

What's in a Name? The Quebec Notary

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Introduction

I am a notary practising law in Canada, in the province of Quebec, a jurisdiction with a Civil law tradition. In other words, I am a lawyer, and although this may seem obvious to persons speaking French or another language closely associated with the Civil law system, it is not at all clear to all anglophones. A few years ago, an English-speaking real estate agent with, I might add, several years' experience working closely with notaries in Quebec, saw my law diploma hanging on the wall of my office and said with surprise, "Oh, you have a law degree!" I quickly responded, not without some regret at losing my uniqueness, that *all* Quebec notaries have law degrees.

As every speaker of English knows, the suffix *-er/-yer* denotes an agent or an occupation, "one who does" or "one who works with" (e.g. baker, farmer, etc.). The word *lawyer* is unambiguous—we all know that it means a person who practices law. Why, then, is this word rarely used in Quebec in reference to *notaire*?

The choice of the word *notary* to translate the French title *notaire* has been unfortunate—a perfect example of a *faux ami* or false cognate. I can say from personal experience that this has had unfortunate consequences for the notarial profession (or notariate) in Quebec, where notaries are generally regarded by anglophones¹ as nothing more than clerks or paralegals. I contend that the correct translation for *notaire* in a Civil law system is *solicitor and notary* specifically, and *lawyer* generically.

Legal systems of the world and language links

Two major legal systems of the world are directly involved in the issue at hand: the Common law and the Civil law. They tend to be language-linked for historical reasons.

The Common law system began in England approximately 1,000 years ago and spread from there throughout the British Empire together with the English language. Hence the United Kingdom (excluding Scotland), Ireland, twelve of the thirteen provinces and territories of Canada, Australia, New Zealand, and the United States are among the Common law jurisdictions of the world. Coincidentally, English also happens to be the predominant language in those countries.

The Civil law system has its roots in the Roman Empire, with Germanic input, and spread with it throughout most of Europe. From there it was taken to Latin America by Portugal and Spain, and to Quebec by France. As the language of the Romans was Latin, its descendants, the "Romance languages" (including French), tend to be closely linked with the Civil law system.

Legal systems of Canada and language links

Canada is a bilingual federation of ten provinces and three territories, and for the reasons mentioned above, it is also a bijuridical country: where private law is concerned, the Civil law is found in the

province of Quebec, and the Common law elsewhere. This roughly mirrors the distribution of language with, however, some overlap. For example, in the Province of New Brunswick, French and English are the official languages but the legal system is the Common law. In Quebec, a Civil law jurisdiction, French is the official language although the proportion of anglophones is significant.

Given that, historically, the Common law has had a well-developed and exclusively English terminology and the Civil law, a well-developed French terminology, the translation into English of a French term expressing a Civil law concept is a tricky operation, i.e. there is a risk that the legal concept will be translated along with the language. Examples are the French words *hypothèque* and *succession*, which represent Civil law institutions. Anglophones in Quebec, even jurists, almost always say, and usually write, *mortgage* and *estate* respectively—classic Common law creations—instead of the more correct *hypothec* and *succession*. Quebec jurists fall prey to this error because, unless they have been trained in both legal systems, they are not likely to be aware of the differences.

It should be noted that much is presently being done in Canada to develop French Common law and English Civil law terminologies, but the issue of the notary's designation illustrates the fact that there is still a long way to go, as we shall see.

Legal professions of Canada

In Civil law jurisdictions, the legal profession is divided into two groups called, in French, *avocats* (“court lawyers”), who are licensed to practise law in general except that they cannot confer the character of authenticity to acts, and *notaires* (“contract lawyers”), who are licensed to practise law in general except that they cannot litigate or represent clients before the courts in contentious matters. In the Common law areas of Canada and in the United States, these two groups are considered as one.

It is hardly surprising that anglophones in Quebec, being swamped in a sea of North American Common law disguised in their own language, do not realize that the legal profession in Quebec is, as in most other Civil law jurisdictions, dual. Hence, they recognize only one class of jurists, i.e. advocates, whom they call *lawyers*.

Terms used in jurisdictions outside Quebec

If the generic term for all legal professionals is *lawyer*, the world's legal systems that have a dual legal profession require a specific title for each specialization. In France, as in francophone Quebec, these are *avocat* and *notaire*. It might be useful to compare our English appellations in Quebec, *advocate* and *notary* respectively, with English titles in other jurisdictions.

In Scotland, court lawyers are called *advocates* and contract lawyers are called *solicitors*. In England, they are called *barristers* and *solicitors* respectively. However, as we have seen above, in Common-law North America, these two groups are fused: in Canada, a lawyer is usually called a *barrister and solicitor*; in the U.S., a lawyer is more often referred to as an *attorney* or *attorney-at-law*.

The Civil law term *notary*: a practical problem

Notary Public

Compounding the issue is the term *notary public*. Notaries public are part of the Common law tradition. The term is defined in the *ITP Nelson Canadian Dictionary* as "a person legally empowered to witness and certify the validity of documents and take affidavits and depositions"—not a person who practises law.

Use of the word *notary* in English to translate the French title *notaire* has led speakers of English to confuse Quebec notaries with notaries public. Subsection 4(1) of the *Notarial Act*, R.S.Q. c. N-2, allowing only notaries admitted to practice before 1933 to continue using the title *notary public*, is an amendment enacted when the confusion was realized. Subsection 4(4) does go on to say that "[f]or the purposes of sworn declarations or affidavits intended to be used outside Québec, any notary may use the title 'notary public'," clarifying the distinction between the function of jurist and that of certifier. This subtlety is lost among the general public, however.

Professor Pedro A. Malavert discusses this problem from the inverse, Common law perspective in the United States, where notaries hold purely clerical positions. It would appear that some American notaries have taken advantage of immigrants who know only Civil law notaries by allowing them to believe that they were jurists. He points out that "this problem has become significant enough to lead several states to enact laws that specifically require notaries to indicate that they are not lawyers when advertising in a language other than English" (397).

By contrast, the expression *Latin notary* is used, not in any one jurisdiction in particular; but rather to designate Civil law notaries as a group worldwide, as for example in the International Union of Latin Notaries. The title also serves to distinguish Civil law notaries, private legal professionals, from notaries public.

Lawyer, advocate, notary, barrister, and solicitor: dictionary definitions

A suitable point of departure for an analysis of the appropriate use of legal professional titles is the dictionary. Both English and French-English bilingual dictionaries are relevant. The *New Shorter Oxford English Dictionary* (1993) offers definitions for the words *lawyer, advocate, notary, barrister, and solicitor* as follows:

lawyer: A person with knowledge of the law; a member of the profession of the law; *esp.* a solicitor, a barrister.

advocate: 1. A person whose profession is to plead causes in courts of law (now chiefly *Sc[otland]*); *US* any lawyer. 2. *gen[eral]* A person who pleads, intercedes, or speaks for another . . . 4. A person who speaks in favour of . . . a proposal etc.

notary: 1. A clerk or secretary to a person. 2. A person, usu[ally] a solicitor, publicly authorized to draw up or certify contracts, deeds, etc. . . . and discharge other legal duties of a formal character.

solicitor: . . . 4. A legal practitioner properly qualified to deal with conveyancing, draw up wills etc., advise clients and instruct barristers, and represent clients in the lower courts.

barrister: A lawyer who has been called to the bar, and has the right of representing clients in the higher courts; . . . *US* any lawyer.

From the definitions above, it is clear from a purely semantic point of view that the English term *solicitor* fits the traditional role of *notaire* in the Civil law system as well as, if not better than, *notary*. It is also obvious that the word *lawyer* also applies in a more generic sense. This is confirmed in bilingual dictionaries, such as the *Larousse*, *Webster's*, the *Oxford-Hachette*, and *Cassell's*, where the terms *solicitor* and/or *lawyer* are given as English equivalents of *notaire*. The *Robert & Collins du management* translates *notaire* and its permutations as follows:

notaire: solicitor (GB), lawyer, notary public

frais de notaire: lawyer's fees

notarial, e, aux: notarial

notarié, e: drawn up by a lawyer [or] a solicitor (GB)

acte notarié: deed executed and authenticated by a lawyer

The normative powers as they are seem to confirm what every Civil law jurist should know, but which no anglophone recognizes, namely that a *notaire* is a lawyer.

Legal definitions of *advocate* and *notary* in Quebec

To practise law, every legal practitioner in Quebec must belong to one, and only one, of two law societies: either the *Chambre des notaires du Québec* (the “Chambre”) or the *Barreau du Québec* (the “Bar”). Members of the *Chambre* are governed by the *Notarial Act*; members of the *Bar* are governed by the *Act respecting the Barreau du Québec*. Nowhere is the word *lawyer* legally defined. The two Acts mentioned above do contain several descriptions of titles. Below, I have reproduced the English version of the descriptions contained in each law, indicating the title as it appears in the French version.

The *Notarial Act/Loi sur le notariat*:

notary/*notaire*: s.1(i) “notary”, “practising notary” or “member of the Order”: any person entered on the roll

s.2(1) Notaries are legal practitioners and public officers whose chief duty is to draw up and execute deeds and contracts to which the parties are bound or desire to give the character of authenticity . . .

s.4(1) Every notary shall be called “notary” . . . Nevertheless, any notary admitted to practice before 12 June 1933 may use the words “notary public” . . .

title attorney, legal adviser/*conseiller juridique*:

s.4(3) Notwithstanding any law to the contrary, any notary may assume the title of “legal adviser” or “title attorney”

The *Act respecting the Barreau du Québec/Loi sur le Barreau du Québec*:

advocate/*avocat*, legal counsel/*conseiller juridique*, attorney/*procureur*:

s.1(e) “advocate”, “legal counsel”, “member of the Bar”, “attorney”: a person entered on the Roll

solicitor/*conseiller en loi*:

s.1(g) “solicitor”: an advocate from another province or a territory of Canada or a law professor who is entered on the Roll under a restrictive permit; “advocate” includes “solicitor”, unless otherwise provided by law.²

The legal definitions do not follow the linguistic definitions outlined earlier. Not only has the legislature extended the word *solicitor* to apply to advocates, it has completely excluded notaries from the semantic field. The bizarre result is that a legal practitioner from a foreign jurisdiction (including another province) and under a restricted permit in Quebec may use the title *solicitor*, while a notary fully licensed to practise law at home, and for whom the title is most appropriate, may not.

Consequences

The general English-speaking public in Quebec is not aware that notaries are lawyers. The linguistic reflex is so strong that even anglophone notaries refer to advocates as lawyers and themselves as notaries. I have heard advocates and notaries refer to an advocate’s fee as the “legal fee” and to some other amount as the “notarial fee,” suggesting that a notary’s fees are not legal fees.

In addition to the loss of the term *solicitor* by legal definition, notaries face the loss of this term by usage. Quebec law firms of advocates use both French and English appellations in the same advertisement. The French title *Avocats* is used without exception, but is rarely translated as *Advocates* in English. Instead, the English translation is usually *Barristers and Solicitors* (emphasis added) or *Attorneys*.

Similarly, in all but the most official or formal legal writings, *avocat* is usually translated as *lawyer* and *notaire* as *notary*, which is, in my view, erroneous. The proper translation, as we have seen, is *advocate* for *avocat* and *notary* for *notaire* (according to the law), and *lawyer* for either in a general context (according to the dictionary). Unfortunately, the general public, consumers of legal services, rarely hear or see the words *avocat* and *notaire* rendered properly, and the notarial profession has suffered as a consequence.

The notariate in Quebec has experienced a steady decline over the past two or three decades, both in numbers and in income. In the 1980's, up to 200 new notaries were admitted to the practice each year. In the last few years, notarial candidates have numbered only 50-60. The classic image of the Quebec town until the mid-20th century was one of a triumvirate of influence: the parish priest, the physician, and the notary. Today, religion has lost its position at the core of people’s lives, physicians are reluctant to practice outside large urban centres, and the notarial profession is now struggling to retain its place on the legal scene.

While I do not attribute the difficulties of the notarial profession entirely to a misnomer, I am convinced that it is a noteworthy factor. The problem is most acute in Montreal, which has a higher

concentration of commerce and anglophones than elsewhere in Quebec. Many Canadian and multi-national corporations that operate in Montreal have their headquarters in Common law jurisdictions. These companies import their legal attitudes and, when seeking legal services, they hire advocates, whom they perceive to be the only *lawyers*, not notaries. This is the terminology they understand. The same is true of home-grown anglophones. The English private law terminology to which the “man in the street” is exposed is Common-law tainted. Notaries do not exist as lawyers in their vocabulary and are seldom consulted as legal professionals except for mandatory notarial transactions.

Remedies

In closing, I wish to suggest two solutions that come to mind for the problem outlined here. First, the legislation can be changed such that the legal definition of *solicitor* applies to notaries. Unfortunately, this is highly unlikely to occur, since a majority of members of the Quebec National Assembly are advocates, and this is seldom or never an issue for them. The second solution is the education of the public in general, and jurists and translators in particular, concerning the appellations of the legal professions. This, although difficult given that bad habits die hard, is still feasible. I hope that this paper is a step in that direction.

¹ Anglophones make up approximately 10% of the population of the province as a whole but as much as 20% of the population of Montreal: Statistics Canada, 1996 Census.

² It is interesting to note that *conseiller juridique* is translated differently in the two statutes: notaries are *legal advisers*, advocates are *legal counsel*. Also, it is not generally known that Quebec notaries are eligible to become Queen’s Counsel (Q.C.).

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