

# Whose law is it? A jurilinguistic view from the trenches

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*The only tool of the lawyer is words. We have no marvellous pills to prescribe for our patients. We have no Superconducting Supercollider to help us find the Higgs boson. Whether we are trying a case, writing a brief, drafting a contract, or negotiating with an adversary, words are the only things we have to work with.*<sup>2</sup>

Charles Alan Wright

*If legal concepts are the skeleton of the law, then words are the muscle.*

Lise Poirier

## **Abstract:**

*This article is about the work of the jurilinguist as it applies to legislative drafting, hence the allusion to the trenches in the title. It explains what the relatively new field of jurilinguistics consists of and examines the role of the jurilinguist in the Canadian Federal Government. It focuses on the difficulties posed by bilingual legislative texts and the ways jurilinguists can help legislative counsel. It traces a brief history of the beginnings of jurilinguistics. It gives examples of points of contact between the two legal systems found in Canada (common law and civil law) and between its two official languages (English and French) and outlines the problems that arise from those points of contact and some possible solutions. This article also more generally examines the drafting of Canadian legislation from the point of view of the linguistic approach taken by jurilinguists.*

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<sup>2</sup> Foreword, Brian A. Garner, *The Elements of Legal Style*, 1983

## Introduction

A jurilinguist provides advice related to the terminology, syntax, phraseology, organisation of ideas and style that are appropriate to legal language and, specifically, to legislative language and to the subjects dealt with, and also, within the context of bilingual co-drafted Bills and regulations, comparison services to ensure equivalency of the English and French versions. So of course, words and language are central to the jurilinguist's work, hence the quotes above. The first part of this article will describe the context that brought about the creation of jurilinguistics. From there, we will touch on the work of legislative counsel and finally on how the jurilinguists assist them.

## Canadian Legal Context

In Canada, at the federal level, the laws belong to two linguistic communities—English and French—which are the two official languages, and are a point of contact between these two communities and between the two systems of law that exist in Canada. In the province of Quebec, civil law applies and in the nine other provinces and three territories, common law. And at the federal level, legislative texts are harmonised with provincial and territorial law.<sup>3</sup>

Subsection 18(1) of the *Constitution Act, 1982*<sup>4</sup> requires that the statutes, records and journals of Parliament be printed and published in English and French and provides that both versions are equally authoritative. Also, the bilingual requirements of the *Official Languages Act*<sup>5</sup> spawned, in the 1970s, a very extensive translation industry, starting with the federal Translation Bureau. Translation units were created throughout the many departments and other public agencies. At that time, the Bills were translated into French by translators who were hard-pressed for time, given the Parliamentary schedule, and who had no contact with the legislative counsel concerned, which would have provided them with useful contextual information. It was felt, within the Justice Department, that co-drafting would give better results. So, in the late 1970s, teams of two legislative counsel, one French, one English, began co-drafting Bills, working together to produce a bilingual version.

## Canadian linguistic context

Within the Canadian population of 32 million people, over 6 million consider themselves Francophone, with more than 5 million living in the province of Quebec.<sup>6</sup> As if that weren't enough, another 300 million English-speaking people live south of our border, in the United States. That's an ocean of English in which it can be very easy to drown.

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<sup>3</sup> See Marc Cuerrier, "Drafting against a background of differing legal systems: Canadian Bijuralism" presented at the 2007 CALC Conference in Nairobi.

<sup>4</sup> [http://laws.justice.gc.ca/en/charter/CHART\\_E.pdf](http://laws.justice.gc.ca/en/charter/CHART_E.pdf)

<sup>5</sup> <http://laws.justice.gc.ca/en/O-3.01/>

<sup>6</sup> Statistics Canada, 2006 Census.

In everyday situations, that contact can give rise to misunderstandings and mistakes and, as a Francophone, it's sometimes easy to lose one's way in such an environment. It puts one in mind of the little boy who asked his English teacher if he could use a French word in his composition because he couldn't think of the English one. The French word? "*Carport*". We all have our "carport" moments. I was raised by Anglophones in a French environment. My mother once famously asked a salesclerk in French if the mailman was in the bag, using the word "*facteur*" instead of "*facture*" for "Bill". The salesclerk said "yes". We used to tease her about the way she mangled French, but she paid us back in kind for our mistakes in English. When we said, "I want to wash my hairs." (Using the plural as in French), she would ask: "How many do you have?" Those types of mistakes are called "Gallicisms", when a word is translated literally from French into English without taking into account idioms, usage, proper grammar and cultural references. The opposite is an Anglicism, for example in French "You're welcome" is "*De rien*", "*Je vous en prie*" or "*Il n'y a pas de quoi*", but in Québec, people say "*Bienvenue*". This makes French people from France smile as its only meaning is to welcome someone's arrival.

At other times, knowledge of the two languages can give you an edge, like a friend whose dentist asked her how her gustative papilla were doing, thinking to confuse her, but not realizing that in French, taste buds are called "*papilles gustatives*". So she answered "Fine, thank you".

Mistakes stemming from that contact can be found as well in legal language. Here are a few Anglicisms, where an English word is translated literally into French, without taking into account usage, grammar and cultural references that have crept into in legal texts:

- alternative
- appropriation
- convertible
- subsidiary

In an environment where English is omnipresent, it is so easy to get confused. The English say: "The cat looked at the queen." The French say: "The dog looked at the bishop." In English, you get up on the wrong side of the bed, in French on the wrong foot. Part of the problem is that the French and English languages are very close to each other. Both came into being in countries linked through history; indeed, French was once the language of English law which gives us "doublets" or legal pairs:

- breaking and entering
- fit and proper
- null and void

The two languages borrow from each other quite frequently. "Étiquette" (*estiquet*) became "ticket" in English and the French adopted it again with a different meaning.

In English law, the influence of French has been important, but is not felt today because it goes back many centuries. Words such as “lien”, “contract”, “justice”, “judge”, “mortgage” and “parole” were all French words originally.<sup>7</sup>

In English, as in French, words of the other language are used as euphemisms (“*ménage à trois*” sounds better than love triangle) or as a way to give a certain “*je-ne-sais-quoi*” to a text or a conversation. One of the most surprising things about television programs produced in France is the use of English words such as un “*mel*”, un “*charter*”, le “*chat*” and so on where there exist perfectly good French words: “*courriel*” (e-mail), “*affrètement*” (charter) and “*clavardage*” (chat). In Canada, we tend to make more of an effort to use French words, because we are so much more exposed to English. In fact, the structure of the language is in jeopardy. Francophones use English syntax without even realizing it and that constitutes a much more insidious attack on the French language. “I miss my mother.” in French is “*Ma mère me manque.*” (Notice the subject goes from “I” in English to “mother” in French). But the literal translation “*Je manque à ma mère.*” is often heard. It is a curious construction in French, as though you were thinking backwards, but it is correct.

Other words have a different meaning according to the language. The word “government” is a case in point. In English, its meaning is quite broad. In French, it means the executive branch of power and nothing more. The word is sprinkled in French texts of all sorts. It’s a very good exercise in stylistics to find the correct equivalent. Here are some of the possibilities:

- *administration publique*
- *assemblée législative*
- *autorité législative*
- *entité publique*
- *exécutif*
- *État*
- *fonction publique*
- *ministère*
- *organisme administratif*
- *organisme public*
- *pouvoir exécutif*
- *pouvoirs publics*
- *secteur public*

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<sup>7</sup> See Malcolm Harvey, *Pardon my French: The Influence of French on Legal English*, in *Jurilinguistique ; entre langues et droits, Jurilinguistics: Between Law and Language*, Bruylant/Éditions Thémis, 2005

In other drafting situations, the English word needs a definition and not the French or vice versa. The word “edible” was defined by an English drafter of a regulation so that it would apply to human food. The French equivalent “comestible” has no other meaning, so the Francophone drafter did not feel the need to include a definition in the regulations. The two words were treated differently in the two languages, but this does not create a discrepancy.

As you can see, the difficulties involved in producing a bilingual version of statutes are formidable when the legal tradition associated with each language is different.

Legislative counsel and other French-speaking public servants work in a predominantly English environment. As such, legislative counsel face a momentous challenge. In addition to all the intricacies involved in drafting the laws of the land, they have to make sure they are saying the same thing in both languages. The meetings with legislative counsel and their clients are often conducted in English. This places the Francophone counsel at a disadvantage. It’s a bit like dancing backwards in high heels.

### **Jurilinguists to the rescue**

The decision was made, in the 1980s, to hire two very experienced translators to help the Francophones draft. The reasoning was that French being the minority language, that was where help was most needed. The term “jurilinguistics” was coined by them at that time, the meaning being the science of linguistics, in the broadest sense, applied to the law or, as I like to say, in the service of the law. So you see the field is quite broad and can involve all manner of stakeholders in the legal field.<sup>8</sup> Here is a more extensive definition given by Jean-Claude G mar:

Jurilinguistics is not a « cookie-cutter » discipline. Broader than a purely theoretical system of formulation, the term suggests the state of mind of a specialist (jurist, legislative counsel, judge, linguist, drafter, translator, revisor, terminologist, lexicographer, etc.) who is required, among other things, to formulate, draft, develop, construe, translate and compare legal texts (unilingual, bi- and multi-lingual)... (translation)<sup>9</sup>

And so began a great adventure. Under the jurilinguists’ impetus, the legislative counsel began producing more authentic-sounding French texts. The jurilinguists drafted a manual on how to avoid some common mistakes, some of them Anglicisms, and offering solutions to recurring problems.

The legal tradition in each system of law is perhaps the most striking difference that has to be taken into account when drafting federal statutes. On the one hand, the common law tradition tends to go from the particular to the general, with as much detail as possible. On the other hand, civil law lawyers, called “civilians”, have learned to be as concise as they possibly can.

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<sup>8</sup> For a history of legal drafting, see: [http://www.justice.gc.ca/eng/news-nouv/autres-autres/2009/doc\\_32413d.html](http://www.justice.gc.ca/eng/news-nouv/autres-autres/2009/doc_32413d.html)

<sup>9</sup> Jean-Claude G mar, Nicholas Kasirer (*dir.*), Foreword, *Jurilinguistique : entre langues et droits -- Jurilinguistics: Between Law and Language*, Bruylant/ ditions Th mis, 2005

What we do is common law in French, but with a twist. The French style is loath to repeat words and phrases; there is more implicit meaning, and more confidence in the reader. For example, it would go without saying in a French normative text, that management should be “good”, that finances should be “sound” and administration should be “efficient”. Here is a provision where each legislative counsel was true to his or her own legal tradition.

1. Every person attains the age of majority and ceases to be a minor on attaining the age of eighteen years. (Ontario *Age of Majority and Accountability Act*)
153. Full age or the age of majority is 18 years. (Quebec *Civil Code*)

According to one civilian drafter, her common law colleague drafts by putting in everything he thinks he needs and then eliminating what is superfluous. She proceeds the opposite way and they invariably meet somewhere in the middle.

The jurilinguists deal with high levels of government and reversing the tide on some linguistic issues is somewhat akin to a miracle. There are still clients who think that if you have three words in English, you need three words in French.

Consider these definitions from the Canadian *Environmental Protection Act 1999*:

<i>«rejet» S’entend de toute forme de déversement ou d’émission, notamment par écoulement, jet, injection, inoculation, dépôt, vidange ou vaporisation. Est assimilé au rejet l’abandon.</i>	“release” includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust.
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Ten words versus sixteen. But they say the same thing and the effect is the same.

A legislative counsel once consulted me on a phrase in a reference document he was using to draft a Bill. The English read “The improvement of the actual and future well-being of...” As we pondered the way to express it in French, we realised that improving takes place over time and starts in the present and carries on into the future. In French we didn’t really need the two adjectives. Of course, legislative counsel have to consult each other and the clients on such matters.

A phrase such as “A question of major national interest” sounds good if read quickly, but if you stop and think about it, wouldn’t any question of national interest be major? These are the types of problems jurilinguists bring to the attention of legislative counsel.

To paraphrase our national anthem, the jurilinguists stand on guard for thee, the French language. It becomes second nature and amongst themselves, they will correct each other and question each other’s choice of words and ways of expressing ideas. They have a sixth sense which compels them to listen critically to everyone, mostly to themselves, so that they are constantly revising everything they hear and say. It can be very tiring. They listen to the news, to the radio, to

interviews. Some jurilinguists are very slow readers, even when reading for pleasure, because they analyze the grammatical structure of every sentence they read.

Since the arrival of the first jurilinguists, the legislative counsel's role has evolved. Drafting rooms came into being; changing dramatically the way Bills were produced. Nowadays, the two legislative counsel often sit at their computers across from clients who give them instructions. The pace has picked up considerably since the 1970s.

Clients often have unreasonable expectations of walking out of these intensive sessions with a final draft in hand. The jurilinguists can help the legislative counsel with a sober second look. When deadlines are tight, many a legislative counsel has been glad to have someone else cast an eye on his or her draft because they are working so fast.

To quote the jurilinguists' job description, they provide "professional services on all jurilinguistic and linguistic aspects of legislative drafting in one official language and on the legal and cultural consistency of meaning between both official language versions of all federal government legislative texts (Bills, regulations and other statutory instruments)."

And what, you may ask, do jurilinguists *do*? They revise the version in their working language, that is to say their first language, and also do a comparison to ensure that the two versions are saying the same thing. They revise for consistency, logic and style, correctness of language, grammar and syntax. They also provide research on terminology, especially in rapidly-developing technical fields and, while their brief is to adhere to the highest standard of language, there have been instances where they have had to create terms where none existed. To ascertain if one version is saying the same thing as the other, the jurilinguists must think through the text. It is not a cursory reading. It is an in-depth analysis, an examination of one version in relation to the other. And they work in pairs: one Anglophone and one Francophone are assigned to each file.

And it's a jungle out there. Many pitfalls await the unsuspecting jurilinguist, from the aforementioned Anglicisms to the complex legal sentences that go on and on and on, to words that sound alike but mean very different things according to the language. These are called false friends. Here are a few examples.

The word "ethics" in its French form (*éthique*) refers only to a branch of philosophy, but in Canada, you see it everywhere in French used in the English sense because of the co-mingling of the two languages.

The wrong word can create a diplomatic incident. The verb "to ask" translates into "*demander*". An unfortunate translator once got them confused and used "to demand" instead of "to ask" with sorry results.

An interpreter who was working in the House of Commons adapted the saying of an MP: "You can't mix apples and oranges" by using a French saying: "You can't mix rags and tea towels".

But the MP kept up the imagery by putting the fruit in trees. So there was the poor interpreter with his rags going up and down trees.

The results of this contact are inevitable and that is one of the ways that language evolves. In translation school in the 70s, God help the poor student who used words like “system”, “control” or “development” in French. Their meaning in French was quite restricted and bore little resemblance to the more extensive English one. Nowadays, they are used liberally in French and elicit no reaction. French dictionaries record them, mentioning their English origin. In translation school, students also had to relearn their language to a certain extent to get rid of the bad habits picked up in their day-to-day life. But in my case, having Anglophone parents, I found myself in the absurd situation of having to learn mistakes I didn’t even know existed in order to pass the exams.

In Quebec, a very unique type of slang is spoken. It’s called “*joual*”, a deformation of the word “*cheval*” (horse), and it is a mixture of archaic French, Anglicisms and atrocious pronunciation. When I was a child, we used to play a game we called “*Wachiprem*” in French. We used to divide up into two teams: one team would hide, the other would go looking and when they were close, the team leader would yell that word so the team hiding could get back to base safely. My parents finally figured out that we were saying a much distorted version of “Run sheep, run.”

Young children were told to go to bed or the “*Bonhomme Sept-heures* (Seven O’clock Man), like the Sandman, would find them. The expression is derived from the English word “bonesetter”.

A trip to a garage in Quebec can be quite revealing. Any automobile part is called by its English name preceded by a French article: *les brakes*, *le gear box*, *le rim du tire*. Government campaigns promoting French have been launched, but with mixed results.

“*Joual*” is pervasive, and if not used by everyone, is understood by all native Québécois. In fact, many writers, singers and other artists use it as a means of asserting their cultural identity.

In the 1980s, translators were seconded from the Translation Bureau of Canada to revise draft regulations. The Regulations and Legislation Sections of the Department of Justice were separate, and didn’t even report to the same person. It was decided in the late 1990s to group them together in one Branch along with all the personnel assisting the legislative counsel. In 1999, the Department made the translators offers they couldn’t refuse and they became Justice employees and members of an amalgamated unit working on both Bills and draft regulations.

Where do jurilinguists come from? Do they grow under cabbages? They might as well. There is no school or course where the job is taught. All jurilinguists have a background in translation. The field of translation is a good training ground for a prospective jurilinguist. Many jurilinguists also have training in law; some have a law degree, while others have been called to the bar. I am one of those whose background is purely in translation, but I have always maintained that a linguist or translator can “learn” a style and the vocabulary of a particular field, because of the intense intellectual effort required to convey in one language the message of the other. We have

found, over the years, that hiring jurilinguists solely on the basis of their legal background was less successful than hiring people with more experience on the linguistic side of things. Of course, once hired, all jurilinguists receive on-the-job training, or as we say in French: training on the “pile” (*sur le tas*). (This sounds worse than it actually is.)

The new jurilinguists are trained by the chief jurilinguist and by the two senior jurilinguists. Coming as they often do from a translation background, they tend to ensure that the two versions are saying the same thing, but sometimes fail to see the overall picture. It’s a common oversight, of which most jurilinguists are guilty in their salad days. Once the equivalency of meaning is established, the jurilinguist must take a step back and analyse what the text means and how it fits into the legislative scheme, in both languages.

Some may object that only a legislative counsel can work on legislation because no one else has the know-how to use the correct words in the proper sense, taking into account all the factors that may impinge on the text, such as Charter issues, case law, and style. But with two legislative counsel and, in the case of Bills, senior counsel reviewing their work, there is enough input from a legal point of view that the draft can benefit from a purely linguistic angle. For where would the statutes be if it were not for words?

The work is highly specialized and there are very few jurilinguists in the federal Public Service. Apart from the team of eleven (four English jurilinguists, eight French) in the Legislative Services Branch at the Department of Justice, there is a unit at the Supreme Court and one at the Department of Foreign Affairs. The service offered is unique. Not only do they revise the drafts, they also provide *ad hoc* linguistic advice, help establish terminology and contribute articles to two manuals, *Legistics*<sup>10</sup> and the *Guide fédéral de jurilinguistique législative française*, on such diverse subjects as “must”, “shall” and “may”, the use of “such” and paragraphing and how to express mathematical operations.<sup>11</sup>

Jurilinguists also write jurilinguistic opinions at the request of legislative counsel, especially when clients want to use an expression or a word that isn’t correct or violates accepted rules of grammar or syntax. They lose some and win some. They don’t normally sit in on legislative counsel’s meetings with clients, time being too short. But they try to arm legislative counsel with the ammunition they need to successfully do battle and win the day on language issues. It is a very difficult thing to try and get a client to understand that he or she may not be right as far as a question of language is concerned. If a physicist were to give a talk on a Higgs boson, no one would contradict his or her knowledge. But since everyone uses language, they feel, and rightly so, that it is theirs. They have a sense of ownership and can resent being told what the “language experts” think.

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<sup>10</sup> <http://canada.justice.gc.ca/eng/dept-min/pub/legis/index.html>

<sup>11</sup> <http://canada.justice.gc.ca/fra/min-dept/pub/juril/index.html>

The actual work of the jurilinguists is done on the paper copy of the Bill or draft regulations. Discrepancies are indicated and the text is marked with questions or comments. Suggestions are made as to the rewording of provisions and solutions are proposed. Jurilinguists also check for consistency, logic and equivalence of meaning. So they are working both vertically and horizontally on the text. The Anglophone and the Francophone jurilinguists working on the file consult each other before handing the work back to legislative counsel. In fact, the presence of another language can help, giving ideas on how to improve each language version.

The jurilinguists are held to a high international standard of language. They use dictionaries, grammar books, guides on style and modern usage, manuals on difficulties, Anglicisms and word combinations, legal dictionaries of course, and specialized lexicons on anything from accounting to tax law, even the Internet. They use terminological data banks; two of the best ones in the world are produced by the Canadian and Quebec governments.<sup>12</sup> Given the variety of subjects that are legislated, especially in regulations, they have to be quick on the draw, know where to search for information and absorb new concepts rapidly. A jurilinguist can be working on regulations concerning oil and gas in the morning and frozen blueberries in the afternoon. The subjects are as varied as the human activities concerned.

They also learn to think on their feet. If a legislative counsel questions a choice of words, the justification can't be: "because". The explanations given must be cogent and clear. It's a job where one becomes intimately familiar with obscure grammar rules and exceptions.

Jurilinguists are also consulted on the meaning and equivalency of existing provisions. Legislative counsel will ask them if they mean the same thing in both languages. And answers are usually needed quickly and require one to think fast. Legislative counsel graciously accept the comments and corrections of the jurilinguists in the spirit in which they are made. The jurilinguists are there to help, not to hinder, and work as a team to produce a better text.

The Legislative Services Branch of the Canadian Department of Justice has an excellent in-house training program to which the Jurilinguistic Services Unit contributes courses on various subjects such as paragraphing, drafting definitions, etc. Some of the jurilinguists teach courses in legal translation at the LL.M level at the University of Ottawa. And they are also called upon to revise bilingual documents produced for conferences, journals and legal opinion banks.

## **Conclusion**

This paper has been more about the French aspect of things, because this is where the need for jurilinguists was first felt. Of course, the Anglophone jurilinguists face different challenges, in many cases, issues that have already been resolved in French. They continue to grapple with

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<sup>12</sup> The federal government's Termium: <http://btb.termiumplus.gc.ca/site/termium.php?lang=eng&cont=001> and the Quebec government's *Grand dictionnaire terminologique*: <http://www.olf.gouv.qc.ca/ressources/gdt.html>

archaic legalese, heavy structures with the excessive use of nouns, the use of neologisms and the tug-of-war between American and British usage:

- archaic legalese – “Notwithstanding” instead of “despite”
- heavy structures with excessive use of nouns – Canadian Broiler Hatching Egg and Chicken Licensing Regulations
- neologisms – blog, cybercrime, cyberspace, environmental footprint, green policy

“*Vive la difference*” is an apt conclusion because the differences between the English and French languages and the two legal traditions inform each linguistic and legal community about the other and enrich us all, expanding our horizons.

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