Rethinking the Interpretation of Bilingual Legislation: the Demise of the Shared Meaning Rule

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This article assesses the value of the "shared meaning rule" as an approach to the interpretation of bilingual statutory provisions in which discrepancies occur between the two language versions. It identifies the three types of discrepancies that arise, shows how those discrepancies originate in drafting errors, and examines the ability of the shared meaning rule to uncover those errors. It then contrasts the rule's approach to the manner in which the courts have interpreted divergent text in similar situations. Based on this analysis, it suggests that the shared meaning rule is unsatisfactory from a theoretical perspective and that it lacks predictive value.

The article proposes that in cases of linguistic divergence, rather than looking for a meaning shared between the two language versions, the courts should search for the single meaning that is most harmonious with the scheme of the Act and its apparent purpose. It concludes that courts should discard the shared meaning rule and instead start with a presumption favouring clarity and then interpret each version using the standard techniques of statutory interpretation—looking to the purpose of the Act, its internal consistency and legislative evolution, and the relevant presumptions of legislative intent—to determine which language version produces the most coherent legislative scheme.

Cet article évalue le mérite du « principe du sens commun » dans l'interprétation des dispositions législatives bilingues lorsque le message formulé diffère dans les deux langues. L'auteur identifie trois types de divergences qui peuvent survenir, démontre comment ces divergences proviennent d'erreurs de rédaction et examine l'utilité du principe du sens commun pour mettre à jour ces erreurs. L'auteur fait ensuite le parallèle entre les critères d'application de ce principe et la façon dont les tribunaux ont interprété les divergences dans les textes dans des circonstances similaires. Partant de cette analyse, l'auteur suggère que le principe du sens commun n'est pas satisfaisant du point de vue théorique et qu'il manque de valeur prédictive.

L'auteur propose qu'en cas de divergences linguistiques, au lieu d'essayer de dégager le message commun dans les deux versions, les tribunaux devraient rechercher le message unique le plus en harmonie avec le plan et l'objet apparent de la loi. L'auteur conclut que les tribunaux devraient s'écarter du principe du sens commun et favoriser au départ la présomption de clarté, pour ensuite interpréter chaque version en appliquant les techniques habituelles de l'interprétation des lois—la recherche de l'objet de la loi, sa cohérence interne et l'évolution législative ainsi que les présomptions pertinentes quant à l'intention du législateur—afin de déterminer la version linguistique qui reflète le mieux le plan législatif.

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I. Introduction

A SURPRISINGLY LARGE NUMBER of legislative jurisdictions enact legislation in more than one language. Ireland enacts legislation in Irish and English, Wales in Welsh and English, Hong Kong in Chinese and English, and Tanzania in Kiswahili and English, among others. South Africa has 11 official languages,[1] of which at least two are used in each statute.[2] Switzerland legislates in three languages,[3] while the European Union uses 20[4] and the United Nations six.[5] And Canada, from which I draw much of the case law discussed here, enacts its legislation in French and English, at both the federal[6] and provincial[7] level.

In interpreting a statute, having access to the second language version of a bilingual text can be a mixed blessing. On the one hand, the second ver-

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1. *Constitution of the Republic of South Africa* 1996, Act 108 of 1996, s. 6(1) [*Constitution of South Africa*]: Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, siSwati, Tshivenda and Xitsonga.
2. Usually English and Afrikaans.
3. While it has four national languages (German, French, Italian and Romanche), only the first three are official languages: *Federal Constitution of the Swiss Confederation*, 18 April 1999, c. 101, art. 70.1.
4. Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish, Czech, Estonian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Slovak and Slovenian.
5. Arabic, Chinese, French, Russian, English, and Spanish: *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 111. In 1973, Arabic was added as an official language: GA Res. 3190 (XXVIII), UN GAOR, 28th Sess., (1973) 123.
6. Section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [*Constitution Act, 1867*], which requires that statutes be printed and published in both languages, has been interpreted as requiring that they also be *enacted* in both languages: *A.G. (Quebec) v. Blaikie et al*, [1979] 2 S.C.R. 1016 at 1022, 101 D.L.R. (3d) 394 at 397. This requirement has been interpreted to extend to regulations as well: *A.G. (Quebec) v. Blaikie et al (No. 2)*, [1981] 1 S.C.R. 312 at 320, 123 D.L.R. (3d) 15 at 22.
7. Constitutionally required in Manitoba (*Manitoba Act*, 1870, 33 Vict., c. 3, s. 23, reprinted in R.S.C. 1985, App. II, No. 8), New Brunswick (*Constitution Act, 1982*, s. 16(2), being Schedule B to the *Canada Act 1982* (U.K), 1982, c. 11 [*Constitution Act, 1982*]) and Quebec (*Constitution Act, 1867, ibid.*), and required by statute in Ontario (*French Language Services Act*, R.S.O. 1990, c. F-32, s.3). The Northwest Territories, Yukon and Nunavut are subject to the same requirements as the federal government (*Constitution Act, 1867, ibid.*).

sion can be helpful in interpreting the first.[8] On the other hand, the second can also raise doubts about the first; as the saying goes, "A person with one watch always knows what time it is. A person with two watches is never sure."

What happens when the two language versions of a statute do not agree? This article will examine the genesis of bilingual drafting discrepancies and the manner in which legal scholars and the courts have interpreted the resulting divergent text. It will suggest that one of the currently accepted interpretive approaches, known as the "shared meaning rule", is largely ineffective and potentially misleading, and will make recommendations on a methodology for future interpretation.

In some bilingual jurisdictions, constitutional or statute law provides for the primacy of one language version over the other,[9] and in these jurisdictions, discrepancies between the two versions are readily resolved by reference to the paramount version. In other jurisdictions, both language versions are equally authoritative.[10] If both language versions are equally authoritative, however, how should an interpreter—be he or she a legal practitioner or a judge—address inconsistencies in meaning between the two versions?

The Supreme Court of Canada had occasion to consider this question in its recent judgement in *R. v. Mac.*[11] The accused had been charged with possession of materials "adapted and intended to be used to commit forgery," and the issue was whether "adapted" meant "altered" or "suited for." The machines in the accused's possession were suitable for use in the making of forged credit cards but had not been altered in any way.

The Ontario Court of Appeal had earlier observed that materials merely suited for use in forgery (i.e., simply *capable of* such a use) would include such mundane objects as a pen and paper, and that interpreting the statute in that fashion could have far-reaching consequences:

> The criminalization of such innocuous and harmless conduct, albeit joined with a criminal intent, comes perilously close to imposing criminal liability based solely on the existence of a criminal intention. It has been a fundamental principle of the criminal law for many centuries that criminal liability should not rest solely on an accused's intention, no matter how worthy of censure that intention might be.[12]

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8. See *e.g. R. v. Barnier*, [1980] 1 S.C.R. 1124, 109 D.L.R. (3d) 257. The court made reference to the use of "juger" and "savoir" in the French version of certain insanity definitions in the *Criminal Code* to confirm that there was a difference in the English version between "*appreciating* the nature and quality of an act" and "knowing that an act ... is wrong."
9. In Ireland, for example, Irish prevails: *Constitution of Ireland* 1996, art. 25.4.6. In South Africa, the language version of the bill signed by the President prevails: *Constitution of South Africa, supra* note 1 at s. 82.
10. Canada: *Constitution Act, 1982, supra* note 7, *Official Languages Act*, R.S.C. 1985, (4th Supp.), c. 31, s. 13; Wales: *Government of Wales Act 1998*, c. 38, s. 47; Hong Kong: *Interpretation and General Clauses Ordinance* (Cap. 1, 1989 Ed.), s. 10B(1); New Brunswick: *Constitution Act, 1982, supra* note 7; Quebec: *Charter of the French Language*, R.S.Q. 2000, c. C-11, s. 7(3). The courts have also declared both versions to be equally authoritative in Manitoba: *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 777-778, 19 D.L.R. (4th) 1 at 44-45.
11. [2002] 1 S.C.R. 856, 163 C.C.C. (3d) 1, [*Mac* cited to S.C.R.].
12. *R. v. Mac* (2001), 152 C.C.C. (3d) 1 at para. 20, 40 C.R. (5th) 138 at para 20 (Ont. C.A.).

The Court of Appeal therefore concluded that "adapted" should be read as "altered."

The Supreme Court of Canada took a different approach. It characterized "adapted" in the English version as ambiguous (as potentially meaning either "modified" or "suited for"), and "adapté" in the French version as clear (as meaning "suited for" only).[13] Without further analysis, Bastarache J. then applied what is known as the shared meaning rule to decide that the common meaning should govern:

> statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions.... In this case, any ambiguity arising from the English version is resolved by the clear and unambiguous language of the French version of s. 369(b). There is therefore no need to resort to further rules of statutory interpretation, such as those invoked by the Court of Appeal.[14]

In the face of a decision by the Supreme Court to apply a relatively simple rule to overturn what would otherwise appear to have been a well-reasoned judgement of the Ontario Court of Appeal, one would hope to be able to identify a cogent and persuasive rationale underlying the rule in question. Unfortunately, this is demonstrably not the case.

Although the shared meaning rule has a superficial appeal, it fails to take account of the manner in which linguistic divergences occur and, because of this, in the majority of circumstances in which it is applied, it misleads. In the minority of cases in which it leads to a defensible conclusion, moreover, it is better stated by a different rule. In the pages that follow I will discuss the weaknesses of the shared meaning rule, and suggest an alternate means of interpreting divergent bilingual statutes that takes better account of the origins of linguistic divergence and provides a more reliable predictor of legislative intent.

Jurists have traditionally categorized linguistic divergences into two broad categories:

1) Instances where one of the possible meanings of each language version is shared by both, and

2) Instances where there is no commonality of meaning between the two language versions.

The approach traditionally advocated to address the first category is usually referred to as the shared meaning rule. The shared meaning rule states that where there is an overlap in meaning between the two language

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13. Arguably, the reverse is true. In English, the definition of "adapted" as "having become suitable for" is used only in respect of living things in the sense of "having become suited by reason of natural selection" (*The Concise Oxford Dictionary of Current English*, 8th ed., *s.v.* "adapt"). The *Robert-Collins French-English Dictionary*, on the other hand, gives both "modified" and "suited for" as possible meanings of "adapté" (*Robert-Collins French-English English-French Dictionary*, 2d ed., *s.v.* "adapter").

14. *Supra* note 11 at para. 5–6.

versions of a provision that are otherwise at variance, the meaning that is shared by both versions is to be preferred. Leading Canadian scholars on statutory interpretation echo this view:

> Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless this meaning is for some reason unacceptable.[15]

> The authorities are unequivocal in declaring that because the two versions are both official, reconciliation must be attempted... In practice, this involves finding a shared or common meaning in the two enactments.... one version may have a broader meaning than the other, in which case the shared meaning is the more narrow of the two.[16]

The courts too have had occasion to repeat the rule:

> The words in both versions, of necessity, must be construed with the same meaning. So, if one version is clear and ambiguous and the other version has the same meaning as well as others, it follows that, when construing, the common meaning must be accepted.[17]

The problem with the shared meaning rule is that it rests on a thin veneer of logic that does not withstand reasoned scrutiny. Because it does not coherently account for the origins of linguistic divergences, in the majority of circumstances in which it is applied, the shared meaning rule produces results that are no more accurate than random chance would predict. To see why this is so, one must look first at how bilingual statutes are prepared, and at the etiology of discrepancies between language versions.

II. Origins of Linguistic Divergence

SUPPOSE I WALKED INTO A ROOM closeting a dozen legislative drafters, quickly said, "write this down: 9565218202" and walked out. The scribbled product of the exercise would probably be a range of versions of the ten-digit number in question. Because most persons can recall only seven digits from short-term memory, the results will vary from person to person. If half of the hastily transcribed numbers are identical, there would be some logical and statistical basis for a third party observer to choose that number as the one most likely to be accurate, in preference to competing versions with no commonality.

The trouble with this particular preference for commonality is that legislation is not written that way. Bilingual statutes are prepared either by

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15. Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (Markham, Ont.: Butterworths, 1994) at 220.
16. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed., (Toronto: Carswell, 2000) at 326–327. See also Michael Beaupré, *Interpreting Bilingual Legislation*, 2d ed., (Toronto: Carswell, 1986) at p. 5.
17. *R. v. O'Donnell*, [1979] 1 W.W.R. 385 at 389, 45 C.C.C. (2d) 208 at 211 (B.C.C.A.).

co-drafting, in which both language versions are drafted simultaneously,[18] or by unilingual drafting followed by translation.[19] In a co-drafting jurisdiction, legislation is written by two legislative drafters, one writing in English and one in French, who receive written or oral instructions from departmental officials—usually experts in the subject-matter of the proposed legislation. The officials explain what they want to the drafters—who are lawyers but not usually subject-matter experts—and the drafters crank out text.[20]

Now suppose I were to tell two legislative drafters that the number I want consists of my telephone number and the area code for Washington. Now, if one language version comes out 956-5218-202 and the other comes out 956-5218-206, what does that tell you?

What it tells you is that one drafter understood "Washington, D.C." and the other understood "the State of Washington." *That* is how drafting errors are made.

Linguistic divergence can be attributed to two largely immutable factors affecting any co-drafting environment. First, with the pressure to produce large volumes of legislation in the minimum amount of time, sometimes one drafter simply forgets to add, delete or adjust a given provision, despite having been instructed to do so. Secondly, it is axiomatic that any group of legislative drafters will have varying degrees of experience and skill, and while the drafter of one version may be capable of accurately and unambiguously expressing what has been asked for, the other may occasionally make do with an approximation, or may inadvertently resort to inappropriate vernacular terminology. Given that one drafter is likely receiving instructions in his or her second language,[21] this is not surprising; a fact that has not gone unnoticed by the courts:

> We are confronted here by a major problem in the interpretation of federal legislation, and, at this juncture, it is proper to stop to consider the difficulty of the task facing our legislative draftsmen. They must not only formulate all legislative provisions in two languages, but also more often than not they must do so in terms of two different legal systems... It is therefore not surprising that major problems should be encountered.[22]

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18. Done in Canada, at the federal level and in the province of New Brunswick, and in Hong Kong.
19. Done in Ireland and South Africa, and at the provincial level in Canada in Ontario, Quebec and Manitoba.
20. Although, as I will discuss below, the manner in which a bilingual statute has been prepared should not ultimately affect the legal analysis applied to discrepancies between the two language versions, for simplicity's sake the discussion that follows assumes that the legislation in question has been prepared in a co-drafting environment.
21. The only situation in which this would not occur would be where the instructing officer is fluently bilingual and gives separate instructions to each drafter in his or her mother tongue. It has been my experience, however, that even fluently bilingual instructing officers give instructions for the most part in one language only, switching to the other to provide additional explication only when it seems to be needed.
22. Per Pigeon J. in *Re Bourgault*, [1980] 1 S.C.R. 35 at 41, 105 D.L.R. (3d) 270 at 274 [*Bourgault* cited to S.C.R.].

In a perfect world, discrepancies would be caught by instructing officers or others[23] reviewing the draft legislation, but the same time pressures that lead to drafting errors can curtail equivalency-checking, and a lack of bilingual instructing officers or an insufficient level of bilingualism among them can frustrate attempts at error correction on their part.

Let's take a look at an example closer to the legislative paradigm:

English version	French version
X. No person shall drive a vehicle in a park.	*X. Nul ne peut conduire un véhicule à moteur dans un parc.*

Translated literally, the French version would read as "No one shall drive a *motor* vehicle in a park."

Using the shared meaning rule, one would be directed to look at what the two meanings evinced by the two language versions have in common, and adopt that commonality as the true meaning. Conceptually, "motor vehicle" in the French version is a subset of the set of all "vehicle(s)" referred to in the English version, and one might therefore argue that *motor vehicle* is the element common to both.[24]

Taking into account what we know of the origins of linguistic divergence in the drafting process, we can conclude that one of two things happened to produce the discrepancy above. Either:

1) The instruction to the drafters was that the provision was to apply to "motor vehicles" and the English drafter wasn't paying attention or only heard "vehicles" and so put that down; or

2) The instruction was that the provision was to apply to "vehicles," and the French drafter either misinterpreted the instruction, or possibly simply equated "vehicles" with "motor vehicles" in his or her mind, and embodied the latter without giving due consideration to the difference between the two concepts.

Q: How does the concept of commonality help us to decipher which of these two situations occurred?

A: Not at all.

III. Categories of Linguistic Divergence

LET US DELVE INTO THE QUESTION a bit deeper by next looking at the types of linguistic divergence that can occur in bilingual legislation, how such divergences can arise, and how the courts have addressed them in practice. We can then examine whether the shared meaning rule offers any assistance in

23. At the federal level, Canada uses teams of jurilinguists to compare English and French versions.
24. On the other hand, it might also be argued that both versions refer to vehicles of one sort or another, and that the idea of *vehicle* represents their commonality.

determining the intended meaning in such cases. In terms of possible types of drafting errors, there are three basic types of linguistic divergence. They are:

1) Where both versions are clear, but reflect mutually exclusive meanings;
2) Where one version is clear and broad, while the other is clear and narrow, reflecting a subset of the broader meaning; and
3) Where one version is vague or ambiguous, and therefore capable of two or more meanings, while the other is clear, reflecting one (or a subset) of those meanings.

A. MUTUALLY EXCLUSIVE MEANINGS

In some cases, both language versions of a statute are clear, but clearly state different rules. Is an inmate who commits crimes while on parole entitled to a remission from sentence, where one language version of the statute says the remission "shall be credited" and the other says that it "may be"? Can an accused be convicted for a killing by a co-accused where one version of the statute limits conviction to the person causing the death but the other version does not?

Where two clear but different statutory rules emerge in a co-drafting environment, we can infer that the drafter of one language version accurately rendered the drafting instruction while the other misinterpreted it, or that the provision was originally drafted correctly in both languages, but that a subsequent change was missed in one language version. In either case, and indeed in all situations of linguistic divergence, the initial error will be followed by a failure either to check the two versions for concurrence or to recognize that they are expressing different concepts.

How do the courts interpret such provisions? In cases of equally clear but divergent language versions, the lack of commonality between the two versions precludes any attempt to apply the shared meaning rule. The manner in which the courts have dealt with such cases is instructive nonetheless, because it provides us with a referential baseline for examining the adjudication of legislative linguistic divergences where elements of potential commonality do exist.

In *Re Canada (Commissioner of Penitentiaries) and Zong*,[25] an inmate who committed crimes while on parole claimed to be entitled to credit for previously earned statutory remission from his sentence. The English version of the *Penitentiary Act*[26] stated that, on being recommitted after a breach of parole, remission "shall be credited" to the inmate, while the French version

25. *Re Canada (Commissioner of Penitentiaries) and Zong*, [1975] F.C. 430, 22 C.C.C. (2d) 553 (F.C.T.D.) [*Zong* cited to F.C.].
26. R.S.C. 1970, c. P-6.

stated that an inmate *peut bénéficier* ("may be credited"). The English version, however, conflicted with a provision of the *Parole Act*,[27] which stated that all remission was forfeited where a crime was committed while on parole, and the court therefore preferred the French version, which avoided this conflict.

In *R. v. Woods*,[28] the court had to consider whether an accomplice could be convicted of first degree murder for a killing done by a co-accused, where the English version of the *Criminal Code* required that the death be caused "by that person" while the French version lacked any corresponding wording. After considering the purpose of the provision and the principle that the benefit of any doubt should go to the accused, the court decided that the narrower English version should govern.

In *Jones v. Gamache*,[29] the court had to determine whether an action could be brought against a Minister of the Crown under a provision that permitted actions against an "officer of the Crown" in English, and against a "*fonctionnaire*" (civil servant) in French. Earlier decisions had held that a Minister was an officer of the Crown, but not a civil servant. The court looked to the original enactment of the provision in question, in which the French version used "*officier de la Couronne,*" and concluded that that version had been corrupted during subsequent revisions. It therefore applied the English version, which had remained consistent.

Other cases of incompatible and mutually exclusive language versions have been decided by preferring the version that was most in accord with the purpose of the Act,[30] that did not conflict with other statutory provisions,[31] that avoided an absurdity,[32] that favoured the liberty of the accused,[33] or that minimized changes to existing legal rights.[34] In each of these cases what we see is that the court interprets each language version using the standard techniques of statutory interpretation (by looking, for example, to the purpose of the Act, consistency of the provision with other provisions, the legislative evolution of the provision and relevant presumptions of legislative intent) and applies the language version whose meaning produces the most coherent legislative scheme.

Should a different approach be taken, though, in considering instances of linguistic divergence in which one can find a commonality of meaning? In the following pages I will look at how courts have dealt with such instances and consider whether the shared meaning rule provides a

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27. R.S.C. 1970, c. P-2, s. 21(1).
28. (1980) 57 C.C.C. (2d) 220, 19 C.R. (3d) 136 (Ont. S.C.) [*Woods* cited to C.C.C.].
29. [1969] S.C.R. at 119, 7 D.L.R. (3d) at 316 [*Jones* cited to S.C.R.].
30. *R. v. J.B.*, [1980] 1 S.C.R. 80, aff'g 44 C.C.C. (2d) 303, 48 C.C.C. (2d) 479 [*J.B.* cited to S.C.R.].
31. *Bourgault, supra* note 22.
32. *J.B., supra* note 30.
33. *R. c. Peters*, [2000] J.Q. no 1366 (Qc. S.C.).
34. *Cité de Montréal v. A&P Food Stores Ltd.*, [1949] Que. K.B. 789.

rational foundation for either explaining those decisions or for predicting future judicial decision-making in similar circumstances.

B. CLEAR AND BROAD VS. CLEAR AND NARROW

The second type of linguistic divergence described above, and one that is quite common, occurs where one language version of a statute expresses a concept in clear but broad terms, while the other uses clear but narrower language, covering some but not all of the same ground. In such cases, the meaning encompassed by the narrower version will constitute a subset of that of the broader version. For example, should a tax deduction be allowed for destroyed property, where the English version allows a deduction for property that has been "disposed of" (transferred or destroyed), while the French covers only property that had been "*aliéné*" (transferred)?

Taking into account what we know of the origins of linguistic divergence in the drafting process, we can conclude that such a divergence would have occurred in one of two ways:

> 1) The instruction to the drafters was that the provision was to apply to property that had been either transferred or destroyed and the French drafter misheard the instruction as being to extend only to property that had been transferred; or
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> 2) The instruction was that the provision was to apply only to property that had been transferred, and the English drafter either misinterpreted the instruction or simply equated "disposed of" with "transferred" in his or her mind, and used the former expression without giving due consideration to the difference between the two concepts.

Such a situation would seem to be tailor-made for the application of the shared meaning rule. The shared meaning rule requires that "the meaning that is shared by both ought to be adopted"[35] and that where "one version [has] a broader meaning than the other, ... the shared meaning is the more narrow of the two."[36] Under the shared meaning rule then, the narrower of the two meanings would always be deemed to govern.

But having regard to the source of such errors, is there any rational basis for applying such a rule? As you can see from the example above, it can be taken as a given that the instruction was either to state a broad rule, or to state a narrow one. In the absence of actual evidence, we can only assume that the odds are 50/50 that the rule was to be broad, and 50/50 that it was

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35. Sullivan, *supra* note 15 at 220.
36. Côté, *supra* note 16 at 327.

to be narrow.[37] In other words, 50 per cent of the time it will be accurate to adopt the broad meaning, and 50 per cent of the time it will be accurate to adopt the narrow meaning.[38]

If we apply the shared meaning rule, we will be directed to adopt the narrow meaning 100 per cent of the time, and will therefore be wrong 50 per cent of the time. The rule, therefore, gives the right result half of the time, and the wrong result half of the time—the same ratio one could expect from flipping a coin. Because the shared meaning rule has only a random chance of success in such situations, it does not, in consequence, contribute to the determination of legislative intent[39] in any meaningful way.

Even if the shared meaning rule lacks theoretical legitimacy in its application to "broad versus narrow" divergences, it could nonetheless prove to be useful if it provided a reliable predictor of the courts' responses when faced with such provisions.[40] This, however, is manifestly not the case. In a survey of 25 judicial decisions[41] in which the courts considered "broad versus narrow" divergences, the court in fact opted for the contrary interpretation—the broader meaning—more often than not. In 13 cases, the court preferred the broader of the two versions,[42] and in ten cases, the narrower

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37. In *Nima v. McInnes* (1989), 2 W.W.R. 634 at 647, 32 B.C.L.R. (2d) 197 at 210 (S.C.) [*Nima* cited to W.W.R.], the court alluded to the evidentiary gap that necessitates such a presumption:
> The problem with drawing any inference of a drafting error, however, is that it is difficult to know in which official version the error appears. Was there no change intended, but one effected, by a drafting error in the English version, or was there a change intended, and none effected, again as the result of a drafting error, in the French version?

38. While experiments into the psychology of transcription errors might disclose a tendency to err in one direction or the other, in the absence of such data one has to assume that the odds are 50/50. While a sample as small as 25 cases (of clear and broad versus clear and narrow divergence) is not sufficient to convincingly support such an assumption, in the cases surveyed for this article, the courts preferred the broader version 52% of the time, and the narrower 48% (see *infra* notes 41–44, and text accompanying notes).

39. In using the expression legislative intent, I am mindful of the caveats traditionally associated with the communication theory of statutory interpretation (Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986) at 318) and criticisms of the majoritarian model of intention (William N. Eskridge, Jr. & Philip P. Frickey, "Statutory Interpretation as Practical Reasoning" (1990) 42 Stan. L. Rev. 321 at 378-79). For our purposes, I am assuming that the legislative text reflects the instructions given to drafters by those charged with policy formulation (J.W. Harris, *Legal Philosophies* (London: Butterworths, 1980) at 149).

40. Even if that response was itself based on an unfounded reliance on the rule.

41. The survey included all cases cited in works on statutory interpretation that deal with the interpretation of bilingual legislation.

42. *R. v. Compagnie Immobilière BCN Limitée*, [1979] 1 S.C.R. 865, 97 D.L.R. (3d) 238 [*Compagnie Immobilière*]; *R. v. Klippert*, [1967] S.C.R. 822, 65 D.L.R. (2d) 698 [*Klippert*]; *Doré v. Verdun (City of)*, [1997] 2 S.C.R. 862, 150 D.L.R. (4th) 385 [*Doré*]; *R. v. Collins*, [1987] 1 S.C.R. 265, 38 D.L.R. (4th) 508 [*Collins*]; *Deltonic Trading Corp. v. Deputy M.N.R.* (1990), [1991] 113 N.R. 7, [1990] 3 T.C.T. 5173, (F.C.A.) [*Deltonic*]; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, 54 D.L.R. (4th) 679 [*Clark*]; *R. v. Juster*, [1974] 2 F.C. 398, 49 D.L.R. (3d) 256 (C.A.) [*Juster*]; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 [*Slaight*]; *Flota Cubana de Pesca v. Canada (Minister of Citizenship and Immigration)* (1997), [1998] 2 F.C. 303,154 D.L.R. (4th) 577 (F.C.A.) [*Flota Cubana*]; *Daycal Publishing Inc. v. Canada Post Corp.* (1989), [1990] 103 N.R. 151, [1989] F.C.J. No. 1128 (C.A.) (QL) [*Daycal Publishing*]; *Goguen v. Shannon* (1989), 97 N.B.R. (2d) 44, 50 C.C.C. (3d) 45 (C.A.) [*Goguen*]; *Nima*, *supra* note 37; *Milliken & Co. v. Interface Flooring Systems (Canada) Inc.* (1993), [1994] 69 F.T.R. 39, 52 C.P.R. (3d) 92 (F.C.T.D.) [*Milliken*].

version.[43] In two other cases, the court opted to construe an exception narrowly, thereby giving effect to the provision with a broader application.[44] In cases in which the shared meaning rule was actually cited,[45] the court rejected it more often than it applied it.[46] Based on this sample, therefore, the shared meaning rule appears to lack any predictive value in respect of "broad versus narrow" divergences.

As is the case in dealing with mutually exclusive linguistic divergences, the courts have traditionally examined provisions exhibiting "broad versus narrow" divergences using the standard techniques of statutory interpretation and have adopted the language version whose meaning led to the most harmonious and effective operation of the legislative scheme in question. In *R. v. Compagnie Immobilière BCN Limitée*,[47] where the Court was called upon to determine whether a taxpayer could claim a tax deduction for property that had been destroyed, it opted for the broader English version that encompassed property that had been "disposed of" (transferred or destroyed), over the narrower French version "*aliéné*" (transferred only), on the ground that the French version of the Act as a whole was drafted inconsistently[48] and that the English version therefore more likely reflected Parliament's intent. In *R. v. Klippert*,[49] the Court had to determine whether provisions relating to dangerous sexual offenders only applied to a person who had been shown to be unable to control his sexual impulses ("*impuissance à maîtriser ses impulsions sexuelles*") or extended to someone who apparently could do so, but chose not to ("failure to control").[50] After looking at the legislative evolution of the provision (an earlier amendment had effected a change to the English version that was not reflected in the French), the

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43. *ILGWU Center Inc. v. Montréal (City of)*, [1974] S.C.R. 59, 24 D.L.R. (3d) 694 [*ILGWU*]; *Deputy M.N.R. v. Film Technique Ltd.*, [1973] F.C. 75 (F.C.A.) [*Film Technique*]; *Re Wolfe and the Queen* (1982), 137 D.L.R. (3d) 553, (*sub nom. Re Estabrooks Pontiac Buick Ltd.*) 40 N.B.R. (2d) 172 (Q.B.), aff'd 144 D.L.R. (3d) 21, 44 N.B.R. (2d) 201 (N.B.C.A.) [*Estabrooks*]; *R. v. Dollan and Newstead* (1980), 53 C.C.C. (2d) 146 (Ont. H.C.J.), aff'd 65 C.C.C. (2d) 240, 35 O.R. (2d) 283 (C.A.) [*Dollan*]; *Roy v. Davidson* (1898), [1899] 15 C.S. 83 (Qc. S.C.) [*Roy*]; *Filion v. Grenier*, [1954] B.R. 158 (Qc. C.A.) [*Filion*]; *Côté v. Canada (Employment and Immigration Commission)*, [1986] 69 N.R. 126, [1987] 13 C.C.E.L. 255 (F.C.A.) [*Côté*]; *Géricon Inc. v. 9005-2150 Québec Inc.*, [1997] R.D.I. 513, [1997] A.Q. No. 3468 (Qc. C.A.) [*Géricon Inc.*]; *R. v. Schaefer*, [1919] 58 S.C.R. 43, [1919] 28 B.R. 35 [*Schaefer*]; *Re Richelieu Oil Ltd.*, [1950] B.R. 714, [1951] 31 C.B.R. 221 (Qc. C.A.) [*Re Richelieu Oil*].

44. *Lagueux v. Phoenix Assurance Co.*, [1932] 53 B.R. 396 (Qc. C.A.); *Goodyear Employees Union Ltd. v. Keable*, [1967] B.R. 49 (Qc. C.A.).

45. Or its equivalent in the former s. 8 of the *Official Languages Act*, S.C. 1968-69, c. 54, which was repealed in 1988.

46. Rejected: see generally *Doré*, *supra* note 42; *Deltonic*, *supra* note 42; *Slaight*, *supra* note 42; *Flota Cubana*, *supra* note 42; *Goguen*, *supra* note 42. Applied: see generally *Film Technique*, *supra* note 43; *Filion*, *supra* note 43; *Géricon Inc.*, *supra* note 43.

47. *Supra* note 42.

48. *Compagnie Immobilière*, *ibid.* at 871, 876 (sometimes rendering "disposed of" as "*disposé*" (which would include destruction) and sometimes (in its view, inappropriately) as "*aliéné*" (which would not)).

49. *Supra* note 42.

50. *Ibid.* at 833–34.

court opted for the broader meaning conveyed by the English version.

In other decisions, the courts have justified applying a clear but broader version over a narrower one: because it was more consistent with the purpose of the Act,[51] with other legislative provisions,[52] or with the legislative history[53] or evolution[54] of the Act; because it best protected the rights of an accused;[55] or because the other language version was poorly drafted[56] or lacked internal rationality.[57]

In cases where the narrower of two clear but divergent language versions was adopted, the court did so on the basis of the shared meaning rule in only a minority of cases.[58] Where the shared meaning rule was not cited, the narrower version was preferred on the basis that tax exemptions should be narrowly construed,[59] that it favoured the liberty of the accused[60] or imposed a less onerous burden,[61] or that applying the broader version would be illogical.[62]

Given its unreliability in cases of "broad vs. narrow" linguistic divergence, is there any scope at all for the application of the shared meaning rule? The one area in which the rule might be argued to apply best is in cases where one version is vague or ambiguous, and therefore capable of two or more meanings, while the other version points to only one of those meanings.

C. CLEAR VS. VAGUE OR AMBIGUOUS

In some cases of linguistic divergence, one version of the statutory provision is vague or ambiguous, while the other is clear, reflecting one or more of the meanings that can be attributed to the vague or ambiguous version. Text can be said to be "vague" where it is "not precise or exact in meaning; lacking in definiteness or precision."[63] A word or expression is vague in a legislative context when it is imprecise, in the sense of being indistinctly broad, so that no particular meaning can be definitely ascribed to it without contextual evidence garnered beyond the limits of the provision in which it is used. Is a requirement that a surrender be certified by "some" of the chiefs of an

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51. See generally *Doré*, *supra* note 42; *Clark*, *supra* note 42; *Juster*, *supra* note 42; *Flota Cubana*, *supra* note 42; *Daycal Publishing*, *supra* note 42; *Milliken*, *supra* note 42.
52. *Doré ibid.*
53. *Ibid.*
54. *Flota Cubana*, *supra* note 42; *Goguen*, *supra* note 42; *Nima*, *supra* note 37.
55. *Collins*, *supra* note 42.
56. *Clark*, *supra* note 42.
57. *Slaight*, *supra* note 42.
58. In 3 of 10 surveyed cases in which the narrower version was preferred: *Film Technique*, *supra* note 43; *Filion*, *supra* note 43; *Géricon*, *supra* note 43.
59. *ILGWU*, *supra* note 43.
60. *Dollan*, *supra* note 43; *Roy*, *supra* note 43; *Schaefer*, *supra* note 43.
61. *Re Richelieu Oil*, *supra* note 43.
62. *Dollan*, *supra* note 43.
63. *The Oxford English Dictionary*, 2d ed., *s.v.* "vague".

Indian band satisfied by one certification? By two? By three? Does a period of "continuous employment" refer to a period of actual work, or would a period that included a temporary lay-off under an ongoing employment contract suffice?

A provision can be considered to be "ambiguous" if it is "of double meaning; admitting more than one interpretation or explanation".[64] In a legislative context, it describes a word or expression that was intended to have one meaning but, because of poor word choice or sentence structure, can be read in two different ways. Does a requirement to fulfil "the conditions of entitlement" refer to all conditions set out in the Act in question, or only to conditions set out earlier in the same section?

Although most words are polysemous—capable of more than one meaning—context usually resolves potential uncertainties of meaning for the experienced user of language. Vagueness or ambiguity arises where the immediate context does not provide sufficient indicia of meaning.[65]

How do provisions in which one language version is vague or ambiguous and the other is clear find their way into legislation? To answer this, let us return once more to the bilingual drafting process. First, it has to be recognized that such provisions can originate from either clear or imprecise instructions. If a clear instruction was given ("a person has to have worked continuously throughout the period"), the concept may have been rendered imprecisely in one language version through inappropriate word choice ("a period of continuous employment"), while the other captured it accurately ("a period of continuous work"). If, on the other hand, the instructions were imprecise ("the surrender needs to be certified by some chiefs"), the drafter of the vague version will have failed to clarify the imprecision ("How many did you have in mind?"), while the drafter producing the version capable of only one meaning will either have received clarification ("One will do."), without communicating it to the other drafter, or will have simply interpreted the vague instructions as pointing to one of the range of possible

64. *Ibid.*, *s.v.* "ambiguous".

65. Tom McArthur, ed., *The Oxford Companion to the English Language*, (Oxford: Oxford University Press, 1992) *s.v.* "ambiguity".

meanings and rendered the text of that version accordingly ("He must mean one will suffice.").[66]

With this in mind, does the shared meaning rule provide a cogent theoretical basis for determining legislative intent, where one language version is vague or ambiguous?[67] From a purely empirical perspective, the shared meaning rule is indeed likely to procure the original intent more often than not. The reason for this follows from two assumptions:

1) in the absence of evidence to the contrary, we must again assume that it is equally likely that the originating instructions were precise or imprecise, and

2) that at least some of the time, clarification will be requested by the drafter of one version, which will produce a clear version even from originally imprecise instructions.

It follows that the clear version will constitute an accurate reflection of legislative intent more than half the time.[68]

Because in this type of linguistic divergence the meaning reflected by the clear version constitutes a subset of the possible meanings attributable to the vague or ambiguous version,[69] the clear meaning will always be the meaning common to both. The common meaning will therefore accurately reflect legislative intent to the same degree as the clear version. And because

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66. Note, however, that a vague rule is not always the result of a drafting error. Consider the following rule:

    A landlord must make reasonable efforts to give notice to a defaulting tenant.

    Although this sets out an implementable legislative rule (in that a court could apply it to a particular set of facts), the rule is vague in the sense that it does not delineate clear boundaries for the types of efforts that it requires of a landlord. The imprecision in this rule, though, is more likely a result of deliberately imprecise drafting instructions than of poor word choice. In many instances, the use of an expression such as "reasonable time" or "sufficient notice" is an indication that the policy-makers did not know, or for political reasons were unwilling to state, what the rule should be, and therefore made do with an approximation. In such cases, it is likely that both language versions will be equally imprecise. In essence, these policy-makers have left it to the courts to finish the job of legislating, hoping that through the accumulation of judicial precedent the courts will decide what the rule should be. See P. Salembier, "Designing Regulatory Systems: A Template for Regulatory Rule-making" (2002) 23 Stat. L. Rev. 165 at 179–182, for a further discussion of the problems such how vague rules can cause.

67. Subject to the qualifications noted above, *supra* note 39.

68. Where the drafting instructions were given clearly, choosing the meaning captured by the clear version, rather than one of the alternative meanings possible under the vague version, will produce an interpretation that accurately reflects the original intent. Where the drafting instructions were imprecise, if the drafter of the clear version did not clarify imprecise instructions but simply chose one of the range of possible meanings and reflected it in the text, then opting for the meaning captured by the clear version will be no more accurate than a random choice among the range of possible intentions. If we assume that at least some of the time (X%) the clear version is the product of a clarification by the drafter of the imprecise instructions, however, then choosing it will produce an accurate interpretation in those cases. If we assume that the likelihood that the instructions were clear is the same as the likelihood they were unclear, then the clear version will be accurate (50+X)% of the time, and inaccurate (50-X)% of the time.

69. As per the definition of this category set out at the start of this section and in the category descriptions on page 11. Situations in which the clear meaning did not fall within the scope of possible meanings for the vague version would be dealt with as mutually exclusive meanings, in the manner discussed earlier.

the clear version will convey the original intent more than half the time, so will the common meaning.

That being said, however, the idea of commonality that forms the basis of the shared meaning rule, while operating as a functional predictor of results, does nothing to explain those results. Instead, it is the fact that a good drafter will request clarification of imprecise instructions that leads to the possibility that a clear draft can be created from unclear instructions. In situations where one resulting version is clear and the other is vague or ambiguous, the fact that a clear draft can sometimes be produced from unclear instructions—in addition to the fact that one can always be produced from clear instructions—shifts the probabilities to favour the clear draft over its unclear sibling as more likely constituting an accurate reflection of legislative intent. It is the element of clarity, however, and not of commonality of subject-matter, that produces this result.

In other words, the conclusion that the clear version accurately reflects legislative intent more often than random chance would dictate is a function of the fact that in some cases in which imprecise instructions lead to an imprecise provision in one language version, intervention by the drafter of the other version in seeking clarification produces a clear version from the same imprecise instructions. It is the act of clarifying, and not the coincidental commonality of subject-matter that results, that shifts the probabilities to favour the clear version. In "vague vs. clear" linguistic divergences, commonality is a by-product of the selective clarification of unclear instructions by one drafter, and not an indicium of legislative intent. The fact that the shared meaning rule produces similar results in "vague vs. clear" situations is purely coincidental, and not the result of any inherent rationality in its theoretical underpinnings.

Consider, for example, the fact that new cars have shorter stopping distances than old cars. Although true, this has nothing to do with the fact that the cars are new, but is instead attributable to the fact that new cars have anti-lock brakes (and old ones do not). A stopping distance theory should therefore be founded on the existence or absence of anti-lock brakes, not on newness. In the same way, a theory of interpretation of linguistic divergences in "vague vs. clear" situations should be founded on clarity, not commonality.

Where one version of a statute is vague or ambiguous and the other is clear, the shared meaning rule of interpretation should therefore be rejected in favour of the principle that the version that more clearly sets out the law should be preferred over the version that does so in vague or ambiguous terms. This rule, in fact, more accurately reflects the practice of the courts in such cases. In 38 surveyed decisions interpreting "vague vs. clear" linguistic divergences,[70] the courts cited clarity as the reason for preferring one

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70. *Supra* note 41.

version over the other 21 times, and in some cases gave it as the only reason.[71]

In *Cardinal v. The Queen*,[72] for example, the issue was whether certification of a surrender by only one of the chiefs or elders of an Indian band constituted sufficient compliance with the 1906 *Indian Act*.[73] The English version required certification by "some of" the chiefs or elders present, while the French version referred to "*l'un des chefs ou des anciens*" ("one of the chiefs or elders").[74] Given the uncertainty inherent in the English version, the court preferred the French.

In *Tupper v. R.*,[75] the Supreme Court of Canada considered a provision that made it an offence to possess "any instrument for house-breaking" in the English version and to possess "*un instrument pouvant servir aux effractions de maisons*" in the French version. From the English version it was unclear whether an instrument had to be *designed for* house-breaking, or whether it was sufficient simply that it be *capable of* being used for that purpose, as was intimated by the French version. Because the three accused were found cruising around in an overdue rental car in the wee hours of the morning in possession of nylon stockings, gloves, screwdrivers and a crowbar—all items that could be used for innocent purposes—the difference between the two meanings was important. The court opted for the latter interpretation, explaining that "[t]he French version makes the meaning clear,"[76] without further elucidation.

The fact that the courts tend to prefer the clearer version in cases of "vague vs. clear" divergences should not come as a surprise. From the point of view of rule of law, judges may feel that it is intuitively fairer to apply a clear rule setting out a single obligation than to arbitrarily hold a citizen to one of a range of obligations inhering in an unclear rule.[77] Another possible reason is that a judge cannot simply say "The law is unclear and I will not therefore render any decision," but is instead required to give some meaning to the legislation being litigated.[78] In the absence of other indicia of legislative intent, when faced with the option of applying the law by giving

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71. *Cardinal v. The Queen* (1980), 97 D.L.R. (3d) 402, 1 C.N.L.R. 32 [*Cardinal* cited to D.L.R.] (F.C.T.D.); *Tupper v. R.*, [1967] S.C.R. 589, 63 D.L.R. (2d) 289 [*Tupper* cited to S.C.R.]; *R. v. Rahey*, [1987] 1 S.C.R. 588, 39 D.L.R. (4th) 481 [*Rahey* cited to S.C.R.]; *Mac*, *supra* note 11; *Irwin v. Canada (Minister of National Revenue)*, [1963] Ex. C.R. 51, [1962] C.T.C. 572 [*Irwin* cited to Ex. C.R.]; *Corporation of Coaticook v. People's Telephone Co.* (1901), 19 Que S.C. 535; *Perrier v. Canada*, [1996] 1 F.C. 586 at 587, 65 C.P.R. (3d) (C.A.) [*Perrier* cited to F.C.]; *O'Donnell*, *supra* note 17; *Kwiatkowsky v. Canada (Minister of Employment and Immigration)*, [1982] 2 S.C.R. 856, 142 D.L.R. (3d) 385 [*Kwiatkowski* cited to S.C.R.].

72. *Ibid.*

73. R.S.C. 1906, c. 81.

74. *Ibid.*, s. 49.3.

75. *Supra*, note 71.

76. *Ibid.*, at 593.

77. I say "intuitively" because this ignores the uncertainty created in respect of the clear version by the very existence of a divergent obligation expressed in the other language version, and assumes that the clear version was in the citizen's language of choice.

78. F.A.R. Bennion, *Statutory Interpretation: A Code*, 2d ed. (London: Butterworths, 1992) at 4, 208.

effect to a rule clearly enunciated in one language, and engaging in the legislative function involved in choosing one of several possible meanings attributable to a rule vaguely worded in the other language, a traditional, less-activist judge will choose the former, and hence will favour the clearer language version. While this ignores E.A. Driedger's caution that the interpretation of divergent provisions is not an exercise of determining "which is the better literature,"[79] absent other indications of legislative intent, it is apparent that the clearer law will prevail more often than not.

In many cases, the courts have applied the standard techniques of statutory interpretation to supplement arguments of clarity. In *R. v. Golden*,[80] the court had to determine whether "any property" in the English version referred to property in general or to a particular item of property (and hence whether a subsequent reference to "something else" referred to something that was not property or simply to another item of property). The French version of the provision used "*ce bien*" rather than "*ces biens,*" indicating that the latter meaning was intended. The court supported its adoption of the French version by reasoning relating to the internal context of the Act and by reference to the absurdity that would result if the other meaning were adopted.

In *Canada (A.G.) v. Piché*,[81] the question was whether a statutory requirement that an applicant comply with "the conditions of entitlement" referred to all conditions in the Act or just to those set out in a particular section relating to eligibility. The French version clearly referred to the latter. In adopting this meaning, the court referred to its superior logic, and to the fact that the alternative argued for would contradict the spirit of the Act and result in absurdity.

Other cases of "vague vs. clear" linguistic divergences have been decided by preferring the version that: was more consistent with the purpose of the Act,[82] legislative history[83] or evolution;[84] was more consistent

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79. *Driedger on the Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 171.
80. [1986] 1 S.C.R. 209, 25 D.L.R. (4th) 490.
81. [1981] 2 F.C. 311 (C.A.).
82. *Johnson v. Laflamme* [1917], 54 S.C.R. 495, 36 D.L.R. 572 [*Johnson* cited to S.C.R.]; *Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs)*, [1990] 1 F.C. 395, 64 D.L.R. (4th) 413 (T.D.) [*Canada (Information Commissioner)* cited to D.L.R.]; *Corporation of Coaticook*, *supra* note 71; *Nitrochem Inc. v. Minister of National Revenue (Customs and Excise)* (1984), 53 N.R. 394, [1984] C.T.C. 608 (F.C.A.) [*Nitrochem* cited to N.R.]; *Re Price* (1974), 8 N.B.R. (2d) 620, N.B.J. No. 176 (S.C.); *R. v. Voisine* (1985), 57 N.B.R. (2d) 38 (Q.B.) [*Voisine* cited to N.B.R.].
83. *Johnson*, *supra* note 81.
84. *Composers, Authors & Publishers Association of Canada, Ltd. v. Western Fair Association*, [1951] S.C.R. 596, 2 D.L.R. 229 [*Western Fair Association* cited to S.C.R.]; *R. v. Popovic and Askov*, [1976] 2 S.C.R. 308, 62 D.L.R. (3d) 56 [*Popovic* cited to S.C.R.]; *In Re Bastien* [1935], 73 C.S. 230; *Prevost v. Menard*, [1908] 34 C.S. 31 (Ct. Rev.); *Voisine*, *supra* note 81.

with other provisions in the Act;[85] remedied an identified mischief;[86] avoided an absurdity;[87] favoured the liberty of the accused;[88] or was better justified for reasons of legal policy.[89]

In only five of the cases surveyed did the courts actually purport to apply the shared meaning rule.[90] In two other decisions, they considered but expressly rejected the rule.[91]

In a further three decisions, the court adopted the vague or ambiguous version in preference to the clear one, and therefore certainly did not apply the shared meaning rule.[92] In *Beothuk Data Systems Ltd. v. Dean*,[93] for example, the English version of the statute required that an applicant have "twelve consecutive months of continuous employment" to qualify for benefits. The lower court judge viewed this as being uncertain in scope, since it was not clear whether the applicant must actually have worked for that period, or whether a looser employment relationship would suffice. The lower court judge applied the shared meaning rule to adopt the French version ("*travailler*"), which supported the work requirement interpretation. The appeal court disagreed, observing that the lower court had "placed excessive reliance on the shared meaning rule..."[94] It instead preferred the alternate, non-shared meaning inherent in the less clear English version as the one more in accord with the purpose of the Act, and because inadvertent changes had been introduced to the substance of the French version during an earlier revision.

Thus it would appear that the courts have actually applied the shared meaning rule in few "vague vs. clear" cases in which they could have done so. Because the courts are not citing the shared meaning rule in such cases even where they ultimately decide on a meaning that is common to the two

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85. *R. v. Lamy* (2002), 210 D.L.R. (4th) 456, 162 C.C.C. (3d) 353 (S.C.C.); *Canada (Information Commissioner), supra* note 81; *Board of School Commissioners of the Municipality of Greenfield Park c. Hopital general de Saint-Lambert*, [1967] Que. Q.B. 1; *Allaire c. Le Fonds d'indemnisation des victims d'accidents d'automobile*, [1973] C.A. 335; *J. Aime Ferland & Fils Inc. c. Quebec (Procureur General)*, [1980] C.S. 129.

86. *Western Fair Association, supra* note 83.

87. *Couture c. La Regie des alcools du Quebec*, [1963] B.R. 431; *Seagrave Construction Inc. v. Bartuccio and City of Verdun*, [1952] B.R. 40 (Mag. Ct.); *Pollack Limitee v. Le Comite paritaire du commerce de detail a Quebec*, [1946] S.C.R. 343, 2 D.L.R. 801.

88. *R. v. Colman*, [1981] 29 A.R. 170, 3 W.W.R. 572 (Q.B.); *R. v. Dunn*, [1995] 1 S.C.R. 226, 95 C.C.C. (3d) 289 [*Dunn* cited to S.C.R.]; *Mekies c. Directeur du Centre de detention Parthenais et Republique Francaise*, [1977] C.S. 91, aff'd [1977] Que. C.A. 362.

89. *R. v. Black and Decker Manufacturing Co. Inc.*, [1975] 1 S.C.R. 411, 43 D.L.R. (3d) 393.

90. *Mac, supra* note 11; *Johnson and Warriner v. Canada (A.G.)* (1998), 145 F.T.R. 108, F.C.J. No. 19 (F.C.T.D.); *Perrier, supra* note 71; *Gravel v. St-Leonard (City of)*, [1978] 1 S.C.R. 660, 17 N.R. 486. In *Pfizer Co. v. Deputy Minister of National Revenue (Customs and Excise)*, [1977] 1 S.C.R. 456, 68 D.L.R. (3d) 9, the court applied an equivalent rule set out in s. 8 of the former *Official Languages Act*, S.C. 1968-69, c. 54, which was repealed in 1988.

91. *Johnson, supra* note 81; *Nitrochem, supra* note 81.

92. *Beothuk Data Systems Ltd., Seawatch Division v. Dean*, [1998] 1 F.C. 433, F.C.J. No. 1397 (C.A.) [*Beothuk* cited to F.C.]; *Dunn, supra* note 87; *Popovic, supra* note 83.

93. *Beothuk, Ibid.* note 92.

94. *Ibid.* at 454.

language versions, it does not appear that the rule has a significant persuasive effect on even a purely rhetorical level.

If we accept that the application of the shared meaning rule in "vague vs. clear" situations lacks a cogent theoretical basis, and that commonality of subject-matter is a less rational predictor of results than is clarity, then a new heuristic model is needed to guide interpreters of divergent bilingual statutes. Before I suggest such an approach, however, let us return to the issue of whether the analysis of error generation should be any different in a jurisdiction where bills are drafted in one language and then translated into the other.

D. EFFECT OF TRANSLATION

At first glance, logic would dictate that an interpreter of a translated bilingual statute should look for meaning to the language version in which the statute[95] was originally drafted, since any change introduced in the translation should simply reflect a translation error.[96] This view is reflected in comments made by the courts from time to time to the effect that one version is a bad translation[97] or "imperfectly reproduces"[98] the other.

It is true that in situations where the meanings of the divergent language versions are clear but mutually exclusive, or where one version is clear and broad while the other is clear and narrow, one might justifiably assume, because the original language version is clear, that the discrepancy in the translated language version is the result of a translation error. Similarly, where the original version is vague or ambiguous, the translated version could be considered to represent simply the translator's interpretation as to which of the range of possible meanings was intended. An argument could then be made that the translator's interpretation should not be substituted for that of the court. On these bases, one could argue that the court should normally look to the original version at least as the starting point for interpreting the provision in question.

While these arguments have some intuitive appeal, several factors lessen their allure. First, if the translator had access for verification purposes to the instructing officers,[99] the version produced by the translator would

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95. I am assuming that the statutes in question are translated before their enactment, as is the usual case when dealing with translated language versions that are deemed to be equally authentic.
96. This approach is advocated by the Hong Kong Department of Justice in respect of statutes originally enacted in English and later translated into Chinese and "declared authentic" under the Hong Kong *Official Languages Ordinance* (Cap. 5). Law Drafting Division, "A paper [sic] Discussing Cases Where the Two Language Texts of an Enactment are Alleged to Be Different," online: Department of Justice (H.K.) <http://www.justice.gov.hk/inprmain.htm>.
97. *Canada (Information Commissioner)*, *supra* note 81 at 420; *Johnson*, *supra* note 81 at 505.
98. *Corporation of Coaticook*, *supra* note 71 at 554.
99. In Ontario, translators have access to the drafters and, through them, to the instructing officers. This is not normally the case in Quebec. Luc Gagne, *Le processus legislatif et reglimentaire au Quebec*, (Cowansville, Qc.: Yvon Blais, 1997) at 30.

have as great a likelihood of being correct as one produced by a co-drafter. Second, in a bilingual jurisdiction, the legislators in question will have seen both language versions of the provision in question at the time it was enacted. Even if some of the legislators are fluent in only one of the two official languages, any posited preference for one language version based on the legislators' linguistic profile would have to take into account who these legislators are, whether they were present in the legislature when the Act was enacted, and whether they voted for or against the legislation. While the courts are willing, in certain circumstances, to consider some aspects of the legislative history of an enactment, an investigation of these types of factors goes far beyond what the courts have been willing to contemplate to date.[100] The uncertainty introduced by these factors effectively negates any interpretive advantage that might otherwise be obtained by determining whether a discrepancy occurred as a result of translation.

IV. Recommendations

WITH HUMAN FALLIBILITY BEING WHAT IT IS and with the pressures under which legislation is produced, it is inevitable that divergences will occur from time to time between the two language versions of bilingual statutes. While leading jurists have proposed that such discrepancies should be resolved by a search for commonality of meaning—advice that the courts have sometimes followed—the lack of any cogent theoretical or derivative basis for the shared meaning rule suggests that a better analytical framework is required.

Although the courts seldom expressly profess to do so, they seem to have intuitively recognized the unreliability of the rule in that they have declined to apply it in the majority of cases in which they could have. As we saw in the *Compagnie Immobilière*[101] decision, the court ignored the shared meaning and instead preferred the broader English text because the drafting in the French was inconsistent. In other cases, the broader version was more consistent with the purpose of the Act[102] or best protected the rights of the accused.[103] In *Klippert*,[104] the broad English text was adopted because the French version seemed to have dropped a stitch during an earlier amendment. In each of these cases, the decision is eminently defensible under the ordinary rules of statutory interpretation, without recourse to concepts of commonality. Even in those cases where the version reflecting the common

100. See Sullivan, *supra* note 15 at 435.
101. *Supra* note 42.
102. *Supra* note 51.
103. *Supra* note 42
104. *Supra* note 42.
105. *Supra* note 71.

meaning was ultimately adopted, there was almost always a cogent reason for choosing the narrower text—albeit one that had nothing to do with the fact of commonality. In *Cardinal*,[105] the clear but narrower French text was preferred over an unworkably vague English version. In *R. v. Golden*,[106] the narrower version was preferred in order to avoid an absurdity.[107] And in *R. v. Dollan and Newstead*,[108] the narrower English version better protected the rights of the accused. Once again, each of these decisions was rationalized using the ordinary rules of statutory interpretation, without attempting to substantiate them in terms of commonality or shared meaning.

Perhaps in recognition of the shared meaning rule's fallibility, some commentators have suggested that it be applied only if other interpretive principles point to the same conclusion.[109] In reality, however, this suggestion equates to denying the value of the rule. What additional value would you attribute to the predictions of a sports commentator who said nothing more than "I think the Yankees will win because other odds-makers favour them"? If the outcome is to be determined by the application of other rules of statutory interpretation, why bother referring to a shared meaning rule at all? Any suggestion that the value of the shared meaning rule becomes apparent in the rare circumstances when there are no other indicia of meaning[110] is countered, I would suggest, by the analysis set out above, which demonstrates that it has no value in cases of "broad vs. narrow" divergence and only coincidentally points to the same conclusion as the more cogent criterion of clarity in cases of "vague vs. clear" divergence.

Rather than looking for a narrower or shared meaning, the goal of the court in interpreting a divergent bilingual statute should be to search for a *single* meaning. Although this may necessitate disregarding text that manifests an obvious drafting error, rationalizing one provision with others in order to achieve internal consistency within a statute, or assigning a single meaning to text that is vague or ambiguous in one language version, doing so does not violate the principle that both language versions of a statute are equally authoritative, since the role of the court in this regard is no different in respect of a bilingual statute than it is in respect of one that is unilingual. A court can disregard obvious drafting errors, rationalize inconsistent provisions and assign meanings to vague or ambiguous provisions in a unilingual

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106. *Supra* note 80.
107. See also *supra* note 86.
108. *Supra* note 43.
109. See for example Côté, *supra* note 16 at 324; Beaupré, *supra* note 16 at 5; *Doré*, *supra* note 42 at para. 25; *Compagnie Immobiliere*, *supra* note 42 at 871; *Voisine*, *supra* note 81 at 54. Sullivan adopts a more qualified approach, suggesting that the shared meaning be rejected only where it is for some reason "unacceptable:" *supra* note 15 at 220.
110. This approach is in fact legislated in Hong Kong: *Interpretation and General Clauses Ordinance*, s. 10B(3).

statute.[111] In the same way, the court can decline to give effect to what it finds to be an error in one language version of a bilingual statute, particularly if the error does not occur in the other language version. While some text in one language version may thereby be rendered dispensable, as the court noted in *Re Estabrooks Pontiac Buick Ltd.*, this is not a problem: "But what of the surplusage? There is no magic in this. Though courts do try to give meaning to all the words of a statute, they will ignore excess verbiage where doing so appears to be more consonant with the legislative intent."[112] The aim is the same in interpreting both unilingual and bilingual statutes: to arrive at a single meaning that is harmonious with the scheme of the Act and its apparent purpose.[113]

Where both versions are clear, but reflect mutually exclusive meanings, we have seen that the courts interpret each version using the standard techniques of statutory interpretation—by looking to the purpose of the Act, internal consistency, legislative evolution, and relevant presumptions of legislative intent—to determine which of the possible meanings produces the most coherent legislative scheme. In each case, the court disregards the nonconforming text, in the same way it disregards aberrant text in a unilingual statute.

The same approach should be applied where one version is clear and broad and the other is clear and narrow. Given that any coincidental commonality can provide no more than a random indication of original intent, commonality should be rejected in favour of the meaning—either broad or narrow—that the standard techniques of statutory interpretation indicate is most harmonious with the scheme of the Act and its apparent purpose.

Where one language version is clear and the other vague or ambiguous, different considerations apply. As we have seen above, because the way in which such a divergence arises makes it more likely than not that the clear version is accurate, that version should serve as the starting point for the interpretive analysis. Put another way, the court should start with the presumption that the clear version reflects the true legislative intent. Aside from better reflecting the applicable probabilities, such an approach might

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111. This practice was first condoned in *Grey v. Pearson* (1858), 6 H.L. Cas. 61 at 114, and has since become known as the "Golden Rule" of statutory interpretation. It was recognized by the Supreme Court of Canada in *Grand Trunk Pacific Railway Co. v. Dearborn*, [1919] 58 S.C.R. 315 at 320, 47 D.L.R. 27 at 31:

> I cannot admit the right of the courts where the language of a statute is plain and unambiguous to practically amend such statute either by eliminating words or inserting limiting words *unless the grammatical and ordinary sense of the words as enacted leads to some absurdity or some repugnance or inconsistency with the rest of the enactment* ... [Emphasis added]

See also *United States v. Allard*, [1991] 1 S.C.R. 861 at 867, 122 N.R. 352 at 359 (where the court supplied additional wording to a provision "drafted in a rather clumsy manner").

112. *Estabrooks*, *supra* note 43 at 38.

113. See Sullivan, *supra* note 15 and Côté, *supra* note 16 for a full exposition of the role of the courts in interpreting statutes in general.

have the salutary effect of promoting clearer legislative drafting.

The clearer version should not, of course, be adopted unthinkingly, because that version might simply reflect a drafter's personal interpretation of unclear instructions or a translator's rendering of a vague original draft, made without verification of intent. For this reason, the court should test the presumption favouring clarity against the meaning dictated by other standard principles of interpretation, and retain that meaning only where that interpretive exercise does not give reason to rebut the presumption.

The lack of a rational relationship between commonality of meaning and the source of linguistic divergence in bilingual statutes, and the unreliability of shared meaning as a predictor of outcome in such cases, suggests that it is high time that the courts challenged the logic behind the shared meaning rule and relegated it to the juridical dustbin. While the rule might provide a signpost to legislative intent in the interpretation of imprecise provisions, the fact that it does so is accidental and unrelated to the element of clarity that more truly explains that result. The real danger of a continuing allegiance to the shared meaning rule is that a court may be persuaded to ignore other more cogent analyses of legislative intent in an unquestioning application of the rule. One might be led to wonder, in fact, whether the decision in *R. v. Mac*,[114] discussed at the outset of this article, would have been different had the Supreme Court not focused so intently on the shared meaning rule.

A more justifiable, and ultimately more reliable, approach to interpreting bilingual legislation is to apply the accepted canons of statutory interpretation to both versions of a bilingual statute to arrive at a single meaning most harmonious with the purpose and scheme of the Act. This may from time to time require that the courts disregard disconsonant text in one version or the other, in the same way they are called on to do so in interpreting unilingual statutes. So be it. Doing so will lend greater coherence to the law in bilingual jurisdictions, and give greater predictability to the outcome when, as is inevitable, the next linguistic *faux pas* occurs.

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114. *Supra* note 11.