Conservative Party. Only one bill introduced by a Liberal member and only one introduced by the New Democratic Party were enacted. Statistics on file with author.

6. Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 54 (Eng.) (formerly known as the British North America Act, 1867); Legislative Assembly Act, R.S.O., ch. L-10, § 57 (1990) (Can.); LEGISLATIVE ASSEMBLY OF ONTARIO, STANDING ORDERS OF THE LEGISLATIVE ASSEMBLY OF ONTARIO para. 56 (Nov. 1999), available at http://www.ontla.ca/documents/standing_orders/out. This system is considerably different from that in the United States, where individual legislators have the power to introduce legislation. See U.S. CONST. art. I, § 1.

7. The author has been legislative counsel for the Province of Ontario, Canada since 1977. In 1986, he became Chief Legislative Counsel for Ontario with responsibility for the province's legislative drafting and translation services. He has drafted bills and regulations for virtually every ministry within the Ontario Government and has provided advice to the Speaker of the Assembly, government ministers and senior officials. Between 1986 and 1991, he was responsible for the completion of the first translation of Ontario's statutes (described below in this paper). He has been special advisor to the Deputy Minister of Justice of Nunavut, in which capacity he was responsible for the creation of Nunavut's legislative drafting and translation services. He has also been a consultant on legislative translation projects in Estonia and Latvia. He has taught on legislative drafting and process at York University and the University of Toronto and at numerous seminars. He has taught for several years on legislative translation and translation processes at the International Legislative Drafting Institute at the Public Law Centre, Tulane University, New Orleans. He has been the executive lead on the e-Laws project (www.e-Laws.gov.on.ca), which provides French and English access to the law of Ontario, for five years.

8. Canada has nine common law provinces and three common law territories. The Province of Québec is a civil law jurisdiction. The federal government, which has jurisdiction over all provinces and territories, now claims to be bijural, i.e., both common law and civil law in its orientation. Québec follows a different model in its legislative process that, as I understand it, is based on the system followed in many civil law jurisdictions. See generally SIR WILLIAM DALE, LEGISLATIVE DRAFTING: A NEW APPROACH (1977) (offering an excellent comparative analysis of legislative drafting in the United Kingdom, France, Germany and Sweden).

and ends with a ministry.⁹ These cycles are: the policy cycle, the authoring cycle and the Assembly cycle. I will describe each in turn.

A. *The Policy Cycle*

The first cycle in the legislative process is the policy cycle. Regardless of where the idea for a bill originates, the idea will be developed by a ministry's public servants into a policy proposal that sets out the need for legislation, the alternatives and staff recommendations. The minister responsible for that ministry must approve the policy proposal for it to proceed. If the minister approves, it is submitted to Cabinet Office,¹⁰ where it will be forwarded to one or more of the committees of cabinet¹¹ for review. The ministry staff will consult with stakeholders at this stage. The cabinet committees are made up of cabinet ministers and are supported by experienced staff who analyse the proposal. The submission is considered in light of overall government policy, program needs and cost, and the legal and political implications. If a committee wants, it may refer a submission back to the ministry for further information or turn it down. After committee approval, the submission will go to full cabinet for discussion and approval. Again, it can be returned to the ministry for further work, turned down or approved. If

9. Each ministry is headed at the political level by a minister of the Crown and at the bureaucratic level by a deputy minister. *See* R. MACGREGOR DAWSON, *THE GOVERNMENT OF CANADA* 260 (4th ed. 1963, revised by Norman Ward). The government acts through its ministries. They are the operational level of the government. Although headed by a politician, each ministry is staffed by career public servants who are expected to function in a politically neutral manner.

10. Cabinet office provides administrative support and policy analysis to cabinet. *See generally id.* chpts. 10, 11 & 12.

11. Cabinet is composed of the political heads of each of the government ministries (or departments) and is headed by the premier or prime minister. Cabinet determines overall government policy. Ministers are bound by a convention known as cabinet solidarity. Once policy has been decided, all ministers must support the policy or, in theory, resign. Cabinet requires that a draft government bill be approved by it before a cabinet minister introduces the bill in the legislature. *See* Public Service Commission of Canada, *supra* note 2; OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, *HOW A GOVERNMENT BILL BECOMES LAW (PRE-LEGISLATIVE STAGES)*, at <http://www.ontla.on.ca/library/billsresources/prelag.pdf> (last updated Mar. 2004).

cabinet approves, it issues a minute authorizing the ministry to proceed to the drafting or authoring cycle of the legislative process.¹²

B. The Authoring Cycle

Once the policy cycle is complete and the proposed legislation is approved for drafting, the authoring cycle begins. During the authoring cycle, the legal advisors to a ministry that needs legislation drafted¹³ come to the Office of Legislative Counsel¹⁴ with the cabinet minute containing the high level drafting instructions and the policy submission containing more detailed information on the proposed legislation. It is the function of the Office of Legislative Counsel to author a bilingual bill from these instructions. The process, which will be described in greater detail below, is iterative and requires close teamwork between the drafters and the legal advisors to the client ministry. In addition to its legal advisor or advisors, the ministry team will

12. I prefer the word “authoring” to “drafting” to describe the overall process followed by the Office of Legislative Counsel. In traditional terminology, we draft in English and translate into French. At the end of the day, we end up with one bilingual text that is equally official in English and French. Authoring seems like a neutral approach to describe the overall process used to create bilingual text.

13. The Office of Legislative Counsel considers any ministry for which it is drafting legislation to be a “client ministry.”

14. In Ontario, the Office of Legislative Counsel is the central authoring office for all government bills and regulations. See OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A GOVERNMENT BILL BECOMES LAW (PRE-LEGISLATIVE STAGES), at <http://www.ontla.on.ca/library/billsresources/prelag.pdf> (last updated Mar. 2004). The Office of Legislative Counsel also authors private members’ bills for members of the assembly and advises on the drafting of private bills. See OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A PRIVATE MEMBER’S PUBLIC BILL BECOMES LAW, at <http://www.ontla.on.ca/library/billsresources/pmpbill.pdf> (last updated Aug. 2, 2001); OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A PRIVATE BILL BECOMES LAW, at <http://www.ontla.on.ca/library/billsresources/prbill.pdf> (last updated Aug. 2, 2001) [hereinafter HOW A PRIVATE BILL BECOMES LAW]. See generally OFFICE OF THE LEGISLATIVE ASSEMBLY OF ONTARIO, HOW A BILL BECOMES LAW (2004), at <http://www.ontla.on.ca/library/billsresources/hbblhome.htm> (last visited Mar. 28, 2004) (providing an overview of the various types of bills in Ontario). The Office of the Legislative Assembly is also responsible for the legislative database and for desktop publishing of bills, regulations and statutes. See e-Laws, at <http://www.e-Laws.gov.on.ca> (last modified Mar. 7, 2004) (providing electronic access to these laws).

also include policy and operations personnel and may include outside advisors; however, normally only the legal advisor will attend drafting meetings. The process also requires close teamwork between the drafters and the members of the translation team. When the draft bill is ready, the client ministry is responsible for forwarding it to Cabinet Office together with a cabinet submission that describes the bill and notes any deviations from the approval minute authorizing the drafting. The documentation then goes to the Legislation and Regulations Committee of Cabinet¹⁵ where it is reviewed for compliance with the minute and for further consideration of policy and financial implications. The committee may request drafting changes or more information on the draft. If the committee approves the draft, it goes to the full cabinet for approval. Again the full cabinet may request changes or it may decide not to proceed. However, approval is normally given for the minister to introduce the bill in the Assembly, with or without changes.

C. The Assembly Cycle

In the assembly cycle, the minister of the ministry for which the bill was drafted moves first reading.¹⁶ After the bill has been printed, it will be called for second reading, which entails approval in principle.¹⁷ At this stage, the debate can be far ranging.¹⁸ If the bill passes second reading it may be referred to a standing committee or to the committee of the whole house for clause-by-clause consideration.¹⁹ Any member of the committee may move amendments unless the amendments impose a tax or

15. This committee has had its name changed from time to time, but its functions have remained the same throughout the author's career. See Donald L. Revell, *Rule-Making in Ontario*, 16 LAW SOCIETY GAZETTE 350, 358–61 (1982).

16. In the Westminster system each bill must receive three “readings” before it can become law. A reading is a formal step accomplished on the motion of the person who introduced the bill. Only the motion is read – not the actual bill. I am not aware of a government bill ever being defeated at first reading.

17. See, e.g., LEGISLATIVE ASSEMBLY OF ONTARIO, STANDING ORDERS OF THE LEGISLATIVE ASSEMBLY OF ONTARIO para. 69 (Nov. 1999), available at http://www.ontla.ca/documents/standing_orders/out.

18. See, e.g., *id.* para. 71.

19. See, e.g., *id.* para. 72(d).

authorized the spending of public money.²⁰ The public may appear before a standing committee, but not the committee of the whole house. Upon report by the committee, the bill will be ordered for third reading.²¹ No amendments are possible at this stage.²² After third reading, the bill will await the assent of the Lieutenant Governor and becomes law upon assent. At this point, the ministry becomes responsible for the implementation of the law and the legislative cycles have all been completed where they started — in the ministry.

In closing this part of the paper, I would note that one should expect that with a highly centralized process there is a greater possibility of a high level of consistency across the statute book. It is certainly one of my goals as Chief Legislative Counsel for my office.

III. THE AUTHORING PROCESS

Authoring legislative texts in more than one language requires, in my opinion, a coherent process to ensure the legal and linguistic quality of each text. In this section, I will describe the three methods of authoring with which I am familiar — the Ontario model, the co-drafting model and the double-drafting model.

A. *The Ontario Model*

1. *Background: How Ontario became a Bilingual Jurisdiction*

Ontario is a bilingual jurisdiction for its public general statutes.²³ It was not always so. Until 1978, Ontario legislation existed only in English. In that year, the Lieutenant Governor of Ontario announced a pilot project to translate key Ontario statutes into French during the Throne Speech at the beginning of the legislative session.²⁴ This was at a time of tremendous

20. See, e.g., *id.* para. 56.

21. See, e.g., *id.* para. 77(a).

22. See, e.g., *id.* paras. 68, 70.

23. Ontario also provides for the submission of private bills. See HOW A PRIVATE BILL BECOMES LAW, *supra* note 14.

24. The reasons for this decision are worth a separate paper. I have dealt briefly with the history of bilingualism in Ontario in two papers. See Donald L. Revell, *Bilingual Legislation: the Ontario Experience*, 19 STATUTE LAW REVIEW 32, 32–34 (1998); Donald L. Revell, *Multilingualism and the Author-*

political upheaval in Canada when Québec, with its French majority population, was threatening to secede.²⁵ The Ontario government saw the translation of law in a wider context of securing “a harmonious and unified nation.”²⁶ The Evidence Act²⁷ was amended to provide that these translations could be used in court; in the event of a conflict, however, the English version would prevail. Many major statutes, including the Highway Traffic Act,²⁸ the Education Act²⁹ and the Workers Compensation Act,³⁰ were translated under this program. Throughout this project, bills were enacted in English and then, if our translation project team considered them to be of sufficient importance to Ontario’s French-speaking minority, they were translated into French after enactment of the bill into law. By necessity, because of the pre-existence of the English statutes, Ontario at this time was using a classic translation model for authoring French statutes.³¹

ing of Laws, 1 REVUE INTERNATIONALE DE LANGUES JURIDIQUES ET DE DROIT COMPARÉ 34, 34–35 (2002).

25. Beginning in the late 1960s and continuing through the 1970s, the Québec separatist movement gained strength. Two defining moments were the October Crisis in 1970 and the election of a separatist government in 1976. In the October Crisis, members of a separatist group kidnapped a British diplomat and a Québec politician who opposed separatism. The diplomat was released unharmed; the politician was assassinated. The Parti Québécois won the 1976 election on the promise of holding a referendum to lead Québec out of the Canadian federation. See Michael B. Stein, *Separatism*, in THE CANADIAN ENCYCLOPEDIA, at www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0007291 (last visited Apr. 16, 2004). It was in this context that the Ontario Government developed its policy on bilingualism and the provision of French-language services in Ontario.

26. LEGISLATIVE ASSEMBLY OF ONTARIO, DEBATES OF THE LEGISLATIVE ASSEMBLY OF ONTARIO 3, 8 (Hansard) (Feb. 21, 1978).

27. Evidence Act, R.S.O., ch. 151, § 26(2) (1970) (Ont.), as enacted by S.O. 1979, ch. 48, § 1 (Ont.).

28. Highway Traffic Act, R.S.O., ch. 198 (1980) (Ont.) (published in French as *Code de la Route* (Dec. 1990) by the Ministry of the Attorney General of Ontario).

29. Education Act, R.S.O., ch. 129 (1980) (Ont.) (published in French as *Loi sur l'éducation* (Dec. 1991) by the Ministry of the Attorney General for Ontario).

30. Workers Compensation Act, R.S.O., ch. 539 (1980) (published in French as *Lois sur les accidents du travail* by the Ministry of the Attorney General for Ontario in Mar. 1987).

31. See *infra* Part III.A.2 (for further discussion of the translation model).

In 1986, legislation was enacted to provide that all public general acts would be enacted in bilingual form beginning in 1991; that all laws contained in the Revised Statutes of Ontario, 1980 and all acts enacted between 1981 and 1991 would be translated; and that the translations would be enacted as official law.³² Between 1986 and late 1989 some 12,000 pages of text were translated into French; the translated text, together with the English text, was then consolidated and revised.³³ Several statutes were enacted in bilingual form between 1986 and 1991 even though the formal regime did not start until January 1, 1991.³⁴ The Revised Statutes of Ontario, 1990 came into force on December 31, 1990.³⁵ They are fully bilingual. By virtue of the Statutes Revision Act, 1989, the revised statutes became official law without formal enactment by the Legislature.³⁶

Since Ontario's laws are now enacted bilingually, both versions are considered equally authentic for judicial purposes.³⁷ Thus, the law no longer provides that the English version prevails. As a result, Ontario now has two types of "official" bilingual statutes — those enacted in English and then translated and those enacted in bilingual form. I leave it to statutory interpretation experts to decide if those of the first type should be interpreted differently than those of the second type.

32. French Language Services Act, S.O., ch. 45, § 4 (1986) (Ont.).

33. My calculation is based on the number of pages in the Revised Statutes of Ontario, 1980, and the number of pages of text enacted from the end of 1980 to the end of 1990.

34. Apart from the French Language Service Act, 1986, there were several other major bilingual acts. See *Intervenor Funding Project Act*, S.O., ch. 71 (1988) (Ont.); *Loan and Trust Corporations Act*, S.O., ch. 33 (1987) (Ont.); *Municipal Freedom of Information and Protection of Privacy Act*, S.O., ch. 63 (1989) (Ont.).

35. Proclamation, S.O. (1991) (Ont.).

36. Statutes Revision Act, S.O., ch. 81, § 7 (1989) (Ont.). The Legislature subsequently confirmed the Revised Statutes of Ontario, 1990, in the Revised Statutes Confirmation and Corrections Act, S.O., ch. 27, § 1 (Ont.).

37. This is the position at common law. See MICHAEL BEAUPRÉ, *INTERPRETING BILINGUAL LEGISLATION* ch. 1 (Carswell ed., 2d ed. 1986). See also Pierre-André Coté, *Bilingual Interpretation of Enactments in Canada: Principles vs. Practice*, 29 *BROOK. J. INT'L. L.* 1067 (2004); Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 *BROOK. J. INT'L. L.* 985 (2004).

2. *Ontario's Current Authoring Process:
Ontario's Translation Model*³⁸

The Ontario legislative authoring process is diagrammed in Figure 1.³⁹

Ontario Authoring Model

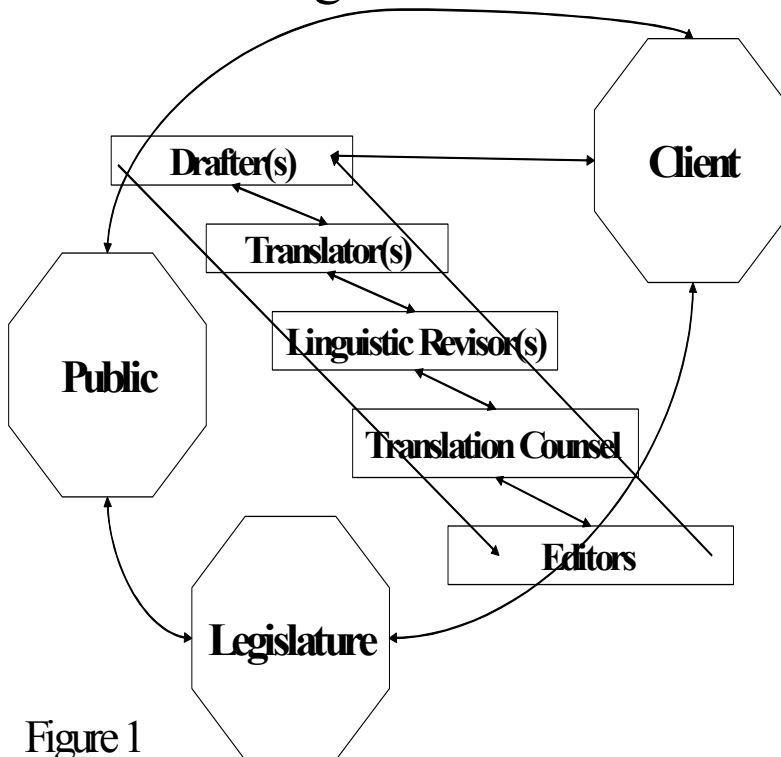


Figure 1

The process begins with the client ministries.⁴⁰ Each ministry has its own legal branch that is responsible for preparing the ministry's drafting instructions. These instructions will be

38. All material under this heading is derived from the author's personal experience. It describes the process developed in our office, in consultation with our staff. This process, like any process, evolves over time.

39. Figure 1 was prepared by the author for a lecture that he has delivered several times at the International Legislative Drafting Institute, Public Law Center, Tulane Law School, New Orleans.

40. *See supra* note 13.

based on the cabinet minute that resulted from the policy development cycle and on the cabinet submission that led to the minute.⁴¹ While written instructions are preferred, the instructions sometimes appear in the form of a draft bill prepared by the branch lawyer, or may consist of oral instructions if it is a simple matter. Regardless of the form of the instructions, an authoring team is assigned to the file by chief legislative counsel.⁴² The drafter will review the instructions, review the existing law, establish a plan for the new bill, and then will usually meet with the client to clarify issues. The process is iterative and the drafter or drafters may prepare several drafts before the draft is sent to translation. This eliminates unnecessary translation as the drafters work out the legal and policy issues with the client ministry. The drafter has the advantage of working directly with the clients who have in-depth knowledge of both the subject matter and of any special English-language terms of art that relate to the draft bill. The translation team has no such luxury, because they do not work directly with the clients. Furthermore, I believe that no ministry is capable of instructing in French and only a few of them can fully comment on the French version of a draft text.⁴³ Nevertheless, client ministries are asked for any relevant French-language or bilingual materials related to the project to facilitate translation. This is how I described the work of the translation team in a previous article:

The translator must prepare a text that accurately reflects the original text in law while at the same time being linguistically correct in the target language. This frequently involves consultations between the drafter and the translator. A senior language professional known as a linguistic revisor reviews every draft translation. The linguistic revisor ensures that the French version is accurately and clearly translated in a way

41. For a discussion of the policy development cycle, see *supra* Part II.A.

42. The authoring team will consist of one or more drafters, one or more translators, one or more linguistic revisors and one or more legal revisors. Drafters, even if they are fluently bilingual, draft only in English.

43. In reality, only five percent of Ontario's population speaks French as a first language. Office of Francophone Affairs, The Francophone Community in Ontario, at <http://www.ofa.gov.on.ca/english/commun.html> (last modified Jan. 26, 2004). Thus, it is highly unlikely that the ministry or the clients would be able to provide adequate instructions or feedback in French.

that will be accepted by the French-speaking community. The text of both versions is then reviewed and revised by a bilingual lawyer who ensures that both versions are equal in law. Finally, the legislative editors review both versions for spelling, grammar and formatting errors.⁴⁴

Figure 1 shows that just as the client is connected to the drafter, everyone in the authoring team is connected via a two-way street so that questions can be asked and ambiguities resolved. This interconnectedness allows for valuable cross-fertilization between the two texts.⁴⁵ We expect that the members of the translation team will meet with the drafter throughout the drafting process to question the drafter and especially to resolve ambiguities and suggest ways that might improve the draft for both French and English readers. Figure 1 also highlights the fact that the authoring process is ultimately connected to the Assembly and then to the public.⁴⁶

The translation model, which in different jurisdictions may or may not include linguistic revision or legal revision, is probably the most widely used model for authoring laws in more than one language. This model, as used in Ontario, has checks and balances built in to ensure high quality legal texts in both French and English in the circumstances surrounding an authoring project.

B. Alternative Models for Authoring Bilingual Legislation

The translation model has been very successful for Ontario and is the most widely used model for authoring laws in more than one language. However, it is by no means the only system used to satisfy this purpose. Two other systems used are the co-drafting model and the double-drafting model.

44. Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 35.

45. Michael J.B. Wood, *Drafting Legislation in Canada: Examples of Beneficial Cross Pollination Between the Two Language Versions*, 17 *STATUTE LAW REVIEW* 66, 69 (1996).

46. If the government or the opposition parties wish to move amendments in committee, the motions are drafted in our office by the same process as is used for the original bill drafting.

1. *Co-drafting*⁴⁷

The authoring model known in Canada as co-drafting was developed by the Office of Parliamentary Counsel in the Department of Justice for Canada for authoring laws in French and English. New Brunswick also uses this model. In co-drafting, an English drafter and a French drafter are assigned to each project. There are no translators involved in the process although a language professional known as a jurilinguist may review the texts. While one or the other of the drafters will act as lead drafter and prepare the first draft, each receives instructions from the client. The second drafter generally waits until the first draft is finished before beginning to draft. The two are expected to collaborate. One might question how close the collaboration could be under the tight deadlines of the parliamentary agenda.

The co-drafting model assumes that clients can instruct in both languages. While this is possible in some bilingual jurisdictions, it is not always the case. Some ministries may have higher degrees of bilingualism than others. Indeed, one must question if true bilingual instructions are ever possible in any jurisdiction. The time allotted for authoring is small, as is the time allotted for producing instructions for the drafters. As deadlines approach, it is likely that instead of two drafters acting as equals, the second drafter will in fact act more like a translator.

Unlike the translation model where all versions are expected to be mirror images of each other, the same may not be true in the co-drafting model. Here both versions are considered to be “original” and the drafter in each language has leeway in presenting the text so long as when finalized both versions contain the same legislation. That is to say, when both versions are read from top to bottom, they have the same effect. This is sometimes known as “vertical equality.” Until recently, this

47. The material under this heading is based on numerous discussions over many years with three of Canada's former Chief Legislative Counsel, Lionel Levert, Gérard Bertrand and Peter Johnson. See Gérard Bertrand, *Codification, Révision et Rédaction des Lois en Régime Fédéral de Droit Jurisprudentiel Anglais et en Situation de Bilinguisme Officiel Français-anglais, l'Expérience Canadienne*, 3 REVUE JURIDIQUE ET POLITIQUE INDEPENDANCE ET COOPERATION 499, 503 (1986).

meant that in federal legislation in Canada the English version of a section might have clauses and the French version would not, or one version might have more clauses than the other.⁴⁸ This causes problems for those who want to do comparisons of the French and English texts. Thus, because of concerns raised by parliamentarians, public servants, the legal profession and judges, the federal drafting office has adopted a policy of close parallelism in structure.⁴⁹ This brings the co-drafting model a step closer to the translation model.

In the translation model of authoring text, all versions are expected to express the same thing in the same way at the same place in the text.⁵⁰ This is called "horizontal equality." While the syntax may vary between the two versions, these variations are minimal. The clause structure will always correspond. Translations will have vertical equality if they are horizontally equal. This leads to texts that are easier to compare than texts that have only vertical equality. Horizontal equality makes it easier to catch errors at the authoring stage than is the case with documents that have only vertical equality. It is reasonable to assume that a reduction in errors ultimately reduces compliance, enforcement, and prosecution costs.

Co-drafting advocates argue that the process ensures that each text is a true original. Hence neither version of the legislation has an inferior status because it is a translation. However, there is no reason why a properly established translation process cannot meet the objective of producing high quality texts in more than one language, thus meeting the linguistic and cultural needs of the jurisdiction without the risks that re-

48. See, e.g., Immigration and Refugee Protection Act, S.C., ch. 27, §§ 16(2), 38(1), 49(1), 68(2), 81, 111(1), 134(1) (2001) (Can.) (the English version contains more clauses than the French version). See also Grain Act, R.S.C. ch. G-10, § 88(1) (1984) (Can.) (the English version has four clauses, while the French version has only two). In some cases one would argue that the English should have been redrafted to conform to the French and in others that the French should have been redrafted to conform to the English. In fact, one could argue that § 88(1) of the Grain Act should have been reconceived in both languages.

49. Department of Justice, Office of Parliamentary Counsel, Drafting Note, no. 2001-3 (2001) (unpublished government document) (on file with author).

50. This is the expectation of the author's office and in the translation offices he has helped to establish or to which he has acted as a consultant in Nunavut, Estonia and Latvia.

sult from the possible loss of horizontal equality. Furthermore, co-drafting often leads to a misallocation of resources by using lawyers who are not trained in creating documents in two languages to resolve issues that are more properly the domain of translation experts.

2. *Double Drafting*

Ontario has experimented with “double drafting,” where one drafter prepares both versions of a bilingual text. While it is still used occasionally, the Office of Legislative Counsel has grave reservations about its efficacy. It found that there is usually insufficient time to allow one person to draft and polish both versions of a bill. It also leads to a misallocation of resources by requiring lawyers to do work that can be more efficiently completed by translators. Finally, the drafter, having already prepared the English version, may convert his or her errors in the original into errors in the other – just as one misses mistakes when proofreading one’s own work.

IV. CREDIBILITY

Regardless of which method a jurisdiction ultimately decides to use for authoring its bilingual legislation, the jurisdiction must employ a credible process to ensure that the laws enacted in each language provide the public with the same high quality and equal authority as the other language texts. Professor R. A. Macdonald has commented on the Canadian situation:

Legal bilingualism presupposes finding a method for reading and interpreting these legal materials that recognizes their equal authority...and that, in Canada, necessarily draws on both English- and French-language versions. Without such a methodology, the promise of legal bilingualism risks being transformed into a practice of *de facto* legal dualism, that is, the pretence that Canadian law can be completely understood by referring to only one of the two official texts.⁵¹

In short, to ensure that bilingual legislation has equal authority, the process must be credible in order to allow for users of either text to have confidence in each version of the law.

51. Roderick A. Macdonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 128–29 (1997).

There are many factors that affect the credibility of the process. Although some of these factors have been discussed in a previous article,⁵² they are especially relevant to this discussion and shall be discussed below.

A. Culture and politics

It is difficult to imagine the development of bilingual laws in the absence of both cultural and political imperatives. Canada provides an excellent example. It would have been impossible to have achieved the political bargain that led to the creation of Canada in 1867 unless the French culture of Québec had been recognized in the Constitution Act, 1867.⁵³ This Act provided for official bilingualism at the federal level and in Québec. However, it was not until the 1960s and what was known as the “Quiet Revolution” in Québec,⁵⁴ that the federal government took legal bilingualism very seriously.⁵⁵ From what I have been told by a former Chief Legislative Counsel for Canada, drafting was done in English in Ottawa. The text was shipped for translation to another department a few miles away in Hull, Québec. There was virtually no contact between drafters and translators. There were countless discrepancies between the English and French texts. This was not a highly credible system. Ottawa, by the late 1960s had generated the political will to accommodate the emergence of a strong French culture and, by 1978, moved to co-drafting.⁵⁶ According to federal officials with whom I have spoken, co-drafting was part of the federal effort to give the highest possible credibility to the French versions of its laws, additionally all existing French versions were reviewed and revised to assure their legal and linguistic correctness.⁵⁷

52. See Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 36–40 (2002). Issues that affect the credibility of the process are, *e.g.*, costs, human resource implication, politics.

53. Constitution Act, 1867, 30 & 31 Vict., ch. 3, § 54, para 133 (Eng.), *reprinted in* Constitution Act, R.S.C., app. II, no. 5 (1985) (Can.).

54. René Durocher, *The Quiet Revolution*, in THE CANADIAN ENCYCLOPEDIA, at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006619> (last visited Feb. 23, 2004).

55. G. Laing, *Royal Commission on Bilingualism and Biculturalism*, in THE CANADIAN ENCYCLOPEDIA, at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0000741> (last visited Apr. 2, 2004).

56. *Id.*

57. Bertrand, *supra* note 47, at 503.

These versions first appeared in the Revised Statutes of Canada, 1985.⁵⁸ In my opinion, these changes were the result of the prevailing cultural and political imperatives of the day.

There was, I believe, a real desire to dampen the fire of Québec separatism. The move to bilingual law symbolized the cultural and political views of Ontario as a strong supporter of Canadian federalism. Many Ontarians do not realize the extent of legal bilingualism in Ontario, and others are firmly opposed, but overall I believe it is recognized that this is “the right thing” to do. While Ontario uses a translation model, it is a system that relies on close collaboration between drafters and translators.⁵⁹ Rather than being “mere” translations, they reflect, in my opinion, an authoring process that respects the culture of Ontario and its political will.

B. Funding for Multilingualism

Multilingualism costs money. For example, Ontario’s total authoring and publishing budget is approximately US \$2.65 million, which includes salaries for a fourteen member English-language drafting team and a fourteen member translation team.⁶⁰ You really do get what you pay for. In a bilingually developed jurisdiction, such as Ontario, devoting equal resources to both versions of the law adds credibility to the system.

The costs necessary in jurisdictions first developing its bilingual legislation are even greater. Extra funds will be needed to convert existing unilingual laws to bilingual form. In addition, all present funding is necessary for on-going staffing and operating costs, and editing, publishing, and data management costs. While these costs are minuscule in a large jurisdiction like Ontario with its overall budget of US \$21.24 billion,⁶¹ for small countries like the Baltic nations that wish to join the European Union, the costs per capita would be quite significant.

58. *Id.*

59. *See supra* Part III A.2 (for a discussion of “The Ontario Model”).

60. Based on figures supplied to the author by the Executive Coordinator of Administration and Finance, Office of Legislative Counsel, Ontario.

61. Supply Act, S.O., ch. 10 (2003) (Ont.) (Act authorizes expenditures for the fiscal year ending Mar. 31, 2004). The approved expenditures for the 2003/2004 fiscal year are CDN \$28,326,666,900. *Id.*

In a jurisdiction such as Nunavut,⁶² where the laws are in English and French but not in the native language that is spoken by 80% of the population, the failure to find the money to translate may have significant implications elsewhere in the system.⁶³ The failure to pass laws in Inuktitut is seen as a failure to realize these ambitions.⁶⁴ If credible translation work does not begin soon, the whole legal system will lose credibility. But Nunavut, with a population of 25,000, may, in my opinion, find that the cultural and political imperative cannot overcome the cost issue. Even if it does, it will still find other difficulties in overcoming language and staffing issues.⁶⁵

62. Nunavut was created as part of a land claims settlement recognizing the cultural and political ambitions of the Inuit people. See Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada, Preamble, *ratified* by the Inuit (Nov. 1992), *signed* by the Prime Minister of Canada (May 25, 1993), available at http://www.aic-niac.gc.ca/pr/agr/pdf/nunav_e.pdf. See also Nunavut Act, S.C., ch. 28 (1993) (Can.); Kevin Grey, *The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self Government*, 52 U. TORONTO FAC. L. REV. 300 (1993).

63. See Revell, *Multilingualism and the Authoring of Laws*, *supra* note 24, at 36–40. For example, it might be argued that more Inuit people would study law and become lawyers if the law and the teaching of the law in Nunavut were done in Inuktitut. It might also be argued that such a development would decrease the need for interpreters in court where virtually none of the lawyers work in the native languages and most of the parties and most witnesses speak little or no English or French.

64. FIRST LEGISLATIVE ASSEMBLY OF NUNAVUT, FINAL REPORT OF THE SPECIAL COMMITTEE TO REVIEW THE OFFICIAL LANGUAGES ACT, 6th Sess. (Dec. 2003), available at http://www.assembly.nu.ca/english/committees/languages/final_eng.pdf.

65. It is my observation that the Legislative Assembly of Nunavut conducts almost 100% of its business in Inuktitut. All laws are drafted in English and translated into French using a translation model similar to Ontario's. Inuktitut versions are also prepared for use by the Assembly. However, there are many problems related to their use as "authentic" enactments. First, many of the bills amend acts that have never been translated into Inuktitut. Second, there are no Inuktitut speaking lawyers to offer advice on whether the Inuktitut version is the same as either of the other two versions. Third, there are few translators available on an on-going basis to work on bill translation. Fourth, there is only an underdeveloped terminology bank. In short, there is little chance at the present time for translations of consistently high quality.

C. Terminology and other Issues of Language Quality

Instruction manuals that are obviously translations from another language are always confusing: either the syntax is slightly off or the terminology is just plain wrong. Although sometimes amusing, this can be frustrating when you are unable to understand the instructions. In such situations, both the manual and the manufacturer lose credibility. Likewise, the law loses credibility when inappropriate language is used.⁶⁶ Accordingly, it is important in bilingual and multilingual jurisdictions to ensure that as language quality is checked and rechecked appropriate terminology is developed and properly and consistently applied.

D. Credible staff

The quality of the drafters and the translators will have a pronounced effect on the credibility of the process and the final legislation. As a person on the front lines of legislative authoring, I sometimes get the impression that people really believe that the creation of legal documents is a purely technical exercise. The Office of Legislative Counsel is regularly asked to “just put this in legalese.” If only it were so simple. As creative processes, both drafting and translation have both technical and artistic challenges. One must address issues of language, law and politics to produce a well-written and well-translated document. If a law is to be credible, it must be presented in the political process as a credible document. The document gains credibility by being authored by experts. It is vital to hire people who have appropriate credentials and aptitudes, and then to provide these talented people with appropriate training. In Ontario, for example, all drafters must be lawyers.⁶⁷ While several have studied drafting at the post-graduate level, most have learned on the job and learned from mentors. The translators and linguistic revisors must have several years of experience before they are hired and they will be closely mentored on the

66. The plain-language movement would have been unnecessary if the law was always written in appropriate language.

67. This is a requirement for the position as set out in the job specification. We consider drafting to be the practice of law. In our opinion, it would constitute the unauthorized practice of law for non-lawyers to engage in legislative drafting.

job for a period of up to two years, but legal qualifications are not required. Legal revisors are lawyers who learn through mentoring; there is no academic training available for this work.

I cannot speak for jurisdictions beyond Canada, but from what I hear anecdotally, federal, provincial and territorial governments believe that they are well served by their authoring offices. As a result, the politicians focus on policy rather than wording issues in debate. If the politicians treat the process as credible, then, in my opinion, it becomes credible to others.

E. Time

Drafters and translators will always complain that they need more time to accomplish their tasks. Many times they are right to complain. Clients spend a great deal of time thinking about policy but allow minimal time for proper drafting. In a 1998 article I wrote:

In my opinion, the single biggest issue in the authoring process is the failure of clients to realize the complexities of the process. This frequently shows itself in inadequate time for authoring. It is a serious issue when only one language is involved; it becomes even more serious where two or more are used. Time constraints drastically influence all other issues, whether they be plain language or staff morale, and this appears to be a problem in many jurisdictions. The Office of Legislative Counsel in Ontario takes the position that it will do the best job possible in the time available. While a lack of time has a major impact on the drafter, it may have an even greater impact on the translation staff. They are virtually the last stage in the authoring process and as time collapses for drafting it must necessarily collapse even more for those at the end of the process.⁶⁸

At some point, a lack of time will undermine quality, and when quality suffers, credibility will be lost.

V. CONCLUSION

After first outlining the overall legislative process in Ontario, this Article discussed Ontario's translation model for authoring

68. Revell, *Bilingual Legislation: the Ontario Experience*, *supra* note 24, at 38.

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bilingual legislation. Then, alternative models were considered, including the Canadian federal government's co-drafting model, and the occasionally-used double-drafting model. Finally, consideration was given to factors affecting the credibility of the process and the final legislation.

Simply stated, these are my conclusions. Bilingual or multilingual legislation must concern itself with creating versions of legislation with equal authority. Ontario's modified translation model, with its built-in checks and balances, provides an excellent example of how to create high-quality, bilingual legislation. It provides for the most efficient allocation of resources, and the horizontal equality which it strives to achieve ultimately reduces compliance, enforcement, and interpretation costs.

Whichever model a jurisdiction chooses to follow, it is essential that the process used for creating bilingual or multilingual laws be credible if both or all versions are to obtain equal authority. To maximize credibility, bilingual legislation should reflect the cultural and political imperatives of the public and it should receive adequate funding, proportionately distributed to all the languages. Terminology and other issues of language should be carefully considered and consistently applied by a staff with the necessary expertise and experience who are provided sufficient time to properly complete their difficult task. Only then will the legal system and its constituents be well served.