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REVIEWS

Diana Yankova

TRANSLATION APPROACHES IN A MULTILINGUAL AND PLURILEGAL SETTING: CANADA AND THE EU[1]

Abstract: This paper willfocus on the converging and diverging elements of the idiosyncratic legal regimes of federal Canada and of the supranational European Union. The methodology applied in Canada in terms of the stages in identifying the points of contact between the different legal systems and languages in relation to the procedure adopted in cases of conceptual and terminological non-correspondence, as well as the drafting techniques employed and the justification for choice in each particular instance, will be highlighted. The Canadian approach to terminological issues in the ongoing process of harmonizing federal legislation will be considered as a possible model for felicitous solutions regarding current pressing difficulties in the translation of legal terms in the European Union.

Key words: translation, legal translation

Introduction

The focus of this paper is the converging and diverging elements of the idiosyncratic legal regimes of federal Canada and of the supranational European Union. The methodology applied in Canada in terms of the stages in identifying the points of contact between the different legal systems and languages in relation to the procedure adopted in cases of conceptual and terminological non-correspondence, as well as the drafting techniques employed and the justification for choice in each particular instance, will be highlighted. The Canadian approach to terminological issues in the ongoing process of harmonizing federal legislation will be considered as a possible model for felicitous solutions regarding current pressing difficulties in the translation of legal terms in the European Union.

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The choice of topic was determined by the fact that the translation of legal texts produced within the European Union presents multifarious conceptual and linguistic problems for translators. EU Member States have to harmonize their existing institutions, create new ones and find the language to communicate adequately within unified Europe. A lengthy and arduous process of approximation of legislation ensues, which implies the laborious and demanding task of standardizing legal terminology.

There have been little or no substantive studies of the important linguistic elements in EU law and its implications for the understanding and application of the law (McAuliffe 2006). The EU translation system has not been devised or analysed by language experts and according to Tosi (2005:388) "in addition to being addressed as administrative procedures, language and communication issues should be informed by scholarly discussion". My objective is to present the specific legal, linguistic and communicative context of Canadian bijuralist practices in the process of legal harmonization as representing a unique set of features and conditions and to ascertain if the methodology and terminological choices made by Canadian legal harmonizers can offer pertinent solutions regarding current pressing difficulties in the harmonization of legal terms within the European Union.

Language for legal purposes and legal terminology

In general, analysts agree that in most languages for special purposes, such as the language of technology for instance, the terminology is denser, but the structure is simpler. This, however, does not hold for legal language. Although it abounds in specialized terms, the sentential and suprasentential structure is extremely complex and presents comprehension problems at times even for specialists, exemplified in numerous cases where the correct interpretation of terms, general words, structures and punctuation, for instance, have been at issue. One reason for this is the fact that in contrast to other, more recently developed languages for special purposes, such as the language for communication in computer science, technology or air traffic control, the language for legal purposes has existed for thousands of years. What is even more important and specific, again in contrast to other languages for specific purposes, is that legal language is a social phenomenon, indelibly related to the culture of a specific society, its moral and ethical

norms and its dominant legal tradition. In this sense, the language for law is a metaphysical phenomenon, not extant outside of language, not present in the physical world, but entirely man-made. Therefore, legal concepts and terms, as well as discourse structure, can and often do differ considerably across languages and cultures and it is precisely this characteristic feature that presents the greatest difficulties in cross-linguistic and cross-cultural legal communication as well as in translation of legal instruments. Within the sphere of physical phenomena, computer science, or medicine, for instance, there might arise a problem in linguistic equivalence; in law, however, the most insurmountable issues are first and foremost those of conceptual equivalence and finding the appropriate verbal expression of a concept so that the mental representation of an object does not clash with, diverge from or lead to misunderstanding in the conceptual system of the legal framework of the target language that the term is being translated into. Yet another peculiar feature of legal terminology, not shared by many other specialized languages is its diachronic polysemy which enables language to render legal concepts in tune with the changing perception of a certain society of basic and more complex notions of justice and codification of socially accepted human behavior and encompass the infinite variety of notions and conduct that arise in human interaction.

The lexical stock of legal language is, as a rule, created in several manners: an ordinary word acquires specialized meaning, a new word is coined, or a borrowing is resorted to. The first option is only reasonable: legal parlance incorporates general language words, which become explicitly defined terms often with meaning deviating from standard general usage. Legal neologisms are coined in cases when different legal systems and languages converge, as in international institutions or national bilingual or multilingual contexts and quite often result in compounds or explanatory phrases. Borrowings can sometimes be historically connected to prevalent ideology – as is the case with the former colonial powers of Britain, France, Russia and their colonies. Often borrowings make concepts more comprehensible and amenable to cross-legal understanding than the respective national terms. Currently, this is especially true for European legal integration, where borrowings make reference among 23 languages extremely easier.

Another reason for the perceived complexity of legal language comes from the subject matter under codification itself. On top of the exigencies of the structure and lexis of a specific legal tradition, especially that of Anglo-

American law, we find the added difficulty of the terminology of the special area regulated by the statutory instrument.

The translation of legal text genres can be classified according to different criteria. In relation to their function in the source language Šarčević (1997) groups legal texts into prescriptive (made up of laws, regulations, contracts, treaties, conventions), primarily descriptive texts (comprising judicial decisions, pleadings, appeals, petitions) and purely descriptive (such as legal opinions, law textbooks, articles). Cao (2007:9) builds on this classification but takes into account some missing factors such as the difference in function or status of the source text, documents used in court proceedings, and communication between lawyers and clients. On this basis she distinguishes four sub-varieties of written legal texts: legislative texts - national statutes, international treaties and multilingual laws; judicial texts arising in the judicial process; legal scholarly texts; and private legal texts, such as contracts, leases, wills and also texts drafted by non-lawyers – private agreements, witness statements. Consequently, translation is classified into legal translation for normative, informative or general legal and judicial purposes.

Here I will focus on conceptual issues in translating legal texts for normative purposes within a multilingual and plurilegal context, or the translation of prescriptive texts that have a binding character in the different jurisdictions. Owing to the diverse development of different societial orders, values and dominant belief systems, legal traditions differ in their origin, sources of law and historical and political development which have a distinct bearing on legal ratiocination. A translator or any cross-cultural legal communicator has to keep in mind that concepts are hardly ever completely interchangeable. Different languages package concepts in an idiosyncratic manner, more so concepts in the legal sphere, even within one language – as is the case with legal English in the USA and the UK, for instance, or legal French in France, Belgium and Canada. Consequently, total legal equivalence at the conceptual level is extremely hard to achieve and is one of the challenges that legal practitioners and translators are faced with.

The role of language in the functioning of various legal systems

Apart from cases where one single national jurisdiction is expressed in one language, throughout the world there exist several other basic legal contexts,

namely - different legal systems are expressed in one language (e.g. the English and Scottish system); one and the same legal system is expressed in different languages (e.g. the Swiss system); the third option is the bilingual or monolingual system of public international law.

As international organizations came into being in the 20th century, language became an important political issue on an international level, having previously been predominantly a national political issue. A fierce competition among languages marked the birth of each new international organization: the choice of official language(s) became a political matter, one that entailed considerations of power, prestige and discrimination.

Within this context, both Canada and the EU manifest exceptional features, not inherent in the above distinction. Unlike other international organizations whose resolutions are directed to governments only, the EU is the only international body that passes laws directly binding to the citizens in its Member States. The multilingual EU institutions stand in stark contrast to other international organizations: the United Nations has six official languages, the Council of Europe two, NATO two; EFTA uses only English, which is in fact a foreign language to all six of its members (the current members of the European Free Trade Association are Iceland, Norway, Switzerland and Liechtenstein). As of January 1st, 2007, the date of the last enlargement, the official languages in the European Union stand at twenty-three. EU's multilingual policy is markedly different from other international organizations in that the selection of official languages is not based on power relations between member-states, but since the very beginning has been identified by the principle of linguistic parity, whereby the official languages of member-states are official within the Union.

The uniqueness of the Canadian legislative framework is engendered by the circumstance that not only do two different legal systems co-exist: one based on the traditions of English common law, the other on French civil law (thus making it distinct from the Swiss system), but also that these two legal systems have to be expressed in two languages (unlike the UK and the Scottish system). Since the late 1970s federal bills have been drafted by a Francophone and an Anglophone drafter in conjunction so as to reflect more felicitously Canada's bijural legal tradition. The adoption of the reformed Civil Code of Quebec in 1994, which gave rise to substantial changes in the essence and terminology of civil law, served as an impetus to the harmonization process in Canada and resulted in a huge effort to harmonize federal common-law

based legislation with Quebec civil law: Justice Canada adopted a policy on legislative bijuralism and created a Civil Code Section to implement this policy in cooperation with the Legislative Service Branch. All in all, it has been estimated that about 350 federal statutes (out of more than 700) either apply to Quebec, or resort to the civil law of Quebec as supplementary law.

What are the converging and diverging elements of these two idiosyncratic legal regimes – that of federal Canada and that of the supranational European Union?

The first point of convergence finds expression in the identical function that certain EU legislative instruments, for instance regulations, have with Canadian federal statutes: both are directly applicable in their respective context. However, the scope or effect of EU regulations cannot be supplemented or altered by the implementation activities of the Member States, while a piece of provincial legislation can result in harmonizing a federal statute in Canada.

The second is the languages that legal documents are drafted in. The principal purpose of the huge EU translation service is to safeguard the equal footing of all official languages, and thus, multilingualism is, at least in theory, one of the main features of the European Union. Officially all 23 languages are equal, but in practice some (e.g. French, English, German) are more equal, and others (e.g. Greek, Danish) hardly ever act as source languages. Or as the present director General for Translation Karl-Johan Lönnroth states: "The Commission functions internally on the basis of a language regime of three procedural languages (French, German and English) of which two (French and English) are vehicular and drafting languages" (Lönnroth 2006: 4).

The texts that are translated into all the official languages are documents that are essential in the final stages of the decision-making process, all texts that are for adoption by the Council, and documents that are of general interest for the citizens of the Member States. In all other instances, mainly at the intra-institutional level, functional and pragmatic considerations are operative and this means less effort without loss of transparency or efficiency. This includes the daily administrative work of the institutions and the initial stages of legislative drafting which is done by in-house officials in one or two working languages: mostly English and French. Therefore, most of the legislative drafting in the EU is done in English (70%) and French (20%), as is the case in Canada.

The specific legal language mirrors the legal system it is a product of; this entails that English language terms will denote common law concepts and institutions, and French language terms – Roman law-based concepts and institutions. This is a topical issue indeed, since the national jurisdictions in all of the present EU member states are either based on continental Roman law or common law and equity, and legal practitioners and translators have long struggled with the task of rendering concepts from one system to the other. This aspect also reflects the state of affairs in Canadian drafting – harmonizing the concepts within the two legal traditions and finding the adequate terminology.

Some of the most salient problems that drafters, legal experts, translators and revisers have encountered within the EU context are, among others, differentiating between meanings of one and the same term, differentiation and rendering of terms with close meaning, translation of terms not existent in national legislation, semantic deviation of words belonging to international lexis or faux amis. A study of translation issues in approximating EU legislation, based on an analysis of 120 pages of EU directives (Yankova, forthcoming) found that most of the translation errors stemmed from the difference in conceptualization and the difference in semantic relations between concepts, or in other words, the different manner in which concepts are packaged in the various languages.

I will attempt to elucidate some of these common pitfalls in view of how they have been dealt with by legal harmonizers in Canada, who have for years been involved with the process of harmonization and have demonstrated a very methodical and comprehensive approach. More specifically, I will touch upon the harmonization methodology applied in Canada in terms of the stages in identifying the points of contact between the different legal systems in the Federal Real Property Act and the relevant sections of the Quebec Civil Code in relation to the procedure adopted in cases of non-correspondence; the drafting techniques employed (for instance, using the same term in civil law and common law, resorting to definition, opting for binomials) and the justification for choice in each particular instance.

Towards a unified EU legislation

The ongoing process of social, political, economic and legal integration in Europe has brought about the necessity to harmonize private law within the

European Union. The EU Commission, Council and Parliament have called for adopting a body of rules by 2010 that would provide a common frame of reference for contract law and would pave the way towards uniformity in Community legal practice and to drafting a European Civil Code. No doubt ambitious, this task is liable to encounter problems connected to, above all, the absence of a single European legal culture (cf. Koskinen 2004) López-Rodriguez (2004) concurs and stresses that given the lack of experience in transposing Community law into national legal systems; any legislative initiatives should also promote the creation of a European legal discourse. A European Civil Code would entail problems, related to "*inter alia*, the legal basis for such an enterprise, the choice of instrument and scope of the adopted measures, the feasibility of unifying European private law, the crisis of codification, the sociological background of private law institutions and, finally, the link between private law, language and cultural identity" (López-Rodriguez 2004:1197).

The legislative initiative in the EU lies exclusively with the Commission (although it also includes the Council and the Parliament) and this monopoly "resides in the need of balancing European and national concerns" (Gallas 2001: 84). Of the five types of secondary EU instruments: regulations, directives, decisions, recommendations, and opinions, the first two are the most important and the most common. Each instrument performs a different function and has a different extent and scope. Regulations are absolutely binding, while directives are binding in regard to the results to be achieved, but the exact methods of attaining these results are left to the discretion of each Member State; decisions are binding on those to whom they are addressed, while recommendations and opinions have no binding force. Directives provide guidelines and minimum standards and that means that there might be clashes between the different national laws transposing a certain directive. None of the instruments provide a thorough and all-embracing regulation of a given institution. The national context of each member-state thus influences and distorts the uniformity, aimed at by the directive.

Although some areas of private law have been harmonized, such as fractions of company law, contract law, copyright law, labour law, the EU is far from having a comprehensive and unified regulation of private law. It can so happen that under different Directives, different conditions apply to one and the same case (cf. López-Rodriguez 2004: 1198) and

such inconsistencies have hindered the swift and painless transposition of Directives into national law.

The legal basis of the supranational European law was mainly the predominantly civil law system of the founding members of the European Communities, and more specifically, of French law. The French *commissaire du governement* served as a model for the EU Advocate-General and the French *Conseil d'Etat*'s methods for legal protection have been adopted by the European Court of Justice as pointed out by Mattila (2006: 107). In the 1970s, after the accession of the UK and Ireland, European law came to be affected by common law as well, which is evident in the establishment of precedents at the ECJ (McAuliffe 2008). Therefore, the two legal systems are converging. At the same time, the supranational system of EU law is developing its own methods and principles, not exiting in common law or continental law – such as the principle of subsidiarity, defined in Article 5 of the Treaty establishing the European Community. Its aim is to ensure that decisions and actions at Community level are justified in relation to the possibilities at national, regional or local level and with the exception of its specific and exclusive prerogatives the Union does not take action. Other specific principles are those of proportionality, which leaves the greatest freedom to the Member States and individuals and the principle of necessity, stipulating that any action by the Union should not surpass what is necessary to achieve the aims of the Treaty.

Transposition of concepts

The exceptional communicative situation in the creation and consumption of texts within the European Union finds expression in the character of the participants in the process. In the context of supranational law, legislation is produced in a long process of draft-making, revisions and modifications within all the language versions. There are constant consultations and cooperation between text originators, legal experts, translators and revisers. The individual and independent voice or imprint is completely lost within this multi-authored prose: "the co-decision procedure entails at least 31 steps by 11 different services in the three main institutions and four of these involve the European Commission's Translation Service" (Wagner 2000). Sometimes, at different stages, the language in which one and the same statutory instrument is drafted changes and quite often legislation is drafted by non-native speakers.

The non-correspondence of legal terminology from one legal language to another has long been at issue – even in cases when there is a superficial surface equivalence, the content of the legal institution is different in common law and civil law. Such is the case with *mortgage/ hypothèque*, for example: in civil law jurisdictions if personal property is mortgaged, the debtor keeps the legal title to the property and the creditor only has a charge, while under common law the title is transferred to the creditor or the mortgagee as security. Problems with terms can arise due to several reasons. National legal terms can sometimes be applied within EU law and thus their meaning can be widened or narrowed. For instance, the specific use of the generic terms Council, Commission and Community. A number of concepts have appeared in some national legal systems as a result of harmonizing terminology and concepts, such as the requirement of *good faith* as a contractual term (limiting the effective agreement of the parties by standard contract terms) was not present in English law with the same content, conversely other terms from case law did not exist in continental law.

In a supranational context, it is vital to come up with terminology that is not expressly related to the national legal orders of the Member States to avoid confusion and culture-laden expressions, which in practice might result in verbosity and the coining of new terms.

Terminological formation in the EU

The methodology used in transposing new notions in national legal systems follows several principles. Sometimes general words are used with a specialized sense, i.e. they acquire a narrow meaning or even deviate from general usage (e.g. the precisely defined terms of marriage or employment). In some cases, calques are freely adopted. For instance, *White Paper*, a term mostly used in Britain and other Commonwealth jurisdictions, is easily rendered as *Bílá kniha* in Czech, *Livre blanc* in French, *Livro branco* in Portuguese, *λευκή βίβλος* in Greek, *Witboek* in Dutch, *Baltoji knyga* in Latvian, and the foreign element is not so perceptible. Most of the specific Community terminology comes from French, most notable of which is the name of the whole body of EU law – *acquis communautaire* – where some languages use the same term (English, Dutch), others have calqued the expression (Italian and Greek), yet others have opted for translation with the meaning of Community law (German, Swedish, Finnish). In

some languages more than one term is used, which shows the difficulty in rendering even such central to EU law concepts.

In other cases, a word of national origin is opted for as in the translation of the term Directive – although English, Spanish, Portuguese, Danish and Finnish use a common root word, Germany has designated the term *Richtlinie* and the Dutch *Richtlijn* for the same concept.

The legislative process in the EU has affected the uniform and coherent system of private national law that is typical for European countries following the Continental tradition. Since 2001 there has been an initiative to consolidate, codify and modernize existing instruments within the sphere of Civil law. But still, there is the danger that a national court will interpret Community legislation in light of national law and will thus rule out actual uniformity.

In the US, the common legal culture and a shared language has facilitated the approximation of laws, in Scandinavia an intensive cooperation and a strong feeling of normative unity has led to uniformity. Conversely, although Germany, Switzerland and Austria share a common language and similar socio-economic and cultural backgrounds, they lack both political unity and a common legal source (López-Rodriguez 2004: 1208). A necessary prerequisite for attaining legal uniformity is the presence of a common legal culture, generated by a common legal discourse, which does not exist for the time being in the EU. Member states are close geographically, homogeneous religiously, and share a common philosophical background, but they lack a common legal thinking, and it is not only a matter of differences between common law and civil law jurisdictions, but also the large number of national jurisdictions which reflect national uniformity. The absence of a shared language further hinders interpretation. Future harmonization has to take into account the cultural and linguistic divides and has to promote the elaboration of a common European legal discourse and the creation of a common legal methodology whereby courts in Europe construct and apply national law, using a comparative European method – considering functionally equivalent decision-making in other jurisdictions that would result in creating a European doctrine of precedents.

Drafting in Canada

Historically, federal legislation in Canada was drafted predominantly on the basis of common law, then translated into French and adapted

to Quebec's civil law. The problems with this process were obvious – the translations were often deemed legally inadequate and the quality of the legal French was poor. Also, outside of Quebec, adaptation to civil law was not considered of importance (cf. Sullivan 2004). Since 1978, the federal Department of Justice initiated the process of co-drafting, whereby all legislation is drafted simultaneously by a team of a Francophone and an Anglophone jurist. The co-drafting practice, however, soon was found to be catering for the needs of the bilingual character of federal legislation, not so much for its bijural basis. It was therefore felt that co-drafting imposed common law conventions on the French language text of federal legislation. More recently, two factors have brought about a fundamental change in the way legislators approach drafting – the first is the efforts of the provincial and federal governments to develop adequate terminology for common law concepts; and the second and more important one is the enactment of the new Civil Code of Quebec in 1994.

We need to examine the relationship between federal and provincial private law. Federal legislation often depends on provincial private law for interpretation. Some federal enactments are fully comprehensive and self-contained while others can only be fully understood and interpreted if reference is made to extrinsic legal sources, most often provincial law. The 1867 Constitution Act provides that provincial legislatures have exclusive jurisdiction over matters of property and civil rights and therefore, the predominant part of Canada's private law is legislated on the provincial level. In cases when federal legislation includes private law terms and concepts such as mortgage, property, trust and leases, without defining these terms and concepts, they take the meaning that applies in the private law of the province in which the provision is being applied. Federal and provincial legislation are thus in a relationship of complementarity, where provincial private law is the suppletive law.

Drafting bilingual and bijural legislation in Canada is oriented towards four different types of audience: anglophone common law lawyers; francophone common law lawyers; anglophone Quebec civil law lawyers; and francophone civil law lawyers.

The initial stages of the process of harmonizing federal legislation with the reformed Civil Code of Quebec, are: verification (ascertaining whether a statutory instrument applies to Quebec); then examining the political and legal contexts of an enactment and the distribution

of powers between the federal and the provincial legislature and determining if there is complementarity or dissociation in respect to provincial law; and then identification of points of contact between federal and provincial private law. But I will try and shed more light on the Canadian model for harmonizing legislation as far as it concerns harmonizing terminology.

Looking at the results from the pilot studies in revising federal statutes in the area of private law and the lack of their conformity with the Civil Code of Quebec, several types of difficulties surface (Morel 1999):

a. insufficient harmonization linked to reform of the civil law;

b. insufficient harmonization linked to language used: use of approximate language; use of equivocal language: words with precise technical meaning in the civil law but in a clearly different sense;

c. insufficient harmonization linked to unijuralism.

Following the guidelines of the 1993 Policy for Applying the Civil Code of Quebec to Federal Government Activities, there are several techniques available for drafting in a bijural context (Wellington 2001):

1. using a common term which is neutral, generic, or general which has no connotation in either of the two legal systems. This means using the same term in civil law and common law, e.g. *lease/bai', loan/prêt*. Another example is the proposition that the terms *immeubles* and *real property* be replaced by neutral terms such as *biens-fonds* and *land* in the *Federal Real Property Act*. The idea is that such an option would render the terms bijural and avoid ascribing artificial meaning to terms that are part of the respective legal language.

2. definition, or giving a specific meaning to a term in both the civil law and the common law. For instance, *abandon* (*release or surrender*) in subsection 248(9) I.T.A.:

Les définitions qui suivent s'appliquent au paragraphe (8). «abandon». - «abandon» a) Abandon, au sens de release ou surrender **en vertu du droit des autres provinces que le Québec**, qui n'indique aucunement qui est en droit d'en profiter;	In subsection (8), «release or surrender» means (a) a release or surrender made **under the laws of a province (other than the Province of Quebec)** that does not direct in any manner who is entitled to benefit therefrom, or

b) donation entre vifs d'un droit sur la succession ou d'un bien de celle-ci, **faite en vertu du droit de la province de Québec** a la personne ou aux personnes qui auraient profité de la renonciation si le donateur avait renoncé a la succession sans le faire au profit de quelqu'un; l'abandon doit être fait dans un délai se terminant 36 mois après le décés du contribuable ou, si le représentant légal de celui-ci en fait la demande écrite au ministre dans ce délai, dans un délai plus long que le ministre considère raisonnable dans les circonstances.	(b) a gift inter vivos made **under the laws of the Province of Quebec** of an interest in, or right to property of, a succession that is made to the person or persons who would have benefited if the donor had made a renunciation of the succession that was not made in favour of any person, and that is made within the period ending 36 months after the death of the taxpayer or, where written application therefor has been made to the Minister by the taxpayer's legal representative within that period, within such longer period as the Minister considers reasonable in the circumstances.

Also, a generic definition, which is characterized by a high degree of abstraction – can be extremely useful for the purposes of covering a concept or an institution in each of the provinces. As an example, the definition of *secured creditor* in the Bankruptcy and Insolvency Act, section 2, is an enumerative and concrete definition which does not fulfil the purposes of the ongoing legislative reforms in Canada. Following the new Civil Code of Québec it has been proposed that the concept is defined as a 'person holding a security', and security defined by its essential components, with no specific reference to any express type of security.

3. the third option is using a double – a technique that expresses the legal rule applicable to each legal system, in different terms. It involves the use of common law and civil law terms in drafting a provision applicable in each or both major legal systems. The technique is especially useful when it is necessary to clearly delineate the application of the rule of law in Quebec and the rest of Canada, e.g.:

real property or immovables/immeubles ou biens réels;

personal property or movables/meubles ou biens personnels;

tangible personal or corporeal movable property/meubles corporels ou biens personnels corporels.

Another example might be *fee simple or ownership/fief simple ou propriété.*

The double can be simple or paragraphed. A simple double presents the terms specific to each legal system consecutively, as in the following example:

The title to the real property or immovable intended to be granted . . .

Le titre sur l'immeuble ou le bien réel est dévolu ...

and a paragraphed double is a technique whereby the concepts specific to each legal system are given in separate paragraphs:

"liability" means

(a) in the Province of Quebec extracontractual civil liability,

and

(b) in any other province, liability in tort;

« responsabilité »

a) dans la province de Québec, la responsabilité civile extracontractuelle;

b) dans les autres provinces, la responsabilité délictuelle.

It has to be noted that resort to the above technique may sometimes hinder the comprehension of a provision, especially when the statutory provision lists a number of legal concepts, which would under this principle be doubled. In such cases the provision might result in clumsiness and obscurity.

Types of problems encountered in the process of harmonization in Canada:

1. Unijuralism – when a provision is based on a concept, specific to only one legal tradition in both language versions.

Unijuralism is found in the terms *special damages/dommages-intérêts spéciaux*, in subsection 31(3) of the Crown Liability and Proceedings Act. *Special damages* and its French translation *dommages-intérêts spéciaux* refer to the common law. The accurate civil law counterparts are *pre-trial pecuniary loss* and *pertes pécuniaires antérieures au procès*. In such cases, the technique of the double is suitable to define the application of the legal rule in the two legal orders, as in:

When an order referred to in subsection (2) includes an amount for, in the Province of Quebec, pre-trial pecuniary loss or, in any other province, special damages . . .	Si l'ordonnance de paiement accorde une somme, dans la province de Québec, à titre de perte pécuniaire antérieure au procès ou, dans les autres provinces, à titre de dommages-intérêts spéciaux …

See Bill S-4, clause 51(2).

Other examples would be the translation of common law terms such as *leasehold interest*, *licence* or *beneficial ownership* respectively by *tenure a bail*,

permis and *propriété effective*, which are clearly do not belong to Quebec civil law.

2. Semi-bijuralism – when a legislative provision is based on concepts specific to the common law in the English version and concepts, specific to the civil law in the French version. An example is the case with *real property/ immeuble*, in section 20 of the Federal Real Property Act, where the English version uses a common law term and the French version a civil law term. In order for this provision to become truly bijural and to conform on the one hand to common law terminology in French, the term *biens réels* is appended to the French version, and in order to reflect the civil law terminology in English, on the other, the term *immovable* is added to the English version. These changes would result in a double, e.g.:

A Crown grant that is issued to or in the name of a person who is deceased is not for that reason null or void, but the title to the real property or immovable intended to be granted...	La concession de l'État octroyée à une personne décédée ou à son nom n'est pas nulle de ce fait; toutefois, le titre sur l'immeuble ou le bien réel est dévolu …

The semi-bijural drafting approach, however, is considered no longer appropriate to address the four legal audiences (common law and civil law in each official language).

3. The third type of problem encountered in Canadian harmonization is apparent bijuralism – when a legislative provision contains civil law terms that are inappropriate in the context because of obsolete terminology, inadequate terminology, or incompatibility with a new civil law principle. An example of obsolete terminology can be found in the terms *délit civil, délit*, and *quasi-délit*, in section 2 of the Crown Liability and Proceedings Act. The concepts these terms denote remain unchanged in the new Civil Code of Quebec, but are now expressed by the term *responsabilité civile extracontractuelle*. By combining the techniques of definition, the neutral terms *liability/responsabilité*, and the paragraphed double, the problem of obsolete terminology can be solved as in the previous example (with a paragraphed double).

A case of inadequate terminology is when a federal act provision makes use of civil law terms but gives them, in context, an inadequate meaning, e.g.:

Catégorie 8 Annexe II R.I.R. c) un **immeuble** qui est un four, un réservoir ou une cuve, acquis aux fins de fabrication ou de transformation; d) un **bâtiment** ou une autre structure, acquis après le 19 février 1973, qui est conçu pour préserver le fourrage ensilé dans une ferme	Class 8 schedule II I.T.R (c) a **building** that is a kiln, tank or vat, acquired for the purpose of manufacturing or processing; (d) a **building** or other structure, acquired after February 19, 1973, that is designed for the purpose of preserving ensilage on a farm;

In some provisions *immeuble* is used as the equivalent of *building*. In civil law, *immeuble* comprises the land and buildings on the land, while *bâtiment* refers to a specific building erected on a piece of land. Consequently, the use of the civil law term *immeuble* is a case of inadequate terminology.

Another example of inadequate terminology is *surrender/rétrocession*, in paragraph 16(1)(d) of the *Federal Real Property Act*. The term *rétrocession* exists in civil law, but in this context it creates a disparity of content: the accurate civil law concept in this case is *résiliation*, and the accurate French common law term is *résignation*. One way to solve this disparity is by using a double:

d) authorize, on behalf of Her Majesty, a surrender or resiliation of any lease ...

d*)* autoriser, au nom de Sa Majesté, soit la résiliation ou la résignation d'un bail …

See Bill-4, clause 18(1).

An instance of incompatibility with a new civil law principle is the term *privilège* (*Defence Production Act,* section 20). In the new *Civil Code of Quebec*, the concept of *privilège* has been disposed of and replaced in part by *priorités et hypothèques* – 'prior claims and hypothecs'. The French term *privilège* has been kept for the French common law audience, but *priorités et hypothèques* must be given for Quebec civil law audience.

Once again, the double technique has made this provision compatible with the new rule in the *Civil Code of Quebec:*

> ... clear of all claims, liens, prior claims or rights of retention within the meaning of the *Civil Code of Quebec* or any other statute of the Province of Quebec, charges...
>
> … libre de toute priorité ou droit de rétention selon le *Code civil du Québec* ou les autres lois de la province de Québec, ainsi que de tout privilège ou de toute réclamation, charge …

In order for the new techniques of bijural legislation to be communicated to the legal community and to the population in general, the Canadian Department of Justice has compiled bijural terminology records[2] of civil law and common law terminology in English and French. They are intended for the use of the previously mentioned four types of audience. This presents a clear attempt to go beyond linguistic correspondence and into the realm of conceptual equivalence.

Harmonization cannot be reduced to a mere question of vocabulary. Civil law and common law traditions have a discrete way of conceiving and expressing legal ratiocination. Or, in the words of Macdonald, "Any attempt to achieve a bilingual statute-book through the translation of legislation initially drafted in one language cannot fully succeed. The inevitable limits of discursivity are such that translators will be compelled to sacrifice meaning for textual exactitude, and this sometimes even at the expense of clarity... Distinct originals are, in other words, the precondition for legal bilingualism. Bilingual statutes will then be the result of integrating two separate texts initially crafted in a manner sensitive to the contexts and subtleties particular to each language" (Macdonald 1997: 159).

Implications for the EU

Several conclusions stem from the examination of the Canadian bilingual and bijural context and practices that can prove suitable within the European context.

It is important to investigate the terminological changes brought about by the transposition of Directives into the domestic law of member states by replacing notions of national legislation that are no longer part of the technical vocabulary of the new supranational law.

Also, it is essential to analyze the consequences of the use in domestic law of terms that remain unchanged but whose conceptual content has been altered or legal regime transformed.

Except where Parliament has chosen to use neutral terms, expressions with no precise meaning - such as particular, private person, etc. - or which are ambiguous in meaning - such as *dommages* (which can refer to harm as well as damages) - should be replaced by the appropriate technical terms.

[2] http://www.justice.gc.ca/eng/pi/bj/harm/index.html

We should refrain from using homographs belonging to both the French civil law vocabulary and the English common law vocabulary, with different meanings in each tradition, such as *détention/detention* or *charge/charge*. Different considerations apply, of course, when Parliament chooses to accommodate the potential difference in meaning of the words in each of the two legal systems. Such may be the case, for example, with the contrat/contract couplet, where the meaning is analogous but not identical.

Whenever there is a way to express the concept unequivocally, we should refrain from using, in a different sense, a word that has some technical meaning in the civil law. Examples that come to mind are the use of the word *représentants* to refer to persons responsible for the administration of an estate or succession or the word *dévolution* to render "vesting order".

We should, as far as possible, refrain from artificially giving special meaning to a word with a precise technical meaning. For example, the use of the expression *right of use/droit d'usage* to refer to a right 'other than an interest in land', or giving the word *tort* the meaning of *délit* (delict) or *quasi-délit* (quasi-delict) in the old civil code, can be avoided.

Rules drafted exclusively in a national vocabulary should be reformulated within EU legislation, since they are universally applicable. Examples are the references to a *simple contract*, or to *special damages*.

The English versions of statutes formulated in semi-bijural language should also be rewritten, since they are drafted using only the common law vocabulary. This reformulation is necessary notwithstanding the fact that the transposition into civil law language of the vocabulary that is used may be done by way of statutory interpretation.

Conclusions

By way of a conclusion, I would like to point out that in multilingual and plurilegal contexts one of the greatest pitfalls are cases when the denotation of a certain legal institution might be the same across languages, but the connotation different and thus misleading. A case in point is the pair *mortgage/hypotheque* – where it was shown that although the two terms can be said to be linguistic equivalents and would be found in bilingual dictionaries to be such, they differ in the legal content they express and in the legal consequences they entail. Apart from knowing the linguistic terms, what

is needed is comprehensive knowledge about the legal institutions and the concepts used within a legal framework in order to arrive at appropriate translation choices.

In achieving felicitous rendition of legal concepts across different languages and different legal cultures what is essential is sound knowledge of the linguistic possibilities for representing them in another language and in a different legal culture. There is a need for a systematic inquiry into the conceptual system of legal institutions, their terms and referents especially in the EU, where judicial decisions, directives and regulations come into force and are transposed in all 27 Member States. It is of utmost importance to come up with terminology that is relevant, appropriate and recognizable within all those legal contexts. At the same time, the legal framework of the European Community calls for the creation of so far unfamiliar to national jurisdictions legal institutions and the languages to express them, striving to prevent reference to the diverse legal systems of national jurisdictions and thus lead to supranational misunderstanding.

A balance has to be found between using terms that are reminiscent of national law, of coining neologisms, of using archaisms, and introducing specialized terms.

The methodology and drafting techniques used in harmonizing Canadian federal legislation with Quebec civil law are pioneering, unparalleled, innovative and unique worldwide. They also continue to evolve.

Canada is the only country in the world where the common law and civil law systems co-exist as the two fully-fledged legal systems of a sizeable population. Internationally, Canada is already a leader in the well-balanced co-drafting of bilingual legislation and a source of inspiration for countries such as Switzerland, Belgium and Hong Kong. Adding bijuralism to bilingualism only creates increased interest within the European community, where the common law English-speaking countries, Great Britain and Ireland, are co-members with civil law countries.

The scope of the Canadian Harmonization Program has no precedent; in this era of globalization of national economies and markets, the mastery of the two legal systems that are the most widespread throughout the world is a major asset, especially in the area of international trade.

What is more, as the harmonization process makes more headway and gains greater impetus, the Department of Justice has undertaken to share the results of applying legislation in several ways: by continuing to expand

the bijural terminology records, by elaborating a harmonization guide, by publishing the research carried out by academics, experts in the field. Canada's efforts are laudable – it is not often in the social sciences that we see a synergy between academics and practitioners, of combining theory with practice: the academic expertise will prove invaluable to legal drafters, engaged in the harmonization process, and in turn, legal drafters will share their own experience as legal harmonizers.

Unfortunately, so far there has been little interaction, either practical or academic, between EU law makers and Canadian legislators in highlighting and solving common conceptual and terminological problems that arise in the attempt to find expression of diverse legal systems in different languages. In Fernbach's words more than twenty years ago: "It is to be hoped that the effects of the development of Canadian jurilinguism will be felt in Europe and will result in productive exchanges, given that the European Economic Community's legal translators are also looking for language solutions to the problems of the co-existence of French, the language of the civil law, and English, the language of the common law" (Fernbach 1984). Canada's best practices in the sphere of harmonizing legislation should be made more visible in Europe and their enormous efforts and achievements could serve as an example and assist in the process of EU legal integration.

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