

Legislation Committee

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Title: Scrutiny of Legislation in the Assembly

BILINGUAL LAWMAKING AND JUSTICE

A report on the lessons for Wales from the Canadian experience of bilingualism by -

Mr Justice Thomas, Senior Presiding Judge of the
Wales and Chester Circuit;
His Honour Judge Roderick Evans, QC, Recorder of
Cardiff ;
Winston Roddick QC, Counsel General to the National
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Gwyn Griffiths, Senior Assembly Counsel;
Catrin Huws, Assembly Counsel.



Swyddfa'r Cwnsler Cyffredinol
Office of the Counsel General

Bilingual Lawmaking and Justice

1. Introduction

1.1 The delegation is very grateful to the Canadian High Commission in London for the kind invitation to undertake the study visit referred to in this report, and for the detailed work that led to such an informative and interesting tour.

1.2 The purpose of the visit was to enable those involved in the preparation of bilingual legislation and interpreting such legislation as well as the administration of justice in a bilingual context generally to benefit from the extensive Canadian experience of bilingual work in those fields.

1.3 In particular the delegation saw how legislation was prepared and justice done bilingually by Federal institutions at Ottawa and provincial institutions both of Ontario at Ottawa and of New Brunswick at Fredericton and Moncton. At each of those levels the proportion of French speakers to English speakers is comparable to the proportion of Welsh speakers to English speakers in Wales. However, while the Federal Government of Canada and Ontario have far greater resources than Wales, New Brunswick provides a fully bilingual service for a smaller population than that of Wales with resources more comparable to those available in Wales.

1.4 The delegation consisted of:-

- Mr Justice Thomas, Senior Presiding Judge of the Wales and Chester Circuit ;
- His Honour Judge Roderick Evans, QC, Recorder of Cardiff ;
- Winston Roddick QC, Counsel General to the National Assembly for Wales;
- Nerys Arch, Senior Assembly Counsel, the National Assembly for Wales;

- Gwyn Griffiths, Senior Assembly Counsel;
- Catrin Huws, Assembly Counsel.

1.5 The visit included:-

- the Superior Court of Ontario in Ottawa;
- the Federal Court of Canada in Ottawa;
- the Legislative Services office of the Ministry of Justice, Ottawa;
- Parliamentary Counsel of the House of Commons, Ottawa;
- the Centre for Research in Public Law at the University of Montreal;
- the Department of Justice in Fredericton, New Brunswick;
- the Legislative Assembly of New Brunswick at Fredericton;
- the Human Rights Commission of New Brunswick at Fredericton;
- the Provincial Courts of New Brunswick in Moncton; and
- the Centre for Translation and Judicial Terminology at the Faculty of Law in the University of Moncton.

1.6 Amongst those who were kind enough to give of their valuable time to the delegation were (in the order in which we visited them):-

The Honourable Mr Justice A Roy,
Justice of the Superior Court of Ontario,

Mr Chris O'Connor,
Head of Political Section, The British High
Commission, Ottawa

The Honourable Mr Justice Allan Lutfy,
Associate Chief Justice, The Federal Court of
Canada

The Honourable Mr Justice John D Richard,
Chief Justice, The Federal Court of Canada,

Mr Robert C Bergeron,
Senior General Counsel, Legislation Section,
Department of Justice, Ottawa

Mr Rob Walsh,
Law Clerk and Parliamentary Counsel, House of
Commons, Ottawa

Mr Michael Lukinyuck,
Deputy Principal Clerk, House of Commons, Ottawa

Professeur Daniel Poulin,
Directeur, Université de Montréal, Centre de
recherche en droit public,

Professeur Karim Benyekhlef,
Université de Montréal, Centre de recherche en droit
public,

The Honourable Bradley Green Q.C.,
Attorney General, Minister of Justice, Minister
Responsible for Aboriginal Affairs, Government
House Leader, New Brunswick

Mr Roger Joseph Albert Bilodeau,
Deputy Minister, The Department of Justice, New
Brunswick

Ms Josée Dubé,
The Queen's Printer, The Department of Justice,
New Brunswick

Mr Patrick Malcolmson,
The Human Rights Commission, New Brunswick

The Honourable Joseph Daigle,
Chief Justice of New Brunswick, The Court of
Appeal,

The Honourable David Smith,
Chief Justice of the Court of Queen's Bench of New
Brunswick,

Professeur Charles Zama,
directeur adjoint, Centre de traduction et de
terminologie juridiques,
École de droit, Université de Moncton,

2. The approach in Ontario, in New Brunswick and of the Federal government.

2.1 Availability of legal materials and forms in both languages

2.1.1 The importance of the availability of bilingual resources was emphasised by all those who gave evidence to the delegation as a key factor in a bilingual nation. Legislation and textbooks are available in both French and English. Terminology has been developed over time and the terms adopted have been used and become accepted.

2.1.2 A great deal of bilingual material is available due to the work of the Centre for Translation and Judicial Terminology at the Faculty of Law in the University of Moncton. The Centre opened in 1979, one year after the Law School opened in Moncton, which for the first time provided a French language course in common law. At that time all the teachers at the Law School had studied common law through the medium of English, whether they were in fact Anglophone or Francophone. The library was also an English one. It had therefore been decided to set up a Translation Centre.

2.1.3 The Centre started with a translation of property law vocabulary, published in 1980. It then translated the Rules of Court for New Brunswick.

2.1.4 As a result of constitutional challenges in court cases in Manitoba in the 1970s the province had to provide all its Acts, Regulations and Rules in French. These were translated by the Centre. The Centre has also translated for the NW Territories, Yukon and

Saskatchewan. Most of the legislation from those provinces is drafted in English and the Centre translates it.

2.1.5 In 1982, as a result of a court decision, New Brunswick had to provide all published court decisions in French as well as in English. The Centre translated these. The Centre also translated some Federal Court decisions for a while, but these are now translated by the Court itself. The Centre translates some municipal bylaws and also some minutes of Council meetings. Most private legislation (e.g. for professional bodies) in New Brunswick is also translated at the Centre.

2.1.6 It was also regarded important to have available all commonly used forms with both languages being used on the same form and not on separate forms.

2.2 Education and training in both languages

2.2.1 Canada, as well as being bilingual, is a bijural system, i.e. it consists of both civil law and common law jurisdictions. Traditionally French speakers trained in civil law and English speakers in common law.

2.2.2 The Law School at the University of Moncton has offered bilingual courses in common law since 1979. The Translation Centre at the University offers assistance and training in legal translation for students and judges. The Centre also translates teaching materials, and Bar admission materials. The development of bilingual teaching has been another key factor.

2.3 Gradualism: the change in New Brunswick in a generation

2.3.1 The bilingual system developed as a result of a gradual process. Until approximately 1968 English was the language of the administration of Justice and when a bilingual system was introduced there was initially a resistance in some quarters to what was regarded as an undue emphasis on French. The reaction of officialdom

was to draw back somewhat for a while, and to progress more gradually. However, now, there is an acceptance of the need and advantages of the right to use either official language, and a stronger political and community will to ensure that the system works.

2.3.2 In answer to the question what could have been done differently, the delegation was told that an awareness campaign of the advantages of bilingualism would have been of benefit. If education leads to a fully bilingual people, there is less need for translation, and a higher priority can be given to terminological work.

2.3.3 The aim is that translation should be a transitional stage, and eventually all original materials will be produced in French as well as English. Terminology is continuing to develop.

2.4 Cost: the position in New Brunswick

2.4.1 Both Federal and provincial governments contribute to meeting the cost. The Courts pay for translations in most instances. Initially, the Translation Centre at the University of Moncton was funded from Federal and provincial governments, but it is now run on a commercial basis. The cost of publishing the legislation is high, but is reduced by the use of technology and publication on the Internet only.

3. Vocabulary and development of the language: the work being done in Canada

3.1 The work in deriving legal terms

3.1.1 The development of terminology is ongoing. The Translation Centre at the University of Moncton plays a leading role in this work. If no French term exists for an English common law phrase, the linguists at the Centre will first look at the French civil law and, if possible, borrow a term for use in a new context. If that is not possible, they look at the origin of the English word and try to find an appropriate existing term. If that is not possible, then they will create a word, e.g. for “estoppel”

they used the word “préclusion”, thus giving the word a new meaning. They will also adopt terms already in common currency (e.g. “interpleaderie” for “interpleader”) and so terminology becomes part of the common law as it is used. They do not necessarily use terms already approved in other French medium jurisdictions e.g. the use of “arret” in place of the more common “stop”.

- 3.1.2 The Centre has produced a “Juridictionnaire”, which is a dictionary of the difficulties encountered in French common law. It explains how to use terms, in what context, which prefixes to use, etc. It is also available on CD - “Juriterm”. The Centre produced the original software for the dictionary. The aim is to have a complete dictionary of the common law in French.

3.2 The approval of legal terms

- 3.2.1 There is a national body for standardising legal terminology - “the National Programme for the Administration of Justice – the two official languages”. It is based in Ottawa and funded by the Federal Government. It consists of representatives from the Department of Justice and the courts, and the Translation Centre also contributes. A committee of that body decides on terminology. The committee has five permanent members, made up of lawyers, judges, translators and a linguistic expert. The committee considers reports prepared by a team and makes decisions on the terms to be used. Once terms are decided upon, they are used in legislation, cases and textbooks.

4. Justice: Ontario, the Federal Courts and New Brunswick

4.1 Court Structure

- 4.1.1 The Canadian Federal Courts are all fully bilingual, using both the English and French languages, which have equal standing.

The Supreme Court

- 4.1.2 The highest Court in the land is the Supreme Court of Canada. It is the general court of appeal from all other Canadian courts.

The Federal Court of Canada

- 4.1.3 The Federal Court of Canada is organised into appeal and trial divisions, and, whilst based in Ottawa, the judges of both divisions sit across the whole of Canada. The Court reviews disputed decisions of federal boards, commissions and tribunals. The Federal Court's jurisdiction also includes inter-provincial and federal-provincial disputes, intellectual property proceedings, admiralty matters, citizenship appeals, and appeals under certain federal statutes. The Federal Court shares jurisdiction with the provincial superior courts with respect to claims by and against the Crown. A great deal of the Court's work consists of judicial review cases. Cases are heard in French, English or bilingually, and its decisions are always made available in both languages.

The Provincial Courts

The Superior Courts deal with cases from across the province and hold unlimited substantive and monetary jurisdiction. They hear the most serious criminal cases and the largest civil suits. The Superior Courts deal with only 5% of criminal cases, but as these are the more serious offences, they often involve jury trials. The provincial courts are restricted by both the subject matter and monetary value of the litigation and by its geographic location. Provincial courts deal with most criminal cases, but these are not jury trials. Justices of the Peace deal with small civil claims and minor criminal offences.

4.2 The difficulties of translation during legal argument and evidence; consecutive and simultaneous translation.

4.2.1 It is possible to have either single language (French or English) or bilingual trials. In a criminal trial it is the defendant who decides the language of the Court but in civil cases it is common to have bilingual trials. They provide equal justice where the two languages are used and eliminate the difficulties that arise in monolingual trials.

4.2.2 When translation is necessary there are often problems with technical language used in trials. One way of alleviating that problem is to give the translators the documentation in advance. There are also difficulties in translating legal argument because of the terminology, the need to be precise, and the need to follow the logic of the argument. It is often necessary for translators to interrupt the lawyers as they are addressing the court. Ideally judges should be fully bilingual in cases where both languages are used.

Consecutive translation

4.2.3 In single language trials, evidence of a witness who is not giving evidence in the language of the trial is interpreted into English or French on a consecutive basis, as with other foreign languages. Interpreters determine the pace of consecutive interpretation.

4.2.4 The disadvantages of this system were said to be its slowness. It doubles the time of hearing the evidence that has to be translated. It can take away the force of cross-examination. However it is more accurate as the translator has to follow each word of the evidence, translating every word.

Simultaneous translation

4.2.5 The disadvantage of simultaneous translation was said to be the danger of missing individual words. There was also a risk of the translator summarising the

evidence, rather than translating each word. With simultaneous translation, the translation does not form part of the court record. The great advantage is speed.

4.3 Bilingual tribunals; the use of both texts in interpreting bilingual legislation

Jury selection

4.3.1 If a trial is to be heard in French, then both the judge and the jury must be capable of understanding French, without the need for translation. A jury panel is selected randomly by computer. The Sheriff then sends out summonses. Potential jurors are asked to tick whether or not they speak French, but as they are not asked to give an assessment of their ability, the judge has to investigate the level of their language skills when they are empanelled.

4.3.2 For example, a potential juror may say that he speaks French, but he may only really understand argot or street language. Different judges gave different explanations of how they do this, but usually they question the jurors directly in both languages. All concluded that this questioning should take place right at the outset. This normally happens without difficulty, but it is possible to have a panel of up to 200 potential jurors who have already been identified as potential bilingual jurors.

The use of both texts

4.3.3 Language issues do arise. Lawyers will argue that the meaning of the text in one language differs from the meaning in the other language. The judges therefore have to be aware of nuances in the languages and really have some understanding of both. The judges will always look at both texts together. The interpreters attend a trial to assist the parties, not the judge. Bilingual judges are assigned to cases where these issues are anticipated.

4.4 Training for translators

4.4.1 In the Superior Court in Ottawa, translators often join the interpretation service with no prior training. The Court had a pool of just three translators who carried out both consecutive and simultaneous translation. They received no specialist training.

4.4.2 In New Brunswick the translators generally held degrees in translation, although this is not mandatory. However high standards are required, and care needs to be taken that translators do not put words in witnesses' mouths.

4.5 Choice of language for the case

Criminal trials

4.5.1 The choice of language for the trial is the accused's only. According to section 530 of the Criminal Code, the choice must be offered at the earliest stage in the proceedings. The accused usually states the choice of language on his first appearance before the Court. He can however change his mind, and this does happen.

4.5.2 He has the right to be heard by a court that understands him in the official language of his choice, without the need for translation. The judge (and jury if there is one) must therefore be able to understand the chosen language. There is possibly still some hesitation or fear about requesting trials in French. English has been accepted as the official language for so long. It is also possible to get an earlier date if English is chosen.

4.5.3 Witnesses, including victims, have no right to influence the language of the trial. For example, in a French language trial, although four witnesses may be English speakers and only one a French speaker, the presence of the English witnesses does not trigger a bilingual trial. Interpretation is provided in respect of those witnesses who give their evidence in English. However, even if, for example, the advocates speak French and the defendant has chosen to have a French trial, witnesses may still opt to give their evidence in English.

- 4.5.4 The language in which evidence is given is treated as the original language of the evidence. Previously a translation was included in place of the original language; this practice has now ended.

Civil Trials

- 4.5.5 In civil cases, all parties have the right to choose the language of the trial, so judges must be able to use both. The choice of language must be stated in a requisition which is required by statute to be filed. Civil cases are thus more of a challenge and are more truly bilingual because the Plaintiff could choose French and the Defendant could choose English. The parties in civil cases can require interpretation for the Counsel of their choice. If the witnesses in a civil case wish to use a different language from the language of the trial, an interpreter is provided for their evidence.

4.6 Monolingual and bilingual trials

- 4.6.1 The Federal Court of Canada's management system statistics show that only about 3% of cases are heard bilingually, with the vast majority being heard in English, and between 15 and 20% in French. The Superior Court in Ottawa hears approximately 3 cases per annum in French or bilingually.

5. Judicial appointments: adequate number of bilingual judges and staff and availability of training

Bilingual staff

- 5.1 In the public service offers have to be made to deal with all matters in either French or English, and efforts are made to recruit bilingual staff. Recruitment of bilingual clerks to the provincial court service in Ottawa is difficult as there is much competition for bilingual staff and the Federal government tends to pay more. Once bilingual staff have been recruited, there are often difficulties in maintaining their French language skills as the court's work is still mainly in English.

Training

- 5.2 Language training is available for judges and this can be intensive immersion training. Special courses are arranged for Francophone judges to enable them to use French language common law terminology. These courses last one week each year. Anglophone judges, can attend two 10 day intensive sessions to learn French in Quebec each year, with longer sessions for those who show a special aptitude. They are also encouraged to live with a French family for up to 3 months to immerse in the language. The aim is to make the judiciary more sensitive to language issues.

Appointments

- 5.3 The Federal Minister of Justice selects all but the most junior judges. There is no formal language requirement for appointments but linguistic capabilities are taken into account in selection as it is necessary to have a certain number of judges capable of conducting bilingual trials or trials in French. At present the Ontario Supreme Court has 21 judges of whom 9 are bilingual. The Court also has 7 supernumerary judges, of whom 4 are bilingual. In the Ottawa area 80% of the population is English speaking and therefore most lawyers and judges will be English speakers. This is different from the position in some eastern areas of Ontario where there is a greater French speaking population. Judges will be allocated according to their language ability. There is some difficulty in allocating judges to family cases.

6. The language of the judgement

- 6.1 Judges sum up in bilingual trials in both languages, alternately, summing up French evidence in French and English evidence in English. This is possible because the cases are heard by bilingual juries.
- 6.2 Judges will give their judgement, usually in the language of trial, or in a bilingual trial, in both languages. The Court will sometimes pay for the translation of

judgements in bilingual trials (22 cents per word) or in a unilingual trial if the judge asks for a translation into the other language to be provided.

- 6.3 In the Federal Court, an attempt is made to release important judgements in both languages at the same time, but otherwise the judgement is subsequently translated. If the case is an important one, and is in just one language, translation will be provided in any event at the time the judgement is handed down.

7. Allocation of the cost of translation

- 7.1 In the Supreme Court of Canada everything is translated. The Federal Court of Canada will provide interpretation into or from either of the official languages, but the parties have to provide the translation for any other languages. The Federal Court also pays for the equipment and technicians. In a trial there would be instantaneous translation. In the Federal Court, the interpreters are not part of the court staff but are provided by another government department. Interpreters work in groups of three. As they come from a pool, they are not necessarily specialists in legal interpretation. If necessary the Court will use private interpretation services.

- 7.2 In the provincial courts, the court translates exhibits in criminal cases. Under the Ontario Courts of Justice Act, the court is responsible for translation and interpretation where stipulated otherwise the parties provide their own translation.

8. Human Rights

- 8.1 The Charter of Rights and Freedoms has generated many different kinds of pre-trial motions mainly because of delays and questions of disclosure. The issue most commonly raised is that of delay. Finding a judge and jury to hear a bilingual trial can sometimes involve delay. Sometimes, it takes time to schedule a judge who speaks the right language(s). This can give cause for

complaint under the Charter as it relates to the question of accessibility to justice.

9. Legislation: Federal and New Brunswick legislation

9.1 The Constitution Act 1867 requires all Federal Acts of Parliament to be printed and published in both English and French. The Official Languages Act 1967 requires all such Acts to be enacted simultaneously in French and English. Both language versions are equally authoritative, and the Courts will consider both versions and interpret and apply both.

9.2 New Brunswick has been a bilingual province since 1969, so both French and English have had equal status since then.

10. Drafting Legislation

Key words are professionalism; centralisation; computerisation; co-drafting; revision.

10.1 Co drafting

10.1.1 The Federal Government, The Legislation Section of the Ministry of Justice, has been co-drafting its Acts of Parliament since 1978. There are no translators in the Section. The Section used to translate its legislation but concerns were raised as to the quality of the translated legislation. It was criticised by the Commissioner for Official Languages. A study group was therefore set up to consider new solutions. The group invented the idea of co-drafting.

10.1.2 Once a recommendation for new legislation is approved, a file is assigned to two drafters. Members of the relevant department, usually a lawyer and a policy official, meet with the drafters to explain the policy and what is required by way of legislation. It is very important that the drafters have a clear idea of what is required.

- 10.1.3 There are therefore two drafters for each piece of legislation– one Francophone and one Anglophone. Both are bilingual. They are equal partners. Both attend all meetings and know all the background to the Bill. There is however a lead drafter and a second drafter. The lead drafter alone will attend a meeting if the second drafter is unable to.
- 10.1.4 All instructing officers are also bilingual, or at least within the team there is someone who is bilingual.
- 10.1.5 All involved in the drafting (i.e. lawyers and instructing department) work on one document. The structure of the Bill will be organised by both drafters, together with the policy department.
- 10.1.6 Both language versions use the same sections and sub-sections. They do not number the clauses as they draft as that means it is then easier to change the sequence.
- 10.1.7 There is a specialist in the section on bilingual problems.
- 10.1.8 New Brunswick. The Legislative Services Department have been co-drafting since the 1980's. The process involves five stages:
- Understanding and analysing. A proposal is brought forward in English from the relevant department, and both the drafting lawyers attend meetings with the department to ensure that they both fully understand the intent. These meetings are usually in English.
 - First draft. The lead drafter prepares a first draft and shares it with the other lawyer who comments on it and prepares a draft in the other language. Each lawyer therefore works on an individual document but there is a great deal of continuous communication between both lawyers throughout the process.
 - The English and French versions are sent out to the instructing department.

- The draft is sent back and forth between the department and the drafting lawyers for amendments.
- The drafts are then edited and published.

10.1.9 The co-drafting produced, it was thought by the drafters in Ottawa and New Brunswick, better legislation in both languages. When legislation was drafted in English and then translated into French there was much criticism of the quality of the French legislation. The co-drafting process ensures equal care and consistency in both languages. Neither version can be said to be inferior to the other. Both versions should properly implement the policy, and be identical in legal effect. There are two original versions, with neither being a translation of the other. The slightly longer time it takes to do the actual drafting is counterbalanced by the saving on time achieved in the process as a whole.

10.1.10 Both drafters participate equally. They read each other's drafts continually. As there are two lawyers working on each piece of legislation, they are more likely to spot gaps and problems, and identify how to solve them. They adopt the solution most appropriate to each language draft. If the draft is in one language and then translated, problems are less likely to be spotted.

10.1.11 The system of co-drafting was therefore considered better than translating and also better than one person drafting in both English and French. If that were done there would be no one to check the work, and one of the drafts would not be in that drafter's mother tongue.

10.2 Teams and central drafting

10.2.1 Drafting of Federal statutes is done centrally, by drafting lawyers in a central section, the Legislation Section which drafts all government legislation.

10.2.2 The Section consists of 28 lawyers and serves all departments. The drafters try not to specialise in any

particular subject, although some have more experience than others in particular subjects. There are also six revisioners in the Tax Counsel Division who work on financial matters.

- 10.2.3 Two drafters work on each Bill but they do not work in fixed pairs. There are more or less equal numbers of French and English lawyers in the Section.
- 10.2.4 All the drafters in the Section have followed the drafting course in Ottawa. It takes 5-6 years to train once they have started in the Section.
- 10.2.5 They have no secretaries but input their own data. There is only one support staff in the section, who is responsible for the Cabinet documents.
- 10.2.6 They have desk instructions, precedents etc. They have staff meetings every week. The First Legislative Counsel produces Notes to Drafters with advice or points to note. There is a Deskbook Committee within the section who prepare notes on various subjects such as “Boards” or “Tribunals”. These notes and the Notes to Drafters are eventually incorporated into the Deskbook.
- 10.2.7 They also use other tools such as a human rights checklist and prosecutor’s handbook.

Regulations

- 10.2.8 “Regulations” are what we would describe as secondary legislation. The position with drafting regulations is somewhat different. The Regulations Unit is also under First Legislative Counsel. There are about 100 lawyers who draft regulations, and the English/ French split is about 70/30. Some are in satellite units and work closely with the instructing departments.
- 10.2.9 The instructing departments usually draft their own regulations, which is also the position in Ireland, and then the Regulation Unit checks for conformity with the enabling statute. The work is generally very technical.

The Unit also checks on the quality of the drafting, often redrafting the regulations, which is why the lawyers from the Unit now work more closely with the departments.

10.2.10 Regulations vary in the way they are drafted. Some are co-drafted but some are translated. Because they are very technical, there may not always be bilingual technical experts available to instruct. Very many regulations are drafted each year, and about 40-45 statutes.

10.2.11 Once the Regulation Unit approves regulations they are sent to the Canadian Privy Council and are made. They are then tabled to the Joint Committee of the House and Senate who check the regulations and the enabling statute, and they can summons officials to appear before the Committee. They have the power to repeal regulations and although they have only done so a few times, it is a very effective threat. There is therefore a great deal of scrutiny of regulations.

10.2.12 In New Brunswick, the Legislation Services branch consists of seven drafting teams, each made up of an Anglophone and a Francophone lawyer, both of whom will also be working towards being bilingual. They draft all the public Acts and Regulations, all of which are bilingual.

10.2.13 Each team works exclusively for certain departments other than when it is necessary to help out in other teams. Each team is responsible for the drafting work of two or three departments.

10.3 Availability of bilingual lawyers

10.3.1 In New Brunswick, the current system has evolved over nearly thirty years. All the pre -1973 legislation had to be translated from English into French, thus slowly developing a body of bilingual law. Twenty years ago lawyers were usually either Anglophone and common law lawyers or Francophone and civil law lawyers. New Brunswick is a common law jurisdiction. Moncton law school then started a course in common law in French

so that there were Francophone common lawyers from 1982 onwards. There are by now therefore trained French common law lawyers who can draft, appear in court and serve as judges.

10.3.2 Language training is also provided for the drafters by the department.

10.4 Production of side by side texts

Editors and jurilinguists

10.4.1 As both the Ministry of Justice in Ottawa and the Province of New Brunswick co-draft, they do not use translators, but all Acts and Regulations are checked for language correctness and consistency by teams of editors and jurilinguists.

10.4.2 The Legislative Services branch in Ottawa has a team of editors and jurilinguists. There are 6 French and English editors who check the versions and technical matters, etc. The jurilinguists are specialists in language, and are not legally trained. There are three Anglophone jurilinguists and three Francophone jurilinguists who give technical support. They compare the versions and suggest improvements. There are also automation services.

10.4.3 In New Brunswick editors check the drafts for references, inconsistencies and formatting. There are two editors in the Department, one Anglophone and one Francophone. They are not lawyers but language graduates. The drafts are then returned to the lawyers for final approval, and are then sent to be published. The proofs are checked by the editors.

10.5 Technology

10.5.1 The Ministry of Justice in Ottawa makes great use of IT support. The section is on a separate network, so they can send secret documents to each other. Confidentiality of instructions, memos and draft Bills is of great importance. There are two computers in all rooms,

but the drafters do not share rooms. They have had dual screen computers for the last ten years. All drafters have their own directory and there is also one common directory for sharing documents.

- 10.5.2 They use WP 5.1. They are still using this as they commissioned so many changes to the software that it was tailor made for their use. The programme allows them to re-number clauses in Bills and all cross-references automatically. It is necessary that all drafters use the same style and this is standardised so that it is easier to revise.
- 10.5.3 There is a computer specialist team that is currently working on a new language programme. The State of Tasmania has a very good model. They are developing a macro for the computer that will compare versions and check that they are the same, e.g. that both versions have headings in the same place.
- 10.5.4 In New Brunswick, it was emphasised that in developing new programmes, it is very important to work very closely with the IT team, i.e. sit next to them as they work every day.

11. Production of consolidated legislation; organisation and categorisation

Publication

- 11.1 In Ottawa all the legislation is available on the Internet, and also they produce a CD-ROM of the consolidated legislation.
- 11.2 In New Brunswick, legislation is published in-house by means of desktop publishing (Framemaker). The two drafts are sent separately to be published and are put on a template. Chapter numbers are assigned by the English name.
- 11.3 Each item of legislation is published in pamphlet form. They also produce loose-leaf volumes containing consolidated legislation. This is updated every three

months or so, thus ensuring for every citizen a right of access to up to date laws.

- 11.4 Legislation is also published on the Internet in Word in its consolidated form, and bilingually, but not side by side.
- 11.5 When an amending Act is passed it is known as, for example, “The 1990 Education Act to amend the 1986 Education Act”. Within a short period of time it will be consolidated, and the 1990 Act will then disappear.
- 11.6 Regulations are published in the Royal Gazette. They are also published in a consolidated form on the Internet. In addition to the two editors referred to above there is a Law Gazette Editor.

12. Assistance to members of the legislature in drafting

- 12.1 The Office of Legal services in Ottawa provides the services of Legislative Counsel who drafts Private Members’ Bills and amendments to Government Bills. The Office also has a Parliamentary publications section which edits and publishes all Bills, including Government Bills, and also translates. The Opposition often put in very many amendments and the Office has to draft them all. Many motions are not substantive, and the Legislative Clerks within the Office draft rulings for the Speaker as to whether motions are procedurally acceptable, within the Bill or conform with other provisions.
- 12.2 In New Brunswick opposition motions and amendments are drafted by outside bodies privately but are usually checked by the editors within the Department. The Department does however draft motions to amend (floor amendments), which are usually short, if the Government wishes to adopt them.

13. The Constitution/ Human Rights

- 13.1 In Ottawa the Legislation Section has to consider how the legislation blends into the Constitution and whether it

conforms to the Charter. The drafter has to sign a declaration that the Bill is within the Charter.

- 13.2 The Human Rights Law Section is often asked for its opinion. If it considers that there is a risk of a challenge, then the matter is referred back to the policy department to reconsider the policy. If no changes are made the matter is referred upwards, until eventually it goes to the Minister of Justice for a decision.
- 13.3 The Human Rights Law section reviews memos as they go through the system, so before they come to the drafters. However often new issues arise during the course of the drafting.
- 13.4 The drafting lawyers are not specialists but are alert to issues of human rights, e.g. with regard to penalties. They call in the experts from the Human Rights Law Section, the Constitutional Law Section or Criminal Policy Section, etc.. They also have to check that the Bills conform to other general Acts, the Official Languages Acts, and international laws.
- 13.5 The courts have the right to strike down legislation which is incompatible with the Charter, and do so occasionally.
- 13.6 Accessibility of legislation is also a human rights issue. The public should be able to access legislation easily in its most up to date form, and should be able to understand it easily. Legislation is therefore consolidated, published on the Internet and drafted as plainly as possible.

14. Wales

14.1 The context.

The policy and requirements of the Welsh Language Act and the Government of Wales Act

- 14.1.1 The Welsh Language Act 1993 imposes a duty on the public sector to treat Welsh and English on the basis of

equality when providing services to the public in Wales. The same principle applies to the courts.

- 14.1.2 The Government of Wales Act 1998 lays down the principle that in the conduct of Assembly business English and Welsh are to be treated on the basis of equality (section 47). Standing orders are to be in English and Welsh. Subordinate legislation is to be drafted in English and Welsh (unless it is inappropriate or not reasonably practicable) (section 66). Section 122 provides that English and Welsh texts are of equal standing.

14.2 Current position in outline

Assembly legislation is drafted by a lawyer working alone, in English and then translated into Welsh. It is then checked by a bilingual lawyer.

Legislation is published both in paper form and on the Internet, but is not consolidated. Publication requirements are statutory.

No particular training is provided in drafting or language.

A Standing Committee on the Welsh Language is in the process of producing a uniform policy for progressing the implementation of the principles in the Welsh Language Act in the Courts and Tribunals in Wales. Although civil trials and hearings before Magistrates are conducted in Welsh or bilingually, no trials in the Crown Court are conducted other than in English; Welsh has to be translated.

15. List of recommendations

Matters for immediate implementation

15.1 Maintaining and developing the links with Canada

- 15.1.1 The main lesson learnt from Canada was that successful bilingual drafting is possible. The Canadian jurisdictions have taken over twenty years to achieve the

models the delegation saw. By learning from their experience Wales can hope to accelerate that process. They have a great deal to teach on co-drafting, the use of I.T., publishing, bilingual templates and so on.

- 15.1.2 The delegation now needs to be able to translate what was seen into working practices for Wales. Some important contacts were made and these will be continued through informal communications such as e-mails. However the contact could also be established more formally. Suggestions were made that Robert Bergeron, Senior General Counsel from the Ministry of Justice in Ottawa, or a member of his staff, should come to the Assembly on a secondment, for six months or so. The possibility of a secondment and its funding should be explored. Robert Bergeron's short visit to the office of the Counsel General in January 2001 to assess how he and his colleagues might assist the Assembly was a very constructive starting point. During that week, Robert Bergeron addressed the Lord Morris of Borth y Gest seminar on the Canadian experience of legislative drafting.

15.2 Associations

Two drafting associations were mentioned as being valuable to join, again to help develop and maintain links with drafters in other jurisdictions, from whom much may be learnt. These were the Commonwealth Association and the European Association. It is of course open to any lawyer to join whichever association he or she sees fit, but to maximise the benefit for Wales, there should be members of both amongst the lawyers at the Office of the Counsel General.

15.3 Conferences

It is suggested that that a conference of Commonwealth lawyers might be organised in Wales. Drafters and judges would both benefit from such an opportunity, though the conference would need to be appropriately structured.

- 15.4 Co drafting of Assembly legislation (and practice directions)
- 15.4.1 The ideal is the model in Ottawa where all drafters are bilingual and all instructions are also bilingual, and where the technology used is sophisticated. In reality the example of New Brunswick is probably far more achievable, in terms of size and resources. The experience of New Brunswick shows that a system of co-drafting can be achieved in a small province, with limited resources. This system was considered to be better than translating, as more regard is given to the principles of equality of language, resulting in both versions being authentic. In Ottawa instructions and meetings were all bilingual, whereas in New Brunswick, instructions and meetings were usually in English, and this is likely to be the situation at the Assembly for the immediate future. There were fewer bilingual and French-speaking lawyers in New Brunswick than the Department considered ideal, and again this is more reflective of the situation in the Assembly than that in Ottawa where all drafters were bilingual and there was equal numbers of Francophone and Anglophone lawyers.
- 15.4.2 Problems of lack of standardised legal terminology in the minority language are common to Wales and Canada. There was no tradition of French language common law, and so there were no common law terms in existence in French. The terminology has been developed over the last twenty years and is now used. In the same way there has been no law making in Welsh for over five centuries, and therefore there has historically been no equivalent Welsh terms for many legal phrases.
- 15.4.3 It is recommended that a start be made on the co-drafting of Assembly legislation, and that this be done initially by means of pilot projects, co-drafting two or three instruments. Ideally the first items of legislation to be co-drafted should be original pieces of drafting, i.e. not amending instruments or ones where we are following Whitehall's policy very closely. They should not be too technical. In each team selected as pilots,

two drafters should be appointed to work on the legislation, a first and second drafter, so that one has primary responsibility for communicating with the policy division, but both should attend all meetings, and they should work very closely together. They should discuss all instructions and discuss the structure of the instrument together. Ideally they should be able to read each other's drafts, but the reality is that one drafter is likely to be able to work only in English whereas the other will be bilingual. After the drafting is complete both drafts should be checked for language correctness and consistency by the translators acting as editors.

15.4 Deskbook

A start should be made on compiling a deskbook of advice to drafters. Initially this should comprise points from the Legislation Committee, and any advice or information which has been shared by lawyers to date. The aim would be that the Deskbook should help to ensure a consistent and effective house style. It might be of assistance to have a deskbook Committee to collect the points and advice received to date, and also, in due course to work (in co-operation with colleagues) on other items to be put in the Deskbook.

15.5 Training

15.5.1 Contact needs to be developed with the Colleges of the University of Wales to explain the needs that exist and those that are anticipated for lawyers who can operate effectively in both languages. Some work has already been done on this by members of the delegation since their return from Canada. The Counsel General for Wales has raised these matters with the Centre for Welsh Legal Affairs at Aberystwyth and University College Cardiff is running a course on advocacy in the Welsh Language as part of its post graduate professional training course. The University of Wales, in particular the law school and the Welsh language departments have an essential part to play in this.

15.5.2 The Judicial Studies Board, The Lord Chancellor's Department and the University of Wales should be asked to consider training for Judges who might be asked to hear cases in Welsh and to provide language tuition for Judges similar to that available in Canada. There is strong support amongst members of the judiciary in Wales for this training.

15.6 Appointments

Judicial, quasi Judicial and Magisterial posts in Wales for which an ability to conduct proceedings in the Welsh Language is necessary should be identified and the Lord Chancellor's Department should be asked to agree criteria for the advertising of the posts, the interviewing of candidates and appropriate appointment procedures. Following the Canadian visit members of the delegation have raised these matters with the Standing Committee on the Welsh Language and discussions have been commenced with the L.C.D..

Medium term

15.7 Production of consolidated legislation

15.7.1 The question of producing consolidated legislation is related to issues of accessibility of the law. Law should be easy to access, in its consolidated form, and easy to read.

15.7.2 The priority in so far as publication of legislation is concerned at the moment is completing the setting up of the Legislation Management Unit. Once that is in place it should be possible to look at the feasibility of consolidating Assembly legislation.

15.7.3 The actual consolidation would be largely an editorial task rather than a legal one, but would probably require a dedicated team. Care would have to be taken to satisfy Assembly members that the consolidation did no more than re-enact existing provisions otherwise it would require the full scrutiny accorded to new provisions.

15.7.4 There is a need to look at the setting up of a system that would allow any member of the public to access the most up to date law, as amended but also to be able to ascertain the state of the law as it was at any date. There are statutory obligations with regard to publishing but the consolidating could be done on the Internet only, thus reducing publication costs.

15.8 Bilingual Juries

A debate should be initiated on the desirability of changing the law to allow in the appropriate case a bilingual jury. Mr Justice Thomas and Judge Roderick Evans Q.C. have sent a paper on this topic to Lord Justice Auld who is conducting a review of the criminal process in England and Wales. The debate will be taken further in a forthcoming Seminar arranged by the University of Swansea to discuss the Welsh Language in the Legal process in Wales.

15.9 Courses and Materials in Welsh

The universities in Wales should be encouraged to run courses in Welsh for Law students at both the under graduate and post graduate levels. Such courses would serve a dual function: they would produce lawyers familiar with legal concepts and terminology in Welsh and also create a need for legal materials in Welsh which the colleges themselves would be able to supply. A law department in one of the colleges in Wales should be encouraged to undertake translation work similar to the department in the University of Moncton.

15.10 Translators

The Court Service should work with the Institute of Translators in Wales to create a qualification obtainable by examination which would qualify the holder of the qualification to be a translator in the Courts of Wales. Some work has already been done on this.

Long term

- 15.11 Members of the delegation were greatly impressed by the thoroughly bilingual legal and legislative system which has been created in New Brunswick during the last thirty years. It is a system which appears entirely natural and to be accepted by both cultural / linguistic groups. This may well be due to the care taken to ensure that the legal system is in practice thoroughly bilingual and that neither linguistic group feels threatened or disadvantaged by the other.
- 15.12 To what extent is such a system a practical goal for Wales? There are important differences between Wales and New Brunswick. New Brunswick has its own primary law making parliament together with a Judicial system comprising a Court of Appeal, Queens Bench and Provincial Courts. All statutes and case law are bilingual and the quoting of sources and authorities in either language is therefore facilitated. The vast majority of laws applicable in Wales are created in parliaments - London or Brussels – where the Welsh language is not an official language and Wales does not have its own Judicial system. Save for subordinate legislation passed by the Assembly the quoting of sources and authorities in Welsh is in practice impossible.
- 15.13 Nevertheless, subject to these limitations, the system which exists in Wales should be such that it treats Welsh and English on a basis of equality in the spirit of the Welsh Language Act and does not inhibit the use of either language. If the present system achieves bilingualism it will be capable of ready adaptation to ensure that bilingualism will be a feature of any future change in the legislative or Judicial structures of Wales.

The Hon. Mr Justice Thomas

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