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Legislative Drafting

E. A. DRIEDGER*

I have two difficulties. First, I am not sure what is expected of me; I believe that I am expected to make some comparisons between the English and French languages. That gives rise to the second difficulty; I do not know French.

However, in the course of my teaching of legislative drafting for the past ten years I have been able, with the assistance of French-speaking students, to make some comparisons in order to avoid misunderstandings or mistakes in expressing one thought in two languages. I also make some comparisons with German, having some familiarity with that language, and also to some extent with Latin, a subject I was exposed to years ago at University.

I do believe that some knowledge of another language does improve one's knowledge and use of his own language.

My topic, if I can call it that, is therefore, some sources of difficulty in rendering a text in one language into another language.

My experience, as you no doubt know, is largely limited to statutes, and, while some or many of you may have had little to do with statutes, I hope and believe that my comments will be relevant to other instruments.

I subscribe to one fundamental principle. An English statute should be written in English English, and a French statute in French French. One should not have the obvious appearance of being a translation of the other. There ought to be two versions of the same law, and not just one version plus a translation. In writing statutes, however, there is a limitation that may not exist with other documents. There must be a high degree of parallelism. What is section 12 of a statute in English cannot appear as article 14 in the French version; and the content of correspondingly numbered sections and articles must be identical — no more and no less. There is obviously greater freedom with other instruments to re-arrange sentences and paragraphs.

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* Le 23 octobre 1979, le professeur E.A. Driedger, invité par la STQ, prononçait une conférence sur la traduction juridique devant les membres de la section de Québec. L'intérêt suscité par la personnalité du conférencier, reconnu comme un des plus grands spécialistes canadiens et même nord-américains de la rédaction des lois, et par le sujet traité nous faisait un devoir de publier le texte intégral de sa conférence afin de rejoindre les nombreux lecteurs de *Meta* qui n'ont pu assister à cet événement.

I also believe that in preparing legislation there ought to be close co-operation between English — and French-speaking lawyers in the early drafting stages — long before the final versions appear. That kind of co-operation is, I am sure, quite impossible in many of the tasks assigned to you, so you just have to do the best you can. If you see an ambiguity or obscurity, you may not be able to ask the author of the original What do you mean? You may have to make an educated guess, and I daresay you may or may not be right.

I think that one of the most difficult areas of language mastery are tense nuances. We can write out the whole set of conjugations in English, French and German, of a particular verb — present, past and future; indicative and subjunctive. They will be parallel; they will look alike. But they do not necessarily have the same meaning, force or usage. Just to give you a couple of examples.

In German and French the perfect tense is often used where in English the simple past would be used. To use the perfect tense would not necessarily cause any ambiguity, but it would not be idiomatic English.

Then, although the subjunctive mood and subjunctive verb forms exist in English, the indicative forms have virtually ousted the subjunctive.

To express a French subjunctive form by the English subjunctive form, or the English indicative by a French indicative might also be un-idiomatic.

These are little things that may have no consequences but to indicate that one version is only a translation of the other.

There are, however, some tense differences of greater significance. What I said about setting out conjugations in parallel form, is not quite right. There is in English a tense form that does not exist in other European languages, namely, the progressive tense, formed by the verb *to be* plus a participle, as in *I am writing*. In this tense there is a time element that does not exist in the simple present. It means *in the course of*.

The single letter *a* is a preposition as well as the indefinite article, and was used as such more frequently in old English than it is at present. Thus, it would be said *He is a hunting*, where *hunting* is a gerund, and the expression means that He is in the course of hunting. In time, the preposition was dropped and the expression was changed to *He is hunting* where *hunting* became a participle and part of a verb phrase.

This is a very useful tense form, but it can cause ambiguity or misunderstanding when expressing this idea in another language. The difficulty may be compounded by ellipsis. For example: *a vehicle carrying gravel*. Does this mean a gravel-carrying vehicle (where the participle carrying is adjectival), that is to say, a vehicle that is ordinarily used for carrying gravel although empty at the moment; or does it mean a vehicle that is carrying gravel (where the participle is verbal), that is to say, is at this moment carrying gravel.

This problem arose recently in Saskatchewan.

> In the case of Eppler v. Loutitt, (1963) 46 W.W.R. 168 the court considered a provision in a Liquor Act that prohibited a transportation of liquor in the following terms: "liquor being transported in a vehicle used for carrying passengers for hire or gain unless the liquor is in the possession of a person who is a bona fide passenger in the vehicle". Does this mean a vehicle that is ordinarily or customarily used for carrying passengers even if there is no passenger in the vehicle, or does it mean a vehicle actually carrying a passenger? The court held the latter, and confined the statute to the transportation of liquor in a vehicle while it was being used for carrying passengers, unless the liquor belonged to the passenger, thus leaving the taxi driver free to buy liquor for himself and take it home in an empty cab.

This illustrates why I think that two versions should be developed concurrently. If done in English first, the other should ask What do you mean? Change it to remove the ambiguity and then I can write a clear French version.

It might well be necessary, in writing a French version, to insert words in addition to the verb (words that do not appear in the English text) to make it clear that *in the course of* is meant. Conversely, if the simple tense is used in the French version, then the English version should not be written in the progressive tense if that will create an ambiguity in the English version that does not exist in the French.

There is also a subtle difference in a simple present tense. There are situations where the simple present tense in French has an obligatory force that is absent in English and additional word or words must be used.

English: the notice shall contain
French: the notice contains

I now come to what I think is the most difficult item in English grammar, and that is the correct use of the auxiliaries *shall* and *will*.

In Old English there was no future tense, and therefore no future auxiliaries. There were, however, two auxiliaries with future implications, namely, *shall* and *will*. The word *shall* was originally only an auxiliary of obligation, and the word *will* was originally only an auxiliary of volition. The conjugations were:

Command	*Wish*
I shall	I will
Thou shalt	Thou wilt
He (she, it) shall	He (she, it) will
We shall	We will
You shall	You will
They shall	They will

However, we cannot command ourselves, so *shall* in the first person was not used; also, we can state our own wills but not of others, so *will* in the second and third persons were not used. The result was the following practical conjugations.

Command	*Wish*
You shall	I will
He shall	We will
They shall	

Since commands and wishes are concerned mainly with the future, a future tense auxiliary developed out of these words, but as such they retained traces of their original meanings. Both were used to express the mood or will of the speaker, what Fowler calls the coloured-future. There was yet no simple or plain future, and since *shall* in the first person and *will* in the second and third persons were not used, they became plain future auxiliaries. These subleties can be illustrated by the following examples:

I shall be at my office to-morrow.
This is only a prediction

I will be at my office to-morrow
This is a promise or undertaking

If you do so and so, you will regret it.
This is only a prediction.

If you do so and so, you shall regret it.
This is a threat. It is not a command to regret.

The result is that we get these peculiar conjugations.

command	*wish (violation)*	*coloured-future*	*plain future*
you shall	I will	I will	I shall
he shall	we will	we will	we shall
		you shall	you will

Will and *would* are now in the process of taking over *shall* and *should*, especially in the United States, so that what once was incorrect will eventually be correct and what was correct will be forgotten; but in the process a valuable subtlety in the English language will disappear.

As we see, the word *shall* is an auxiliary of obligation and also a non-obligatory auxiliary. The latter sense has many uses.
For example:

The British use *shall* otherwise than to prescribe or prohibit a personal course of conduct to a far greater degree than we do. They say, e.g.

he shall be guilty... and shall be liable
this Act shall (shall not) apply
he shall be entitled

The English forms shown above are perfectly correct in law and grammar, but we have a different practice.

We say
he is guilty... and is liable
the Act applies (does not apply)
he is entitled

These, as you can see, are the French forms. Care must be taken in moving from English to French, that the non-obligatory *shall* in English is not rendered as an obligatory *shall* in French.

There are some cases where *shall* in English, even though used in an obligatory sense, cannot be translated into French.

In creating an entity it would be said in English: *There shall be a corporation.* In French, it would be said: *There is established a corporation.* That could be said in English too, but then the word *hereby* would have to be inserted before *established.*

There can also be problems with the WH relatives, particularly with *which.* This word, in introducing a subordinate clause, may be defining or non-defining.

Thus in the statement:

The largest island in the world which
is south of the equator is Madagascar,

if the *which* is defining, the statement is true, but if it is non-defining it is false, since Greenland is larger. In print, a non-defining *which* can be indicated only by inserting comas before and after the clause. But, in my judgment, that is not a reliable technique, because, in writing, a coma may be improperly inserted or omitted.

In English there is another relative — *that* and it is always defining. I am a thatter and not a whicher.

In British statutes *which* is usually used, but they are careful to comma the clause off if it is non-defining, and to have no commas where it is defining.

The same problem exists in French with *qui, que, lequel,* but there is no relative corresponding to *that.* Here again is a case for co-operation. One should ask the other What do you mean?

I am not competent to say, but it appears to me that in French if the relative introduces a defining clause then it is written as a subordinate clause in the main clause; but if it is non-defining it is taken out of the main clause and added as a separate sentence or as a co-ordinate clause following a semi-colon. That is often done in English too.

I believe there is a tendency in French to avoid a direct verb, and to substitute a noun derived from that verb, plus a different verb:

May apply for a licence.
May make application for.

The tendency in English is to be more direct and use the real action verb. This is, of course, not universal, but I have found that, on the whole, my French speaking students (when writing in English) use this indirect form to a much greater extent that my English students. Perhaps this derives from the diplomatic usage of French — diplomats don't like to be direct.

In French demonstratives and identifying pronouns are used to a greater extent than in English — that is because the English definite article has a demonstrative force that the french article does not have.

> On the door to the administrative office of the common law section at the University of Ottawa, there is printed:
> The students are not allowed in this room.
> A bilingual student whose primary language is French would not notice anything strange about this notice. But a student unilingual in English would say to himself What students?

Thus we frequently find in French legislation — *those* — *they* — *that* — where in English would be the simple — *the*. This may not create any difficulty in understanding, but the excessive use of these demonstratives in English is not English idiom — and the use of the definite article as a demonstrative in French is not French idiom.

However, there are situations where difficulties do arise, namely, where a demonstrative or pronoun refers to something outside the sentence in which it occurs. I see in French statutes many, many instances where references like this are made to matters outside the sentence. In English, quite apart from statutes, the general admonition is that this should not be done. In English statutes this is dangerous, because it creates doubts or ambiguities and often leads to litigation.

The reason for this, as was suggested to me by a French speaking colleague, is that in French a word like *such* has a shorter reach than it has in English. In French it is usually restricted to the immediately preceding sentence, but in English it can travel all the way back to the beginning, and thus create doubt.

English writers seem to be much funder of compound-complex sentences than French. In English statutes and in English literature one finds structures punctuated as one sentence, but consisting of two or more co-ordinate clauses and within each two or more subordinate clauses, some adverbial and some adjectival. This makes for very hard reading, and it is very difficult to render the same content in another language. German is even worse than English in this respect.

In my own work I have always tried to keep my sentences to moderate length, and what some would write as one section I would write as two or three. In this respect, I believe French writers are better, but here too there are limits. If there are too many simple sentences there is a staccato effect that impairs literary elegance. There is also the danger that back references and cross references are needed, thus opening the door to doubt. As I mentioned earlier, in writing statutes one cannot render section 10 of a statute in English as articles 10, 11 and 12 in the French version. However, with other instruments it can be and is done. I am sure that those of you here moving from German to English would write many English sentences to replace one German and similarly those of you who move from English to French.

A criticism made of English statutes is that they aim too much at precision and not enough at principle, and that English statutes contain too much detail. That is another subject that I cannot deal with to any extent here. I am not satisfied that the criticism is entirely valid.

I believe it is true, however, that the writer of English statutes has precision very much in mind. There are reasons for that, rooted in the Anglo-Saxon political and judicial institutions. After the establishment of Parliamentary supremacy after the revolutionary wars at the end of the 17th century, life, liberty and property were sanctified, and the courts henceforth to this day in case of doubt refused to apply a statute so as to interfere with these fundamental rights. The courts will not infer offences and will not fill in gaps.

> Thus in a recent English case the court considered whether a shopkeeper who had a prohibited knife in his window with a price tag offended a statute that prohibited selling or offering for sale. The court held No. That is why, in statutes like the Food and Drug Act, we find a definition of *sell* as including offer for sale, expose for sale or have in possession for sale.

It is my understanding that in continental legal systems the courts have greater freedom to draw inferences and to fill in gaps than under the common law systems.

In a common law jurisdiction, the law is what Parliament says — nothing more and nothing less. The courts will refuse to interfere with fundamental rights and freedoms unless such interference is clearly stated, expressly or by necessary implication.

The courts will refuse to fill in gaps — they say that they are judges and not legislators.

The result is that in many situations in common law jurisdictions legislation must be more precise than apparently it needs to be in civil law jurisdictions.

I should like now to make some comparisons between English and French legislative styles. This may be of some interest to those of you who might have occasion to look at a Quebec or Federal Statute. There are differences. Most of them are merely cosmetic, but there are some differences affecting substance.

One is the form of commands or prohibitions. As examples, I will refer to the Charter of the French Language. The English version is good English, but it is in the form of a civil law statute rather than a common law one.

Many of the injunctions are in the passive form without mention of any person.

Articles 19, 27, 29, 43, 51.

Along with provisions of this kind must be read article 205.

I have no doubt that this form will work in civil law jurisdictions; but it won't do in common law jurisdictions. There, it is necessary to identify clearly the person or persons to whom the command or prohibition is directed, for

otherwise there can be no "contravention". Commands and prohibitions can be directed only to persons and not to things. The result is that the provision would have to be somewhat longer.

I have already referred to references in one provision by pronoun or adjective to something outside the sentence in which the reference is made. This is done freely and frequently in civil law legislation.

Articles 30, 32, 35.

This is avoided in common law jurisdictions.

Then, there are demonstrative references to other provisions.

Articles 44, 72.

In common law jurisdictions there would be a reference to a subsection (as in article 88) or the two rules would be combined in one sentence, divided into an (a) and a (b) and indented.

In civil law statutes there are usually only articles and no sub-articles, and one article may consist of two or more separate sentences, or even two or more literary paragraphs, each with two or more separate sentences. So far as law is concerned, there is nothing wrong with that system, but it is not done this way in common law jurisdictions. There, each sentence is a separate numbered section or subsection, and, to facilitate comprehension or readability a section or subsection may be set out with lettered indentations. Of course, both methods can be carried to extremes. If an article contains two or three paragraphs each with two or more sentences, it may be difficult to see what is in it, and it is difficult to make a reference to any part of it. And, in the common law systems, if the lettered divisions and subdivisions are unduly long or frequent it also becomes difficult to comprehend. In teaching drafting I have found that the common law lawyers try to put too much into one grammatical sentence, chopped up with lettered and numbered paragraphs (as they are called) sub-paragraphs, clauses, sub-clauses. Better to write separate sections or subsections.

Civil law drafters seem to eschew definitions. A definition section is in common law jurisdictions regarded as an extremely useful aid in the writing and reading of statutes. Of course, this technique can be abused and over-used, and it often is. But the use of definitions is universal in all English speaking common law jurisdictions.

I notice that in civil law statutes there are frequent what I call "breathing" words. They add nothing and serve only to arouse a brief pause.

Similarly, however, also.

Sometimes "however" is intended to have effect, but in many cases I think the word "but" would be better.

Article 32.

Then there are frequent cross or back references in the form.

44 The same rule applies.
72 This rule obtains.

In common law jurisdictions, it would be "this section" (as in articles 88, 95) or a reference to a preceding numbered subsection.

As I have said, apart from the form of commands and prohibitions, these differences in form do not matter too much. But I do think that drafters of legislation in Quebec and drafters in the other provinces (and the English in federal statutes) can learn from each other. I think they all have the same objective — to write the laws clearly and in the best presentable form.

I think that Quebec legislation could be improved if the numbered section and subsection, and use of letter indentations were adopted, as well as judicious use of definitions. As for the English, there is in my opinion too great a tendency to carry the techniques of indentations and definitions to such extremes that the statute becomes harder — not easier — to read and understand; and I find also that there still is too great a tendency to make sentences too long and too complicated. I have always been against these tendencies, when I wrote statutes and when I was teaching.

I am sure that any civil law drafter who would read what I have written and published about legislative drafting would agree with my aims and objectives — just as I agree with those of civil law drafters.

In Canada English style has moved far away from present and past British styles, so that there can now be said to be a distinct and better Canadian style.

But there is still plenty of room for improvement so as to make the statute more readable and understandable.

In the case of the Federal statutes the French versions have been too much translations and often not good ones at that. In the past decade, however, a conscious effort has been and is being made to write the French statutes in French French, but there may still be too close an adherence to English grammatical forms.

I believe it is not incorrect to say that the reverse is the situation with Quebec statutes, where the English version often appears to be but a translation of the French. Also, I believe that the French versions have not moved away from Paris as far as English federal and provincial statutes have moved from Westminster. Rightly or wrongly, I believe that our French statutes could be improved by adopting some of the Canadian English techniques.

I am confident that some day we will have in Canada distinctive and improved Canadian legislative styles in French and in English, not copied or borrowed from any other country.