Translator's Corner

Łucja Biel interviews Karine McLaren, Director of the Centre de traduction et de terminologie juridiques (CTTJ), Université de Moncton, Canada

Legislative bilingualism as a special case of legal translation

Could you please tell us a few words about your background and your experience as a legal translator?

I was born and raised in France and moved to England when I was 18 years old. I worked for the London branch of a major French bank in the City of London for some years and eventually decided to undertake a law degree to help me in my functions. After qualifying as a solicitor, I practiced law for nearly 10 years before moving to New Brunswick, the only officially bilingual province in Canada. I took that opportunity to redefine my career and undertook an accelerated degree in translation before joining the *Centre de traduction et de terminologie juridiques* (CTTJ) of the University of Moncton, Canada's largest French-language university outside Quebec. I initially worked as a legal translator and eventually became Director of the CTTJ. I had always intended to specialise in legal translation, since I wanted to make my previous experience as a lawyer work for me. Translators who have acquired knowledge or experience in any particular domain are in my view much better equipped to handle translations in that particular domain.

You are the Director of the *Centre de traduction et de terminologie juridiques*. Could you please tell us a few words about the CTTJ, its activities and research conducted by the Centre?

The CTTJ was created in 1979 by the Faculty of Law of Université de Moncton to support the implementation of legal bilingualism in common law jurisdictions. At that time, the Faculty of Law itself was in its infancy. It was the first law school to offer a common law degree program exclusively in

French in Canada and is still the only one to do so today. As the vast majority of resources were then in English, there was a pressing need for textbooks, documents and tools which would allow professors to teach and students to learn and eventually practice the common law in French. Today, the CTTJ is a leading authority on the subject of the common law in French. In addition to translating texts of a legal nature, such as court decisions, bar examination papers, provincial statutes and regulations, and by-laws, it is an active member of the common law in French standardisation committee. It has also produced and continues to maintain the only terminology database wholly dedicated to the francisation of the common law, www.juriterm.ca. Juriterm contains more than 17,700 entries pertaining to all areas of private law. It also contains the complete standardised French terminology of the common law and several hundred definitions drawn from *La Common Law de A à Z.* This dictionary produced by our Faculty of Law is based primarily on the common law of England from which all common law systems, including that of Canada, are derived. Hence, it is a valuable resource for anyone from all common law jurisdictions looking for a solution or an explanation of common law concepts in French. The CTTJ also produced and maintains the *Juridictionnaire*, a dictionary of French legal usage designed mainly for legal drafters and translators. Both Juriterm and the *Juridictionnaire* are available online free of charge via the CTTJ's website, www.cttj.ca.

Other than creating tools and resources, the CTTJ believes it has a responsibility to share its realisations with as large a public as possible by attending various conferences on jurilinguistics in Canada and abroad and organising practical workshops designed to assist legal translators and interpreters in their work.

The Canadian system of official bilingualism has a long-standing tradition, getting back to the 19th century. Could you please describe how it works and how it has evolved over the decades?

The belief that Canada as a whole is a bilingual country is a common misconception. Canada is a confederation and the power to legislate in matters of language belongs to the two orders of government – the federal government and the provincial and territorial governments – in their respective legislative jurisdictions. Consequently, the importance given to legal bilingualism varies significantly from one province or territory to the other, according to various historical, political and demographical factors. The federal government and the territories have official bilingualism and some of the provinces have some degree of official bilingualism but, as I said earlier, New Brunswick is the only province which has declared itself to be "officially bilingual" in Canada, which means that both French and English languages and communities have equal status in the eyes of the law.

Let's now discuss the Canadian legislative bilingualism. How does it work? How does the Canadian solution differ from those adopted in other countries with bilingual legislation?

Legislative bilingualism in Canada usually refers to an obligation to adopt and publish statutes in both official languages. Only the federal government and the provinces of Québec, Manitoba and New Brunswick are currently unequivocally subject to *constitutional* obligations in this respect. The three territories (the Yukon, Nunavut and the Northwest Territories) have legislative obligations in this respect, but there is debate as to whether they are also bound by the same constitutional obligations as the federal government. None of the other provinces have any obligation to legislate in both official languages, although some, such as Ontario, have legislated voluntarily to provide for the adoption of statutes in both French and English. In all Canadian jurisdictions except the province of Quebec, English is the language of the majority of the people and common law is the legal system.

The important thing to know is that once a bilingual statute is enacted pursuant to a constitutional obligation, both the French and the English versions are authentic and have equal authority in law. This equal authenticity rule is a judge-made rule which dates back as far as 1891 and which has since been entrenched in the *Canadian Charter of Rights and Freedoms* and in various statutes. The rule has caused difficulties because the English and French versions of statutes, whilst equal in law, have not always been equal in terms of quality. Until the 1980s, statutes in Canada and New Brunswick were first drafted in English, then translated in French by translators who had no particular legal knowledge or expertise and whose translations were often servile and riddled with anglicised language. Added to this, translations were then done "in a vacuum," meaning that statutes drafted in English were sent to translation more or less as a finished product so that translators could not communicate with the drafter to clarify meaning or resolve ambiguities. This situation, together with the increasing political power of the Francophone minorities, led to important reforms in the way that language versions of legislation were prepared and various models were tried and tested over the years.

Today, there are broadly two models used in Canada to draft bilingual legislation, namely translation and "codrafting." The federal government and New Brunswick are the only jurisdictions to have moved to some extent from translation to codrafting. In theory, codrafting is a different process from translation. Each legislative bill is assigned to a team of two drafters, one Francophone and one Anglophone, who draft the text in their respective language. Both are lawyers and both are privy to all instructions, meetings and exchanges of any kind relating to the legislative proposal. Having agreed on the structure of the bill and the content of each disposition, the codrafters then proceed to draft their language version sitting side by side, consulting each other's version as necessary to ensure both versions say

the same thing. They proceed in this manner until the bill is complete, whereupon the draft is sent to expert jurilinguists, who often have a background in translation, to ensure concordance between the two versions. In this way, the participation of both linguistic communities is assured on a level playing field and there's no question of one language trailing behind the other, a criticism which was often voiced in relation to the translation in a vacuum model.

The other jurisdictions that legislate in both official languages still resort to translation as a method of producing bilingual legislation. In the majority of cases however, translators are part of the team assigned to each legislative proposal and work in collaboration with legislative drafters, with whom the translators are able to interact until the final version is produced. Many believe that this model can produce an end result which is in fact very close to what can be achieved through the more costly method of codrafting.

Nevertheless, there has long been a debate about which method of producing bilingual statutes achieves the better result. That is a question that I intend to deal with in the thesis I am currently working on.

And what about juridical bilingualism? How are the language rights of the accused protected?

As far as case-law is concerned, the situation is rather complex. Basically, there is no constitutional *obligation* to produce court decisions in both official languages. According to the current interpretation of section 133 of the *Constitution Act*, *1867*, a judge, for example, "may issue a unilingual judgment in the English or the French language, even if all of the parties appearing before him are unable to understand the judgment which he has rendered" (See *MacDonald v. City of Montreal,* [1986] 1 SCR 460, 1986 CanLII 65 (SCC), par. 32). In criminal matters however, the *Criminal Code*, which applies across Canada, requires any trial judgment to be made available by the court in the official language chosen by the accused (s. 530.1(*h*)). In civil matters, several jurisdictions have also enacted legislative schemes which require them to publish certain court decisions in both official languages. There is however no uniformity between these schemes and in some provinces, there are no obligations at all in this respect.

Broadly, most legislative schemes require court decisions which determine a question of law of general public interest to be made available in both official languages simultaneously. Exceptions are made where the translation process would occasion delay prejudicial to the public interest or result in injustice or hardship, in which case the decision is issued first in one official language and thereafter, at the earliest possible time, in the other. The question of simultaneity has however caused controversy in some jurisdictions, including in New Brunswick, where the wording of legislative provisions is not clear on the question of simultaneity. Obligations to publish

court decisions simultaneously are also not always respected in practice, even at the federal level.

The other main bone of contention is the fact that the federal courts are required by law to publish *all* final decisions, orders or judgments in both official languages, not just those which determine a question of law of general public interest. For some of the federal courts and tribunals, such as the Immigration and Refugee Board of Canada, which issues thousands of decisions a year, this obligation can be extremely costly. As a result, the law is not always respected in practice, a situation which undermines the essence of the legislative regime.

Finally, the question of the equal authenticity of court decisions published in both official languages remains unresolved. The legislative schemes themselves contain little clue in respect of the authenticity of translated versions of decisions and the courts have not pronounced themselves clearly on the issue. Unlike legislative texts, translated versions of court decisions are clearly identified as such. Some court decisions are even preceded by the warning "Unrevised English certified translation." If the translated version can easily be identified, then the natural reflex is to put it aside in case of divergence in order to rely on the original — and therefore clearly authentic — version.

Further, in many cases, the translation model used by tribunals resembles the translation in a vacuum model mentioned earlier. For instance, some federal courts send their decisions to a central agency, called the Courts Administration Service, which in turn sends the work to other agencies or freelance translators. Whilst in theory, nothing prevents the translator from raising questions with the author of the decision, the presence of intermediaries makes such communication much more arduous and rare. In the words of a jurilinguist at the Translation Bureau:

> In the case of other federal judgments, which I work on, we are not supposed to contact the judges while we are translating, though we can and should send a translator's note if we think there are mistakes in the original. This does sometimes lead to corrections to the original judgments after they have been published, which is costly […] Sometimes the corrections are not made at all. However, we are talking about a much greater quantity of text, and the up-front cost of translation in tandem is also an important factor to consider. If the translator has misunderstood the original and introduces an error into the translation, it might get caught by the judge before publication, or it might not, particularly if he or she is unilingual and is unable to read the translation. This is a bigger problem for translations into French than into English. This is not a true example of translation in isolation, and the results can still be very good, but errors are more likely to occur or remain in both the original and the translation under this system than under a system of translation in tandem. (See Barbara McClintock, "Three methods of preparing Bilingual Legislation," *Juriscribe*, November 2013, http://acjt.ca/medias/63/juriscribe_novembre_2013.pdf)

The identification of translated versions of court decisions and the model of translation adopted by certain tribunals, capable of introducing errors into the text, are therefore factors which militate against the equal authenticity of both language versions of court decisions. Yet the standpoint according to which official language versions of court decisions should be equally authoritative receives support from the same political motivations which legitimate the equal authenticity of statutes. In Canada, this finds expression in the principle of substantive equality of the two official languages.

I think it fair to say that legal translation in Canada can be a politically charged exercise.

Could you offer any practical recommendations for legal translators?

I have given you an overview of the context in which legal translation operates in Canada. Obviously, that context will differ widely around the world. I think one of the starting points for anyone wishing to specialise in legal translation is to have a good understanding of the legal system in which they operate and a solid knowledge of the legal principles which apply. Those principles may not always be expressed, but they underlie the legal text and can often be a trap for the unwary translator.