LANGUAGE OF JUDGMENT AND THE SUPREME COURT OF CANADA

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In this paper I examine language issues arising from the manner in which Supreme Court of Canada decisions are reported. I begin with a survey of the practice of the Supreme Court of Canada with respect to language of reporting. I then consider the law which applies to this practice, including the competing principles of the equality of the official languages, the individual right to use the language of one's choice, the rights of parties to authentic reasons in the language of their pleadings, and finally the symbolic importance of language in this context. After a comparison of the Canadian situation with that in other bi- and multi-lingual jurisdictions, I make recommendations for change in the current practice. As I will demonstrate, judicial practice is erratic and inconsistent in Canada, and rules regarding the language of judgment of the Supreme Court of Canada are necessary, both as a means to resolve possible conflict between English and French versions of judgments and as a recognition of the symbolic importance of language in our bilingual nation.

Historical Overview of Practice at the Supreme Court of Canada

For the purposes of this paper, the reporting practices of the Supreme Court of Canada have been divided into four main periods: the period leading up to and including 1969, 1970 to 1980, 1980 to 1988, and 1988 to the present. Prior to 1970, decisions of the Court were reported in the language of drafting. Bilingual reporting of Supreme Court of Canada decisions began after 1969, following the passage of the *Official Languages Act, 1968-1969*.[1] Between 1970 and 1980, decisions were published side by side with no designation as to which was the original and which was the translation. However, between 1980 and 1988 this practice changed. In the vast majority of judgments in this period, the original version and the translated version were identified. In the last few years, the practice has undergone yet another shift to vary according to such factors as the subject matter of the case and the individual judge.

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[1]S.C. 1968-1969, 17-18 Elizabeth II. c. 54 [hereinafter *OLA 1968-69*].

Period up to and including 1969

In this period, decisions of the Supreme Court of Canada were reported only in the language of drafting of the individual judges. With a few early exceptions, no translations were provided.[2] While the judges from outside of Québec drafted their opinions overwhelmingly in English, the reverse is not true of the judges from Québec. Decisions of Québec judges were sometimes drafted in English.[3] This practice may seem to reflect a concern to draft in the language of the parties or the pleadings, although it is not clear on the surface that this was the case.[4]

In 1964 the Supreme Court of Canada made some effort towards bilingual reporting when the editors of its reports began experimenting with bilingual headnotes in selected decisions.[5] However, this practice was never comprehensive. Russell describes this foray into bilingualism as "hesitant and haphazard."[6] In a comprehensive study of the Court's activities during this period, Russell observed that:

> Since most of the Court's members are English-speaking and these English-speaking judges never write their judgments in French, this means that the bulk of the Court's judgments are reported in English. The French-speaking judges write opinions in both languages; if the case they are deciding is from Québec, in all likelihood their opinion will be written in French, whereas if it deals with a matter of national interest, they may express themselves in English.[7]

The lack of translation meant that decisions in French would reach a fairly limited audience. As a result, judges from Québec must have felt some pressure to use

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[2]Peter Russell notes that in the early years of the Supreme Court of Canada, some opinions of Québec judges were translated into English and published in the Supreme Court Reports. Russell writes: "This development apparently was prompted by the complaints of English-speaking lawyers against the Court's first few publications of opinions written only in French." See P. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, Documents of the Royal Commission on Bilingualism and Biculturalism (Ottawa: Queen's Printer, 1969) at 93.

[3]For example, in the early years of the Court, Justice H.-E. Taschereau wrote almost exclusively in English. For more on Taschereau J. and his position in the evolution of the Québec legal tradition, see D. Howes, "From Polyjurality to Monojurality: The Transformation of Québec Law, 1875-1929" (1987) 32 McGill L.J. 523.

[4]The following analysis by Peter Russell indicates the extent of the link between the language of the parties and the language of judgment in this period: "The language used when the Court delivers its judgment will depend on the presiding judge and the language used in the litigation. If the presiding judge is French speaking and French was the principal language used in the pleadings, then the judgment will probably be delivered in French. Otherwise it will be in English." See Russell, *supra*, note 2 at 92.

[5]*Ibid.* at 94.

[6]*Ibid.* at 95.

[7]*Ibid.* at 93.

English when they desired that their opinion be read and considered by jurists from provinces other than Québec.

Period from 1970 to 1980

In his report to the *Royal Commission on Bilingualism and Biculturalism*, Peter Russell stated that: "If the Supreme Court is to produce a jurisprudence which can be shared by all Canadians, its decisions must be equally accessible to the country's two major linguistic groups. Up until now this condition has certainly not been fulfilled."[8] The passage of the *OLA 1968-69* was to have a dramatic effect on the reporting of Supreme Court of Canada decisions. The *OLA 1968-69* established that English and French were the official languages of the federal government and its institutions. This included the Federal (formerly Exchequer) Court and the Supreme Court of Canada, both established pursuant to the federal power to establish courts for the better administration of the Laws of Canada under s. 101 of the *Constitution Act, 1867*.[9] The *OLA 1968-69* provided in s. 5(1) that:

> All final decisions, orders and judgments, including any reasons given therefor, issued by any judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada shall be issued in both official languages where the decision, order or judgment determines a question of law of general public interest or importance or where the proceedings leading to its issue were conducted in whole or in part in both official languages.[10]

Because the mandate of the Supreme Court of Canada was to hear and decide questions of law "of general public interest or importance", the consequence of this provision was that, beginning in 1970, decisions of the Supreme Court of Canada were published in side by side French and English versions.[11] The *OLA 1968-69* did not contain any specific dispositions with respect to the interpretation of judgments reported in two languages. In other words, there was no provision made regarding the authoritativeness of the two versions. Interestingly, during this period, the side by side versions contained no indication of either the language of original drafting or the language of translation. While the quality of the

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[8] *Ibid.* at 95.

[9] (U.K.), 30 & 31 Vict., c.3 (formerly *British North America Act, 1867*).

[10] The new Act of 1988 expands upon s. 5 in s. 20, but still makes no provisions regarding interpretation and authenticity of judgments. See *Official Languages Act*, S.C. 1988, 36-37 Elizabeth II. c. 38 [hereinafter *OLA 1988*].

[11] Note that the only full history of the Supreme Court of Canada does not make reference to this date or to the Court's change in reporting practice. See J.G. Snell and F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985). Yet the increased linguistic accessibility of judgments is seen as an important objective by some commentators. See, for example, M.R. Beaupré, *Interpreting Bilingual Legislation*, 2d ed. (Toronto: Carswell, 1986) at 2.

translation in those early days may have been a clear indicator of the language of the original, the fact remains that the manner of publication presented the two versions without any overt indication. Although never articulated as policy, this seemed to suggest that both versions would be treated as equally authoritative.[12] It is interesting, and possibly relevant, that the period of 1970 to 1980 coincided with the tenure of Justice Louis-Philippe Pigeon, an outspoken advocate of French language in law and the judiciary.[13]

Period from 1980 to 1988

The reporting practices of the 1970 to 1980 period may or may not have been the result of the advocacy of Pigeon J. The fact remains that after his death in 1980, the practice of the Supreme Court of Canada in reporting its decisions underwent a significant alteration. In 1980 the Court began to identify the language of original drafting and the language of translation. Thus, cases were reported with indicators such as: "The following are the reasons delivered by" juxtaposed with "version français des motifs rendu par",[14] and "english version of the judgment of the Court delivered by" as opposed to "Le jugement de la Cour a été rendu par".[15] Each decision is presented in both languages, but one is designated as the judgment, and the other as the English or French translation of that judgment.

It is difficult to understand precisely why this change occurred. It may have had something to do with the changing composition of the Court. It may also be related to the growing professionalization of the translating facilities at the Supreme Court of Canada. It is possible that as translation at the Court evolved from a response to a change in legislation to a highly specialized and well integrated part of the institution, the translators began to take sufficient pride in their work to desire acknowledgment in the form of recognition of their efforts in

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[12]Russell, however, expresses a contrary opinion. Referring to the prospect of Supreme Court judgments reported with translations, he writes: "If this were done, it is unlikely that both French and English versions of a judgment could have the same authority." See *supra*, note 2 at 96. This opinion was based on the experience of the International Court of Justice, and the complexities, expense and time constraints of the process of legal translation.

[13]In paying tribute to Pigeon J., former Chief Justice Brian Dickson had the following to say: "il a vraiment joué un rôle de premier plan pour ce qui est de faire de la Cour une institution plus bilingue qu'elle ne l'avait jamais été. Il va sans dire que le juge Pigeon était lui-même parfaitement bilingue. Toutefois, il s'est profondément intéressé aux aspects institutionnels du bilinguisme à la Cour. Il a consacré une somme vraiment remarquable de temps et d'energie afin de s'assurer que les traductions des jugements de la Cour suprême du Canada soient fidèles et exactes." These remarks by Chief Justice Brian Dickson are found in *Mélanges Louis-Philippe Pigeon*, Montréal, Wilson & Lafleur, 1989, aux pp. 49-50.

[14]From *Bilodeau* v *A.G. Manitoba*, [1986] 1 S.C.R 449 at 458.

[15]From *C.K.V.C. (Québec) Ltée* v. *The Canadian Labour Relations Board*, [1981] 1 S.C.R. 411 at 412.

the actual decisions. Although the reasons for the change are unclear, the fact of the altered practice is incontrovertible.

From 1980 to 1988, decisions of the Supreme Court of Canada are essentially reported in one of four ways: as decisions of individual judges or the Court in English with a French translation (vast majority); as decisions of individual judges or The Court in French with an English translation (relatively few); as decisions by individual judges with no indication of language of drafting (extremely rare); and as decisions by "The Court/La Cour" with no indication of the language of drafting.[16]

In this period, a few interesting patterns appear in the language of reporting practices. These patterns cannot be described as customs in that they are not followed absolutely. Nevertheless, there is a tendency in cases from Québec for the decisions of individual judges to be reported in French with an English translation. These decisions are almost always penned by the judges from Québec. However, in some instances, Québec judges draft in English with a French translation.[17] This may occur primarily where one or both parties appear to be English speaking, or it may reflect the language of pleadings: francophone parties may nonetheless have had lawyers who pleaded in English before the Court. Although this suggests that the judges feel some compulsion to use the language of the parties, the fact that there is no absolute custom to draft in the language of the parties is made clear where in separate opinions in the same case, different judges draft in different languages.[18] During this period, where decisions in French are delivered by judges not from Québec, they are short oral decisions.[19]

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[16]Examples of decisions of "The Court/La Cour" reported in this period with no indication of langauge of drafting include: *A.G. of Québec* v. *Blaikie*, [1981] 1 S.C.R. 312; *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Order: Manitoba Language Rights*, [1985] 2 S.C.R. 347. Note that not all decisions of "The Court/La Cour" in this period are reported with no indication of language of drafting. Decisions of "The Court/La Cour" in French with an English translation include: *A.G. (Que.)* v. *Québec Protestant School Boards*, [1984] 2 S.C.R. 66; *A.G. Que.* v. *Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831. Decisions in English with a French translation include: *McEvoy* v. *A.G. (N.B.)*, [1983] 1 S.C.R. 704; *Franklin* v. *The Queen*, [1985] 1 S.C.R. 293; *Head* v. *Graham*, [1985] 1 S.C.R. 566; *Dyck* v. *Manitoba Snowmobile Ass'n*, [1985] 1 S.C.R. 589; *Bell* v. *The Queen*, [1985] 1 S.C.R. 594; *Trask* v. *The Queen*, [1985] 1 S.C.R. 655; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Blais* v. *Minister of National Revenue*, [1985] 1 S.C.R. 849; *Clark* v. *C.N.R.*, [1988] 2 S.C.R. 680; and *R.* v. *Francis*, [1988] 1 S.C.R. 1025.

[17]For example, in *Vézina and Coté* v. *The Queen*, [1986] 1 S.C.R. 2, and *Dumas* v. *LeClerc Institute*, [1986] 2 S.C.R. 459, Lamer J. writes for the unanimous Court in English with a French translation.

[18]See for example the decision of Le Dain J. (Lamer J. concurring) in *A.G. (Que.)* v. *Greater Hull School Boards*, [1984] 2 S.C.R. 575. While the majority decision is in French with an English translation, the decision of Le Dain and Lamer JJ. is in English with a French translation.

[19]See, for example, *R.* v. *Jacques*, [1983] 1 S.C.R. 724.

In this period a number of decisions are reported as decisions of "The Court/La Cour", with no indication of the language of drafting or translation. Apart from being unanimous and essentially anonymous decisions,[20] these decisions are either in cases originating in Québec,[21] cases dealing with language rights,[22] or cases of a constitutional nature.[23]

The practice in the 1980 to 1988 period is characterized predominantly by reporting of decisions in side by side versions with an indication of language of original and language of translation. This practice resulted in the overwhelming number of decisions being reported in English with French translations. Deviations from this general rule follow certain patterns, indicating some degree of respect for language of pleadings or the parties, and a perceived need for a "language neutral" approach to some cases. Nevertheless, these patterns are inconsistent throughout.

1988 to the Present

In 1988, the *OLA 1968-69* was substantially amended, and became what is now known as the *Official Languages Act, 1988*.[24] Sections 14 to 20 of the Act deal with the use of language in the administration of justice. These provisions give a substantially more detailed structure for language use than did s. 5 of the earlier Act. Section 14 provides that "English and French are the official languages of the

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[20]I use the term anonymous to distinguish these decisions from unanimous decisions of the Court which bear the name of the judge writing for the Court. I do not mean to imply a particular wish for anonymity, although in some of the more politically controversial cases, one wonders whether this might not have been a desired consequence.

[21]For example: *Flamand* v. *The Queen*, [1982] 1 S.C.R. 337; *Le Blanc* v. *The Queen*, [1982] 1 S.C.R. 344; *Lemarche* v. *The Queen*, [1982] 1 S.C.R. 345. However, not all decisions of "The Court/La Cour" from Québec are reported in a language neutral manner. See: *A.G. (Que.)* v. *Québec Protestant School Boards*, *supra*, note 16, (French with English translation); *Robitaille* v. *American Biltrite (Canada)*, [1985] 1 S.C.R. 290, (English with a French translation); *A.G. Que.* v. *Carrières Ste-Thérèse Ltée*, *supra*, note 16, (French with English translation); *Blais* v. *Minister of National Revenue*, *supra*, note 16, (English with French translation).

[22]For example: *Order: Manitoba Language Rights*, *supra*, note 16; *A.G. of Québec* v. *Blaikie*, *supra*, note 16. However, not all language rights cases by "The Court/La Cour" are reported in a language-neutral manner. For example, see: *Re Manitoba Language Rights*, *supra*, note 16, (English with French translation); *A.G. (Que.)* v. *Québec Protestant School Boards*, *supra*, note 16, (French with English translation).

[23]Not all constitutional decisions by "The Court/La Cour" are reported in a language-neutral manner. See, for example, *McEvoy* v. *A.G. (N.B.)*, *supra* note 16, (English with French translation); *Trask* v. *The Queen*, *supra* note 16, (English with French translation). As a further anomaly, it appears that a non-unanimous constitutional decision had its separate opinions drafted in a language-neutral manner: *Re Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004.

[24]*Supra*, note 10.

federal courts" and reiterates the constitutional guarantee that either of these languages may be used in any process issuing from such a court. Section 20(1) specifically governs the language of final decisions, orders or judgments, and provides that, in general: "Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages." Where, in exceptional circumstances, time does not permit translation, the court in question may issue judgment "in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective."[25] The *OLA 1988* also provides that all decisions must appear in both languages at the earliest possible time. No provision governs the choice of official language when a judgment is to be rendered first in only one of the languages, nor is there any provision regarding the designation of the original language version.

The *OLA 1988* cannot be said to have produced a marked impact on the reporting practices of the Supreme Court of Canada. While it gives a greater elaboration of the idea of juridical equality of the two languages, it does little more than codify what had become the Court's few consistent practices regarding language of judgment. In terms of the day to day practice of the Court, the period from 1988 to the present is marked by the same inconsistencies[26] and a number of recent developments which, though interesting, contribute to the increasingly chaotic practice of the Supreme Court of Canada. During this period, the Court continues the predominant practice of drafting in English with French translations. Decisions of "The Court/La Cour" with no indication of language of drafting are occasionally handed down. The cases selected for this practice tend to be controversial, dealing, for example, with language rights[27] and abortion.[28] Some cases from Québec which are decided by "The Court/La Court" are also reported in this manner.[29] It should be noted, however, that "language neutral" decisions of "The Court/La Cour" in cases arising from English Canada which do not deal with politically controversial matters are rare.[30] The predominant practice for such cases remains to draft in English with a French translation. In cases on appeal from New Brunswick, Canada's only officially bilingual province, the

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[25]*Supra*, note 10 at s. 20(2).

[26]For example, in *Irwin Toy Ltd.* v. *Québec (A.G.)*, [1989] 1 S.C.R. 927, the judgment of Dickson C.J. and Lamer and Wilson JJ. has no indication of language of drafting, while that of McIntyre and Beetz JJ. is in English with a French translation.

[27]For example: *Ford* v. *A.G. Que.*, [1988] 2 S.C.R. 712; *Devine* v. *A.G. Que.*, [1988] 2 S.C.R. 790; *Order: Manitoba Language Rights*, [1990] 3 S.C.R. 1417; *Reference Re Manitoba Language Rights*, [1992] 1 S.C.R. 212; *Sinclair* v. *Québec (A.G.)*, [1992] 1 S.C.R. 579.

[28]*Daigle* v. *Tremblay*, [1989] 2 S.C.R. 530.

[29]See, for example, *Robitaille* v. *Madill*, [1990] 1 S.C.R. 985.

[30]One example would be L'Heureux-Dubé J.'s separate opinion in *R.* v. *Howard*, [1989] 1 S.C.R. 1337.

Court's practice is no different from that in the English Canadian provinces.[31] Further, there is no distinction made with respect to decisions rendered in cases on appeal from the Federal Court of Appeal, even though this court is also bound by the requirements of the *OLA 1988*.[32]

One of the most interesting developments in this period is that the decisions of L'Heureux-Dubé J. begin to be reported in French and English with no indication of the language of drafting. This practice begins partially in her second full year on the bench.[33] In 1992, all of L'Heureux-Dubé J.'s decisions are reported in side by side English and French with no indication of language of drafting. This practice remains unique to L'Heureux-Dubé J. While there are perhaps a number of different reasons which may explain this change of practice on the part of a single judge, one possible explanation is a greater sensitivity to issues of expression and authenticity in the language of judgment.

Language Rights of Judges in Canada

The above discussion of the provisions of the *Official Languages Act, 1988* and the reporting practices of the Supreme Court of Canada needs to be tempered with a consideration of a principle which is in competition with the notion of the juridical equality of the two official languages in Canada. While the roots of this principle may be found in Canada's constitutional documents, it is, in reality, a principle which has had most of its content defined by judicial interpretation. In effect, it is a principle developed by the judges of the Supreme Court of Canada themselves.

Section 133 of the *Constitution Act, 1982*[34] provides that either French or English can be used "in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of

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[31]In other words, the general tendency is for decisions to be reported in English with French translation: see *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138; *R.* v. *Romeo*, [1991] 1 S.C.R. 86; *Snell* v. *Farrell*, [1990] 2 S.C.R. 311; and *Knox Contracting Ltd.* v. *Canada*, [1990] 2 S.C.R. 338. In *C.B.C.* v. *New Brunswick (A.G.)*, [1991] 3 S.C.R. 459, two of the three separate opinions are written in English with French translation, while the opinion of Justice L'Heureux-Dubé is reported in English and French with no indication of language of drafting.

[32]For example, see *Schachter* v. *Canada*, [1992] 2 S.C.R. 679, and *Rhône (The)* v. *Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497. In these cases, as in most others, the two different opinions are reported in English with French translation.

[33]In 1989, L'Heureux-Dubé J. wrote two opinions in French with English translation, and six in English with French translation. Ten of her opinions were reported with no indication of language of drafting.

[34]Being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

Québec." Section 19 of the *Canadian Charter of Rights and Freedoms*[35] also provides for the use of either English or French "in any ... process issuing from, any court established by Canada", and in "any ... process issuing from, any court of New Brunswick."

The scope of the language rights contained in s. 133 was considered in *Macdonald* v. *City of Montréal*.[36] In determining to whom the language rights belonged, Beetz J. for the majority of the Court, wrote that:

> the language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof.[37]

This view was shared by Wilson J. in dissent, who accepted the right of a judge to use the official language of choice, but who added a proviso regarding the duty to provide a translation: "Regardless of whether a judge acting in his or her official capacity retains the right as an individual to write judgments in the language of his or her choice, this cannot, in my view, detract from the state's duty to provide a translation into the language of the litigant."[38] This proviso is important in that it attempts to balance the language rights of the judge with those of the individual in an officially bilingual legal system. However, Wilson J. does not consider the question of authenticity, thereby avoiding the issue of whether a judge's right to draft in his or her language of choice necessarily dictates the language of authenticity. Further, the positions of both Beetz and Wilson JJ. are interesting in the context of a Court which, however haphazardly, seemed to recognize that parties had some right to a decision drafted in the language of their pleadings.[39]

The position of the Court regarding the language rights of judges was further elaborated by Beetz J. in *Société des Acadiens* v. *Association of Parents*, where he observed that these language rights "vest in the speaker or the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice."[40] It would seem clear, therefore, from a reading of these cases, that under s. 133 of the

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[35]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[36][1986] 1 S.C.R. 460.

[37]*Ibid.* at 483.

[38]*Ibid.* at 540.

[39]In fact, Beetz J. appears to have been extremely careful to respect this practice in his years on the Supreme Court of Canada.

[40][1986] 1 S.C.R. 549 at 574.

Constitution Act, 1982, and by extension s. 19 of the *Charter*,[41] judges have the right to use the official language of choice in the writing and issuing of their opinions. The right of the recipients or readers of court proceedings and judgments to versions in their own language is not protected by the *Constitution*.

The interpretation of s. 133 by Beetz and Wilson JJ. in *Macdonald*, regarding the right of a judge to choose his or her language of use, is ambiguous. It is not clear whether this right means simply that the judge is free to draft his or her opinion in the official language of his or her choice, or whether the right has further implications. That is, it remains unclear whether s. 133 (and by extension s. 19) are determinative of the issue of the language of authenticity of the decision where such decisions are required to be made available in both official languages. The distinction is a fine one. It would imply that although a judge is free to use her own language in the decision making and drafting process, the public interests of a plurilingual state can require a separate set of rules regarding authenticity.

Practice in Search of a Principle

The lack of clear policy regarding language of decision at the Supreme Court of Canada causes problems on two levels. The first is practical: in case of discrepancy between the two language versions, it is not clear which version should prevail. The second is more directly related to principle: in a jurisdiction where two languages are officially equal, it would seem necessary to have rules which govern the choice of language of decision or of authenticity.

Discrepancies between two or more versions

The multilingual reporting of judicial decisions raises its own practical difficulties. Where two or more versions of a single judgment exist, there are bound to be some discrepancies in meaning. In law, the problem of translation has drawn much attention, particularly with respect to the translation of legislation.[42] It

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[41] In *Société des Acadiens, ibid* at 574, Beetz J. observed that: "It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* [now referred to as *Constitution Act, 1982*] with respect to the courts of Canada and the courts of Québec."

[42] The interpretation of bilingual legislation is widely discussed. The following is just a small selection of available materials. Note how the issues arise in a variety of settings from bi- or multilingual states, to colonial situations, to international organizations: M.R. Beaupré, *supra*, note 11; M.R. Beaupré, "Vers l'interprétation d'une Constitution bilingue" (1984), 25 Cahiers de Droit 939; R. Bilodeau, "Le Bilinguisme judiciare et l'affaire *Robin* v. *College de St. Boniface*: Traductore, Traditore?" (1986), 15 Man. L.J. 333; R. Boult, "Le Bilinguisme des lois dans la jurisprudence de la Cour suprême du Canada" (1968), 3 Ottawa L.R. 323; L'Hon. L.-P. Pigeon, "La rédaction bilingue des lois fédérales"

would seem to be generally acknowledged that multiple language versions of statutes can diverge in meaning. The degree of divergence can depend on a number of factors, not the least of which is the distance between different languages and cultures.[43] The problem in legal translation is well expressed by K.K. Sin, who has studied bilingual legislation in the context of Hong Kong:

> It goes without saying that it is necessary for the translated version to convey the same legal meaning as the original if it is to be accepted as an authentic text. This can be achieved only by making the selected semantic components of the target language function in the same way and in the same system as their counterparts in the source language. However, since no two languages cover exactly the same semantic area, translation essentially involves mapping one language onto another and the end result is usually closeness but not identity in meaning. Because of the demand for precision, closeness in meaning is not enough in legal translation. Many people therefore contend that legal terms are in principle untranslatable where the source language and the target language do not share the same legal system, as is the case with English and French, or English and Chinese.[44]

The difficulty of translation of legal terms, particularly across different legal systems, does not stop states from establishing rules for official bi- or multi-lingualism which encompass the laws and structures of the judicial system. Judges are simply asked to add problems of conflicting language and legal culture to their general task of interpreting and applying legislation. In any event, rules are often formulated by the legislature regarding the interpretation of bi- or multi-lingual

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(1982), 13 R.G.D. 177; M.L.J. Cooray, *Changing the Language of the Law: The Sri Lanka Experience* (Laval: Les Presses de L'Université Laval, 1985); J.-C. Gémar, *Langage du droit et traduction/The Language of the Law and Translation* (Québec: Editeur Officielle du Québec, 1982); A.E. von Overbeck, "L'interpretation des textes plurilingues en Suisse" (1984), 25 Cahiers de Droit 973; J. Herbots, "L'interprétation des lois à formulation multilingue en Belgique" (1984), 25 Cahiers de Droit 959; K.K. Sin, "Meaning, Translation and Bilingual Legislation: The Case of Hong Kong", in P. Pupier & J. Woehrling, eds, *Langue et Droit/Language and Law* (Montréal: Wilson & Lafleur, 1989) at 509; J.P. McEvoy, "The Charter as a Bilingual Instrument" (1986), 64 Can. Bar Rev. 155; P. Pescatore, "Interpretation des lois et conventions plurilingues dans la Communauté européenne" (1984), 25 Cahiers de Droit 989; M. Tabory, *Multilingualism in International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980).

[43]The switch in language of law from English to Chinese which will take place in 1997 in Hong Kong provides an illustration of some of the difficulties: "The situation in Hong Kong is complicated by the language factor: there is an enormous gap between English and Chinese resulting from structural and cultural differences. It becomes even more complicated when we take into consideration the fact that the Chinese language used in Hong Kong, both written and oral is not entirely the same as that used in China and so we have to deal with the issue as to which one we should adopt in Hong Kong." See Sin, *supra*, note 42 at 511.

[44]*Ibid.* at 513-14. Tabory, *supra*, note 42 at 26, also notes that a significant problem of the multilingual European Court of Justice is that, regarding translated documents, "legal terms in the various official languages do not always correspond exactly." Examples of some of the more significant divergences in this regard are given by D. Lasok and J.W. Bridge in *Law and Institutions of the European Communities*, 4th ed. (London: Butterworths, 1987) at 92-97.

legislation.[45] Such legislative solutions can involve making one language version of the law authoritative. Most frequently they involve delegating the task of resolving linguistic differences to the courts.[46] Courts themselves can devise their own rules for interpreting language conflicts in the text of statutes.[47]

The quality, and therefore the reliability, of legal translations can also be affected by factors of speed and economy. It is well known that the costs of a legal system operating in more than one language are much higher than those of a monolingual system.[48] Attempts to reduce costs may affect the bi- or multilingual facilities, particularly translation. Further, speed can be a significant factor. Recognizing this, the *OLA 1988* provides for delayed release of translations where it is imperative that a judgment be delivered quickly.[49]

The problems of legal translation become much more complex when dealing with the translation of judgments. It is part of the normal task of a court to interpret the meaning of statutes. Thus, regardless of the degree of divergence between the different language texts, these differences will always be resolvable by judicial interpretation. Judgments, on the other hand, form a strange hybrid between the legal and the literary. On the one hand, they are designed to have a binding legal effect, yet on the other hand they are texts which can express the values, thought processes and personal styles of their authors. Judgments are not written in a way which is amenable to the "simultaneous" drafting process which has revolutionized the preparation of multilingual statutes. They present the usual problems of legal translation in that they are meant to interpret the law, and yet, through divergences in meaning across language, they are themselves often capable of multiple interpretation. That such problems can and do exist is evidenced by the fact that in most multilingual jurisdictions, the proper approach to take in case of discrepancies in meaning between the different language versions of a judgment is usually set out in the rules of procedure of the Court or Tribunal in question. In this respect the Supreme Court of Canada is a striking exception.

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[45]See, for example, *OLA 1968-69*, *supra*, note 1 at s. 8.

[46]Such a solution, for example is the rule in Belgium: "Les contestations basées sur la divergence des textes français et néerlandais sont décidées d'après la volonté du législateur, déterminée suivant les règles ordinaires d'interprétation." See Loi du 18 avril 1898, reformulée dans la loi du 31 mai 1961.

[47]For a summary of the evolution of the Swiss Federal Tribunal's approaches to the interpretation of multilingual legislation, see von Overbeck, *supra*, note 42.

[48]Pescatore notes that the multilingual policy of the organs of the European Community is "à la fois une richesse et une énorme servitude, administrative et financière, mais c'est là le prix qu'on paie pour la compréhension mutuelle et la paix linguistique". See *supra*, note 42 at 989.

[49]*Supra*, note 10 at s. 20(2).

In Canada, every decision handed down by a federally established court will be available, via translation, in both English and French. This is provided for in the *Official Languages Act, 1988*.[50] The Act, however, is silent as to the authenticity of the two versions, and as to the way in which conflict between the two versions should be resolved. It is suggested by the wording of s. 20(2) of the new Act that both versions of a judgment are equally authoritative by virtue of the fact that even when they are not issued simultaneously, "each version [is] to be effective from the time the first version is effective." One might assume that the word "effective", used in the context of a judgment means having all the necessary "force" of a judgment and that as a result, not only must each language version of the judgment be enforceable, but each can be cited, argued, taught and followed independently of the other versions.[51] Nonetheless, it is equally easy to assume that where it is clear that one version is original and the other a translation, in case of discrepancy, the original will prevail.

Politics and Rights

The designation of an authentic language version of a judgment will, in most cases, resolve problems of discrepancies between versions. The authentic version will most likely prevail.[52] However, not all of the problems relating to the language of drafting deal with the technicalities of authenticity. There is both a political and a "rights" dimension to the issue as well. At a political level, there is a strong likelihood that erratic language practices will favour the dominant language of the society. It is unlikely that a bi- or multi-lingual nation will experience a complete factual equality of languages. One language will always predominate, either numerically, economically, politically, or in a combination of ways. The balance between the communities may fluctuate with time, as is the case in Belgium, or the power of one community may grow at the expense of other language groups, as is the case in Switzerland. In such situations, where the equality of languages is a constitutional principle, if not an actual reality, the equality of languages in the judicial system is of extreme importance. Where one language dominates numerically, as is the case with Swiss-German in Switzerland, or English in Canada, the potential for those languages to dominate in government

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[50] *Supra*, note 10.

[51] Even before this provision of the *Official Languages Act, 1988*, both language versions of Supreme Court of Canada judgments have been treated as being equally authoritative. However this seems to have developed by custom as there is no legislative provision regarding this matter in either the *Official Languages Act, 1988* or the *Supreme Court Act*, R.S.C., 1985, c. S-26, as amended by R.S.C., 1985, c. 34 (3rd Supp.) [hereinafter *Supreme Court Act*].

[52] This conclusion does not follow automatically. In Belgium, although an authentic language is designated, both versions are equally authoritative. Discrepancies must be resolved through a process of interpretation, (see *infra*).

bureaucracies and institutions is very real. The language of debate and deliberation of courts may reflect the dominant language of the society. The language in which judges choose to draft decisions may likewise come to reflect that language dominance. Where this is the case, the practices undermine the principle of linguistic equality upon which the political and social linguistic compromise has been based. Crudely put, it looks bad. It reflects a lack of concern, a lack of commitment, or perhaps even the inevitability of language domination within a federal union. Canadians should be quick to realize that language is more than a symbol, but that even as a symbol it is extraordinarily powerful. Rules regarding the authentic language of decision attempt to eliminate such effects of *de facto* language dominance.

At the level of "rights", reporting practices raise issues of the rights of parties both to approach the courts and to receive justice in their own language. Several bi- or multi-lingual jurisdictions have recognized that individuals appearing before a court have some right to receive an authentic decision in the language of their pleadings. Those jurisdictions place those rights superior to any right of a judge to "choose" the language of his or her opinion. In most cases, rules regarding the language of authenticity of judgment reflect the language of the individual parties to the case, that is, the language of the actual dispute, rather than the working language of the court in question.

Language-of-Decision Practice in Other Multilingual Jurisdictions

There are numerous jurisdictions, other than Canada, which have bi- or multi-lingual courts. In this section I will discuss a number and variety of them: international, national and multi-national. Although the number of languages involved in each case varies, one factor remains constant. Each of these jurisdictions has set out specific rules which govern the reporting and authenticity of bi- or multi-lingual court decisions. Further, in all of these cases, the practice gives preference to factors which are outside the control of the judges. In other words, the choice of the judge is irrelevant when measured against factors such as the language of the parties, the pleadings, or of the lower court decision. In none of the courts considered are judges ever constrained to write in a particular language. Nevertheless, they are not free to determine the language in which their decision will be authentic.

International Tribunals

1. The International Court of Justice

Like the Supreme Court of Canada, the official languages of the International Court of Justice (ICJ) are English and French. This is set out in art. 39 of the Statute of the International Court of Justice. The statute of this court is explicit about the way in which the ICJ is expected to operate with its two official languages. It provides that where the parties agree that a case should be conducted in either English or French, the Court will render its decision in that language.[53] When the parties cannot agree, they are each free to choose their own language. The ICJ will then render a decision in both languages, but it is required to designate which of the two versions is to be authoritative. Thus, one commentator has observed that "despite the official recognition by the ICJ of two official languages, any judgment is in fact authoritative in one version only."[54] It is not clear whether translations are used as the authoritative version where a judge has drafted an opinion in a language other than that designated by the parties. It may be that the assignment of cases to the judges takes into account both the language of the parties and the language abilities of the judge. In the case of the ICJ, the fact that only one of the two versions is to be authentic may be related to problems of translation.

With regard to translations of decisions of the International Court of Justice it has been noted that care must be used when relying upon the non-authentic version of a judgment due to both the difficulties in translation, and the speed at which such translations must be accomplished.[55] If translations of this court are, for whatever reasons, perceived as unreliable, this would weigh in favour of having decisions authentic only in the language of drafting.

2. The European Court of Human Rights

English and French are the official languages of the European Court of Human Rights (ECHR). All decisions of the Court are given in both official languages.

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[53]Article 96 of the Rules of Court of the ICJ elaborates on this provision of the statute: "When by reason of an agreement reached between the parties, the written and oral proceedings have been conducted in one of the Court's two official languages, and pursuant to Article 39, paragraph 1, of the Statute the judgment is to be delivered in that language, the text of the judgment in that language shall be the authoritative text."

[54]Tabory, *supra*, note 42 at 20.

[55]S. Rosenne, *The Law and Practice of the International Court*, vols. 1 and 2, (Leyden: A.W. Sijthoff, 1965) at 601. Similarly, s. 20(2) of the *Official Languages Act, 1988* would seem to acknowledge that the time needed to prepare translations of judgments can in some cases make simultaneous issuance too rigorous a requirement.

Until 24 November 1982, the language of judgment practice of the ECHR paralleled that of the ICJ, as only one of the versions was designated as being authentic. With respect to this former practice at the ECHR, Professor Tabory writes: "The choice of the authentic text depends mainly on which language has been used by the Court for the early drafts of the judgment, and there is no fixed practice on this point."[56] This practice, or lack thereof, of choosing the language of drafting is reminiscent of the Supreme Court of Canada. It is worth noting, however, that because of the international jurisdiction of the ECHR, the parties were only occasionally required to plead before it in the official languages of the Court. Thus the choice of English or French for drafting is less politically significant than in Canada. In further contradistinction to the Supreme Court of Canada, the ECHR has always had a clear position regarding the authoritativeness of language versions.

It is interesting to note that until 1982 there were four cases in which both language versions of the judgment were declared equally authentic.[57] On 24 November 1982, the Court adopted a new rule regarding the language of judgment. The text of the new rule, 27(5), reads simply that: "All judgments shall be given in English and in French; unless the Court decides otherwise, both texts shall be authentic." This amendment makes a rule out of the exceptional practice in the four decisions of the ECHR noted above. The change is explained by the Registrar of the Court, who states: "The reason for the change was recognition of the fact that whilst judgments were initially drafted in one official language only (it being this language which, generally, was subsequently stated to be the authentic one), important modifications to the draft were often introduced in the other language."[58] This change in policy therefore reflects the truly bilingual functioning of the ECHR. Since suggested modifications to the circulating draft can be made in either official language, the rule recognizes that the final decision of the Court is not more authentic in one language than in the other. The significance of such a rule is that it is a deliberate acknowledgment of the bilingual functioning of the Court, as opposed to a merely theoretical bilingualism.

While the European Court of Human Rights shares the same official languages as the Supreme Court of Canada, the procedure with respect to the language of judgment remains different. First, the practice of the ECHR to designate both versions of the judgment as equally authoritative is explicitly codified, and reflects the way in which judgments of that Court are drafted. The

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[56]Tabory, *supra*, note 42 at 28-29.

[57]The four decisions are *Ireland* v. *the United Kingdom* (1978), Eur. Court H.R. Ser. A, No. 25; *Case of Klass and Others* (1978), Eur. Court H.R. Ser. A, No. 29; *Airey Case* (1979), Eur. Court H.R. Ser. A, No. 32; and *X.* v. *The United Kingdom* (1981).

[58]Letter from the Registrar, Mr. Marc-André Eissen to the author, 27 June 1991.

Supreme Court of Canada has no rules or consistent practice regarding either the designation of authentic versions, or the need for authentic versions to be designated at all. While the ECHR now renders decisions in which both language versions of the judgment are authentic, this is different from the Canadian cases where decisions of "The Court/La Cour" are reported with no indication of language of drafting. In the Canadian decisions, the two language versions are not declared equally authentic. They simply appear without the usual indicators of language of drafting. Whether the linguistic anonymity of the decisions reflects the truly bilingual way in which they were drafted, or whether it merely conceals the language of drafting is unknown.

3. Inter-American Court of Human Rights

The Inter-American Court of Human Rights has four official languages.[59] According to its Rules of Procedure, the Court may function in any of the official languages, its working language(s) being determined at the beginning of proceedings.[60] Article 20 of the Rules of Procedure makes provisions regarding the official and working languages of the Court, and also provides for translations where a party does not speak one of the official languages of the Court.[61] Article 20(5) charges the Court to determine an authentic text in all cases.[62] While this seems to suggest that a sole authentic text must be designated by the Court, the other paragraphs of the article are less clear as to how that language is chosen, particularly since paragraph 2 refers to "working languages". Article 49(2) of the Rules requires that judgments be published in the working languages used in each case. This generally means that the published judgments of the Court will be in Spanish and English. Spanish has been the authentic language of all the judgments of the Court, with the exception of Advisory Opinion OC-2/82, which had English as its authentic language.

A Multi-National Court: The Court of Justice of the European Communities

The Court of Justice of the European Communities (ECJ) is multilingual. The original languages of the ECJ reflected the original membership of the European Economic Community (EEC): French, German, Italian and Dutch. Today, the ECJ has added Danish, English, Greek, Spanish and Portuguese to its list of

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[59]Rules of Procedure of the Inter-American Court of Human Rights, Adopted by the Court, 23rd Regular Session, January 9-18, 1991 at art. 20. The official languages are: Spanish, Portuguese, French and English.

[60]*Ibid.* at art. 20(3).

[61]*Ibid.* at art. 20(4).

[62]Article 46(1) of the Rules also requires that each judgment include "a statement indicating which text is authentic".

official languages, to reflect the growing membership of the EEC. As might be expected, the rules regarding the use of language in documents and proceedings before the ECJ are fairly complex. A case heard by the ECJ has one language, and a series of rules govern the manner in which this language is selected.[63] The language must be one of the official languages of the EEC. In principle it is the language of the application to the court. If a member state is a defendant, the language is that of the member state.[64] The language of the case is then used for written and oral submissions, and for supporting documents. Although court decisions are published in all official languages, the sole authentic text of the decision of the ECJ is in the language of the case. One source suggests that the reason for the designation of a single authoritative text is so that decisions may not be challenged "merely on linguistic grounds ... ."[65] This is as good a reason as any for designating an authentic text as challenges on linguistic grounds would involve quibbles about the divergences in meaning between two versions of the same decision.[66] Clearly, this problem could become acute in the case of the ECJ with its nine official languages. The practice of designating an authentic text, as seen above, is also followed by the bilingual ICJ.

With the broad linguistic choices available to parties, it may be the case in the ECJ that the authentic version of the judgment is not the original, but rather a translation. This is suggested by Mala Tabory, who writes that the first draft of a judgment "is always written in French, from which translations are produced into the other recognized languages."[67]

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[63]For example, in a direct action, the language of a case involving a Member State as a defendant is the official language of that state. The rules vary depending on the character of the parties, and the way in which the case arrives before the court.

[64]Pescatore, *supra*, note 42 at 993.

[65]Tabory, *supra*, note 42 at 25. Note that there have been some cases before the ECJ with multiple authentic languages. See Pescatore, *supra*, note 42 at 1009.

[66]It is to be noted that as the actual process of drafting decisions is affected by the multiplicity of translations to the extent that in choosing terminology, the judges are careful to pick terms which can be easily and clearly rendered in all the languages of the community. See Pescatore, *supra*, note 42 at 996.

[67]Tabory, *supra*, note 42 at 26. However, the Tabory article dates from 1980, and language practice, since the inclusion of English as an official language of the EEC, may have begun to change in some respects.

C. National Tribunals

1. Switzerland

Switzerland has three official and four national languages.[68] The Swiss confederation is based on linguistic territorial sovereignty. Thus, the country is a patchwork of cantons in which official monolingualism is the general rule. Nevertheless, there does exist a court to arbitrate disputes at the federal level of government. Because it must operate in all official languages, the Tribunal fédéral has developed its own rules to deal with linguistic diversity in the cases which come before it. The rules of the Tribunal fédéral specify in art. 16 (1) that: "Les décisions sont rédigées dans la langue officielle en laquelle l'affaire a été instruite et, à défaut d'instruction, dans la langue de la décision attaquée."[69] Thus, while decisions of the Court will be available in all three official languages, the decision will be authentic only in the official language in which the case was conducted.[70] This language is either the language of the defendant, or alternatively, the language of the lower court decision being contested before the Tribunal.

The Swiss Tribunal fédéral des assurances also has specific rules governing the authentic language of its decisions. Article 20 of its rules of procedure provides that:

> 1) Règle générale, l'arrêt est rédigé dans la langue officielle en laquelle l'échange des écritures a eu lieu ou, s'il n'y a pas eu d'échange des écritures, dans la langue de la décision attaquée.
> 2) Lorsque le tribunal statue en unique instance, l'arrêt est rédigé dans celle des langues officielles qui est commune aux parties ou, si ces dernières appartiennent à des régions linguistiques différentes, en principe dans la langue de la partie défendresse.[71]

These rules provide that, in general, the authentic language of decision will be the official language in which proceedings have been conducted up to the point at which they arrive before the Tribunal. Failing the "échange des écritures", the authentic language is the language of the attacked decision. Finally, provision is

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[68]Official languages are German, French and Italian. These three, along with Romansch, are the national languages.

[69]Règlement du Tribunal fédéral, 173.111.1, 14 décembre, 1978, enacted pursuant to the Loi fédérale d'organisation judiciare, RS 173.110.

[70]The choice of official language for the conduct of the case is also regulated by the Rules of the Tribunal, which provide that in general the official language of the defendant will be the language in which the case will be conducted, and hence, the langauge in which judgment will be rendered.

[71]Arrêté fédéral sur les fonctions arbitrales des membres du Tribunal fédéral et du Tribunal fédéral des assurances, RS 3 577, 19 December 1924.

made for cases where the Tribunal sits as a court of first instance. In such cases, the decision will be in the common official language of the parties. If no common official language can be found, the decision will be made in the language of the defendant. The Swiss rules are notable for the comprehensive way in which they regulate the language of authentic decision. The comprehensiveness is perhaps partly required by the fact that Switzerland has three official languages. Yet the way in which the matter is regulated also indicates that a degree of structural linguistic fairness is required by the Swiss linguistic confederation. Because the three official language groups comprise populations differing widely in size and linguistic stability (as well as, to a certain degree, economic and social position), rules are needed to ensure that one language does not become dominant or exclusive in the legal structure and system. The Swiss example is useful for Canada, since Canada's official bilingualism is constantly affected by the sharp difference in size of the two official language groups.

While the rules in Switzerland for choosing the language of judgment are different from those in the other international courts discussed, the Tribunal fédéral has nonetheless recognized the need to apply objective rules to govern the choice of the language of the authentic judgment. This is important, because, in the absence of formal rules, allegations of linguistic favouritism or of the dominance of one language in the court system could be made.

2. Belgium

Although Belgium is officially bilingual, its language policy divides the country into linguistic regions, where, with the exception of Brussels, monolingualism is the general rule. Nevertheless, at the level of the federal judiciary, rules regulating the use of official languages before and by the courts are required. Thus, it is provided as a general rule at the appellate level that the language of procedure is the language in which the challenged decision is drafted.[72] The rule is the same before the Cour de Cassation, which also serves as a constitutional court.[73] A specific provision exists governing the language of decisions rendered by the Cour de Cassation:

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[72]Loi du 15 juin 1935 sur l'usage des langues en matière judiciare, art. 24. This practice is only useful where there are also rules governing the choice of language of drafting in the lower courts. This is not the case in Canada, where, regarding the situation in Québec, Professor Brierley has written: "Decisions of the courts are rendered, however, in the language of preference of individual judges, whatever the language of the litigants or their lawyers and, when reported, they are published without translation." See J.E.C. Brierley, "Bijuralism in Canada" in *Contemporary Law: Canadian Reports to the 1990 International Congress of Comparative Law* (Cowansville, Que: Editions Yvon Blais, 1992), at 25-26.

[73]*Ibid.* at art. 27.

> 28. Les arrêts de la cour de cassation sont rédigés en néerlandais et en français. Ils sont prononcés en la langue prescrite pour la procédure. Les contestations basées sur la divergence des textes sont tranchées par la cour, suivant les règles ordinaires d'interprétation, sans prééminence de l'un des textes sur l'autre.

Thus, the Belgian rules are very specific regarding the language of decision. Decisions of the Cour de Cassation appear in both official languages of Belgium. Nevertheless, the decision of the Court is pronounced in the language of the proceedings, which itself is determined according to specific rules. This would seem to be a symbolic gesture. Neither text takes precedence over the other, and any divergences between the two are to be resolved according to ordinary rules of interpretation. As with Switzerland, the Belgian approach is carefully regulated. By contrast with Switzerland, Belgium aims more at complete equality of the two languages. In Switzerland, it would appear that any decision has one authentic language, even though it is to be published in the official languages of that country. In Belgium, the substantive effect of the rules is that both language versions of judgments are equally authentic and divergences in the text are not to be resolved by the predominance of one version over the other.

All of the bi- or multi-lingual tribunals examined above have rules which govern both the choice of language of decision and the relative authenticity of different language versions. With the exception of the Belgian Cour de Cassation and the ICJ, all the rules regarding language of judgment can be found in the rules of procedure of the court or tribunal. In most cases, judgments of such tribunals are authentic in only one of the official languages of the jurisdiction, although judgments will be translated into the other official languages. Exceptionally, the ECHR and the Belgian Cour de Cassation have policies of complete linguistic equality, and both language versions of a decision will be equally authentic. In the case of the ECHR, this rule developed from practice and from the experience of a truly bilingual drafting process.

It is interesting to note that in none of the jurisdictions considered above does the language of drafting necessarily coincide with the language of authenticity. The rules which govern language of decision are based on facts relating to the language of both or one of the parties, the language of the attacked decision, or, where both versions are equally authoritative, the official languages of the jurisdiction. It would seem that a much greater emphasis is placed on formal linguistic equality and on objective rules for language use than on the individual preference of judges. In no case is a judge compelled to draft a decision in a language other than that of his or her choosing. Nevertheless, the language of choice of the judge does not determine the authentic language of the decision. The quality of translation facilities does appear to be a factor in determining whether language of drafting and language of authenticity must necessarily

coincide. Where translation facilities are inadequate, the translation cannot be considered authentic.[74]

Language of Judgment in the Supreme Court of Canada

Both the *Supreme Court Act*[75] and the *Rules of the Supreme Court of Canada*[76] are noticeably silent regarding questions of language in general, and language of judgment in particular. While it is true that the fact of bilingualism in the Court is governed by the *Official Languages Act, 1988*, there is still room for the Rules of the Court to deal with the question of language of judgment regarding both the language of proceedings and the question of authenticity. The practice of the Court in this regard has been far from consistent, and no "implied" rules seem to be followed. The absence of such rules is particularly noticeable when comparison is made with other bi- and multi-lingual jurisdictions. In brief, the rules of the Court seem to be deficient in two specific language related areas. Firstly, they do not explain how the Court should determine in which language the original text of the judgment should be drafted. Secondly, they do not explain how the Court should deal with the question of the relative authoritativeness of the two language versions.

Interestingly enough, the original *Charter of the French Language* contained a specific provision governing the language of decision in Québec cases. Article 13 provided that: "Les jugements rendus au Québec par les tribunaux et les organismes exerçant des fonctions judiciares ou quasi-judiciares doivent être rédigés en français ou être accompagnés d'une version française dûment authentifiée. Seule la version française du jugement est officielle."[77] This provision recognized that although it was possible that a judgment might be drafted in English, all judgments should in principle be drafted in French, or, at the very least be accompanied by an authentic translation. In any case, only the French version of a judgment would be authentic. This provision is clear and straightforward, although it should be noted that it is meant to operate in a system with only one official language. In any case, it was found by the Supreme Court of Canada to be *ultra vires* the Canadian *Constitution*. The Court held, *inter alia*, that according to s. 133 of the *Constitution Act, 1867*:

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[74]Poor translations may, in and of themselves, violate the principle of equality of languages. If the translated version is not good enough to be considered authoritative, then arguably the official languages cannot be treated as equal.

[75]*Supra*, note 53.

[76]SOR/83-74, amended by SOR/83-335, SOR/83-930, SOR/84-821, SOR/87-60, SOR/87-292, SOR/88-247.

[77]*Charter of the French Language*, S.Q. 1977, c. 5.

> [N]ot only is the option to use either language given to any person involved in proceedings before the Courts of Québec or its other adjudicative tribunals ... but documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders.[78]

Thus, the unilingual approach adopted by Québec was held to be unacceptable under the terms of the *Constitution*.[79] It would seem that where bilingual publication of decisions is not required within a jurisdiction, the freedom of a judge to choose the language of judgment is absolute and uncomplicated. The language of choice will necessarily be the language of authenticity, and there will be only one official version. However, it is not clear that the judges' choice should be determinative in an officially bilingual jurisdiction.

The Supreme Court of Canada has no apparent rules to determine the choice of language of judgment in the cases it hears. As a federal court of last resort in a theoretically bilingual nation, this is most unusual. International courts of multi-national and multi-lingual organizations all explicitly provide rules which govern the language of judgment. These rules illustrate first that it is necessary and desirable to have rules of authenticity for judgments which are to be published in several languages, and second that the choice of authentic version(s) must be governed by rules of procedure in order to eliminate the possibility of perceived linguistic dominance or arbitrariness.

Conclusion

Jurisdictions under a system of official languages in which bi- or multi-lingual reporting of decisions is an aspect of the equality of languages generally have rules which set out which version is to be authoritative and why. Such rules serve a practical purpose, in terms of resolving any possible conflict between the two versions. They also serve to recognize both the symbolic importance of language in multi-lingual nations, and the importance of language to the legal rights of parties appearing before the courts. In the history of Canadian official bilingualism such rules have been lacking, and judicial practice is erratic and inconsistent.

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[78] *Attorney General of Québec* v. *Blaikie*, (*Blaikie No. 1*), [1979] 2 S.C.R. 1016 at 1030.

[79] It is interesting to note that the Court's interpretation of s. 133 could also be argued to preclude an interpretation of s. 20 of the *Official Languages Act, 1988* to mean that documents emanating from the Courts must be in both languages under certain circumstances. It is likely that s. 133 provides merely a minimum guarantee and that the legislature is free to create rights to have *both* languages used rather than a right of individuals to use either.

The principle developed by the Supreme Court of Canada that a judge has a constitutional right to draft an opinion in the language of his or her choice cannot be an absolute right. It would certainly seem extreme to constrain a judge to draft an opinion in a language other than that of his or her choice. Nevertheless, the judge's right to draft in the language of choice should not be interpreted so broadly as to override the principle of the equality of the two official languages, or the language rights of individuals before the courts. Judges as individuals should not be constrained to use a language not their own. Judges as institutional actors, however, have no inherent right to have the authentic version of a judgment coincide with the language of drafting. A translation good enough to satisfy the demands of official language equality should be good enough to serve as an authentic text. Any serious question about the quality of such legal translations should lead to a reconsideration of the state's commitment to official bilingualism.

Any system of rules for authenticity of judgments and for the practice of reporting should carefully reflect the particular linguistic context of the particular jurisdiction. Translation facilities at the Supreme Court of Canada have evolved to the point where the quality of the translations is such that they could easily serve as authentic versions. The current and past practices of reporting some decisions with no indication of language of drafting suggests that it would be relatively easy to switch to a system, similar to that at the ECHR, where all judgments are reported with no indication of language of drafting and both are equally authoritative.

It may well be that the best rules for the Supreme Court of Canada to adopt would be ones which reflect some of the tacit, though nevertheless erratic, practices which have evolved at different points in the past. There has been a growing, though sporadic recognition, for example, that some cases are of a truly national character, and thus require language-neutral reporting. There is also a trend towards reporting language rights decisions in a language-neutral manner. A custom, also erratic, has developed over the years where decisions in cases originating from Québec are delivered in French with an English translation, particularly where the parties are francophone or have pleaded in French. While some cases have been given language-neutral reporting simply by virtue of the fact that they originated from Québec, this practice is troubling if it is contrasted with the English original/French translation practice for cases originating in so-called English Canada. The situation of New Brunswick, as Canada's only officially bilingual province, should also be taken into account in developing a practice. Whatever solution is chosen should take into account a number of additional factors. The first is the degree of commitment which we intend to bring to the principle of official linguistic equality in Canada. Real commitment, as the governments of Belgium and Switzerland have learned, requires a formalization of the official use of language. In Canada, this need for formalization is partially recognized in the more structured and detailed amendments brought to the

Official Languages Act in 1988. Linguistic equality, like any other form of equality is an ideal which is nonetheless dependent on pragmatic workaday efforts, and constant scrutiny for its achievement.