Legal and Judgment Translation in the Government of Canada: The Urgent Need for Reform

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Introduction

This is an edited version of my response to an investigation report by the Commissioner of Official Languages about the posting of both linguistic versions of our Federal Courts' judgments online.

That issue is really part of a broader problem, which the previous government allowed to worsen: The status of government legal translators in Canada, who fulfil a crucial function in the justice system and society, is low, insecure, and subject to the vagaries of the economy and the whim of the executive branch.

This problem is perpetuated by a structure and a system which, by design, prioritize "business" thinking over "fulfilment of constitutional and quasi-constitutional responsibilities" thinking, and is maladapted in myriad other ways. This system, and the players given decision-making power, necessarily reward unskilled and unspecialized translators who do not have the needed knowledge and skills, at the expense of skilled and specialized translators who have them. It does not understand the needs and specificities associated with legal translation, nor can it.

This structure, and the operations and practices that inevitably flow from it, have consistently undermined the federal government's ability to fulfil its obligations under our Constitution and laws in relation to the translation of Federal Courts judgments and other legal documents of use to government, with adverse effects on language rights, access to justice, minority rights, and the smooth functioning of government.

Even as an entity with interests distinct from the public interest, the Government of Canada loses out due to this problem, because it, too, is a client of legal translations, and needs to rely on legal translations of high quality to understand its own rights and duties. This is true with judgments, but with other legal translation that the government needs day-to-day.

The quality of translations in the legal field is crucial. If a legal translation is not of high quality, a document with legal consequences, such as a judgment, contract or decision, will say something other than its intent in one official language, and will, in a sense, be immortalized. There is therefore no reasonable way to conceptualize the government's legal translation obligations without including quality as an integral *part* of that obligation, and as something the institutional structures must support, rather than work against or endanger, as has often been the case over the past decades.

The current system has players surprisingly ill-suited to the task. On the surface, there is little reason to question their legitimacy or suitability. But once the structure and operations are understood properly and as a whole, it becomes clear why the problem is impossible to resolve

without a major, structural reform that empowers the people with the requisite knowledge, purpose and abilities and prevents their decisions from being countermanded for irrelevant reasons.

The good news is that there are experts who know the problem well and can propose solutions far better than the existing system, without taking much time or requiring great expense.

But first, one needs to have an overall comprehension of the system and the stakes. In this regard, one needs to view rights and structures as whole, rather than in isolation from each other. This requirement flows directly from Supreme Court jurisprudence about the interdependence of language rights and other constitutional rights like access to justice and freedom of expression. These rights, and by necessity, the players crucial in fulfilling them, cannot be considered in isolation from each other. It might seem difficult to believe at first, but judicial and government legal translation fulfil a major role in fulfilling these rights and complying with the correlative government obligations.

A key player in the current system is the Translation Bureau, a special operating agency under the authority of the Minister of Public Services and Procurement Canada (PSPC). Given its hopelessly deficient structure, and the fact that it reports to the *procurement and business* arm of the state, it should no longer be involved in the translation of Federal Courts judgments, or probably even in the translation of other high-level legal documents for the government. It does not have the appropriate structure, mandate, interests, management, or players. This has been proven in many ways over a period of decades.

Bureau management and employees can too easily be moved around, and it is not really in the Bureau's interest to give legal translation a special status that would command better pay and provide sustainability for federal legal translators as a profession. By its very structure and position within the system, it is in a conflict of interest, which all but ensures that it deprives specialized legal translators of the income security, job security, and status necessary to ensure that the government complies with its obligations, and that such skilled professionals, with varied legal knowledge and backgrounds, are interested in becoming federally oriented translator-jurists, and retained in that field so that they can develop professionally and transfer their skills and knowledge to their colleagues and successors. Instead, the Bureau's interest is to get all types of translation done as cheaply as possible.

The problem of inadequate and ill-structured legal translation at the federal level is not new. As the Commissioner mentions in his Report to the Governor in Council, one of his predecessors noted it in 1984. I will explain why a new structure is needed, and what that structure needs to deliver on an ongoing basis, through good times and bad, without regard for which party is in power or how the economy is doing. Indeed, the Supreme Court has already instructed us that compliance with such linguistic and constitutional obligations cannot be contingent on variable budgets and the economy.

Studying law (preferably in both official languages) **and** translation (formally or through internships) is a difficult task, not suited to many people. The dedication and sacrifice required must therefore be rewarded in concrete and durable ways. Otherwise, why would anyone wish to be a legal translator? People would simply go into the legal profession, or another field.

Only a systemic reform will address all these problems adequately, and put legal translation and legal translators on the footing they deserve, so they can serve the government and the public interest, and not be pushed out of the field or marginalized due to career insecurity.

As a result of that reform, a body separate from the Translation Bureau and PPSC would be responsible for the translation of Federal Courts judgments, and possibly, other federal legal documents. This new body would no longer operate pursuant to business contracts with a business-oriented Courts Administration Service, but rather, pursuant to a budget that recognizes its specificity and needs, empowers the right managers and experts, and enables it to carry out its responsibilities without undue interference.

Unfortunately, the Commissioner of Official Languages has seemed very reluctant to bring the major systemic flaws to the government's attention. He also seems to look at the necessarily involved rights and obligations in watertight compartments, something no longer consistent with official language law since the decision in *Beaulac*.

This document is intended to be read in conjunction with the Commissioner's April 2016 Report to the Governor in Council. It assumes knowledge of the *Official Languages Act* and the more recent case law on language rights, access to justice, freedom of expression and the unwritten constitutional principles of our federal democracy, as recognized by our Supreme Court. A reader with a basic understanding of the OLA and those principles will find it much easier to understand this document, written under tight time constraints.

I. Summary of my position and its basis

The Commissioner of Official Languages has found that in order to comply with Part IV of the *Official Languages Act* (OLA), the Courts Administration Service must post the decisions of Canada's federal courts on the Web simultaneously in both official languages. Otherwise, this communication with or service to the public is not of equal quality in both languages. Specifically, when a decision is posted on the Internet in only one language, the members of the other official language community do not have equal access to information in their language, and cannot participate equally in public debate.

Although I agree with this position, I do not agree with the way it is framed, and this has crucial consequences in understanding the problem and the remedy. Specifically, the reasoning of the Commissioner is incomplete, formalistic, and artificially cut off from constitutional and quasi-constitutional principles that are an integral part of how our Supreme Court has told us official languages must be envisioned and applied. These constitutional and quasi-constitutional principles determine the content and scope of the applicable statutory provisions, supplement or duplicate them, and dictate how they must be interpreted and applied.[1]

[1] For example, s. 20 of the *Charter*, which governs communications in both official languages with federal institutions, duplicates and/or offers protections similar to Part IV of the *Official Languages Act*. The two cannot really be separated from each other because they are part of one system that protects language rights.

Crucially, the Commissioner's report fails to recognize that the problems experienced within the Government of Canada, in relation to judgment and legal translation, are the result of a completely inadequate system that cannot produce the needed results and are far too prone to financial insecurity and interference. Existing structures create a conflict of interest that cannot be resolved with small adjustments. We need a new structure that gives legal translation the status and security they need to be sustainable over the long term. And the structure must look at legal translation as the fulfilment of a constant constitutional obligation, not as a "business" function, which is the current view and structure.

In order to understand the role of judgment translation, it is helpful to consider the *Official Languages Act* (the OLA) and its role in the matter.

The OLA "belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 SCR 773 at para 23, quoting *Canada (Attorney General) v. Viola*, [1991] 1 FC 373 (CA) at 386. Since these broad policy considerations include quasi-constitutional principles, they must obviously include the inextricably linked *fully* constitutional principles, related to language rights. Therefore, those principles inform the content of the OLA, and in view of more than 20 years of Supreme Court jurisprudence, they are particularly important in understanding how it needs to be applied in practice, if our Constitution's intent and our democracy's functions are to be properly fulfilled.

The government has less choice in the matter than one might think. It is not really a matter of discretion. The system has to meet certain deliverables, required by the statute, the constitution and the controlling legal principles. It can only do that if properly designed and sustained.

The Commissioner's reports might create the impression that Parliament or Cabinet could simply decide that federal judgments will no longer be posted on the Internet in either language, or no longer be published at all, thereby "solving" the problem of unequal access. Or that Parliament could amend Parts III and IV of the OLA to reduce the government's obligations in this regard.

But that would neither be lawful, nor acceptable, nor even in the government's interest. Any statutory amendment that "clarifies" the rights and obligations in this realm must also be in harmony with our Constitution and our Supreme Court case law, since the OLA is one of the mechanisms by which the state expresses and fulfils its superior (i.e. constitutional) responsibilities.

And even before the *Charter*, the *Constitution Act, 1867*, guaranteed many English and French language rights as minority language rights. The OLA was enacted to strengthen or add to those rights. **Today, our written and unwritten (but Supreme Court-recognized) constitutional principles overlap with the OLA and inform its content *in a way that should be decisive*. The main concern of the present document will be to demonstrate why this is so, and why this is important.** All the rules and structures involved need to be looked at together, not in water-tight compartments. Furthermore, they are part of the "living tree" that is our Constitution, and cannot be regarded the same way as they were 20-150 years ago.

An attempt to amend Parts III and IV to restrict the government's duties in terms of judgment translation would not only be injurious to the interests of many constituencies — including the government itself, a frequent "consumer" of the information contained in judgments in its own right — but also contrary to some of the most fundamental principles of our Constitution, written and unwritten, which would guarantee many, if not all, of the very same rights even if Parts III and IV were repealed.

Specifically, the right to the simultaneous publication of these judgments in both languages, and the "translation obligation" that logically stems from it, includes, and is inextricably bound up with, constitutional access to justice rights, minority rights, language rights, and freedom of expression rights. All these function in synergy. I argue that, together, they impose

> (*a*) an obligation to provide translations of ***high quality***, fully faithful to the original judgments in meaning, tone and detail;
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> (*b*) an obligation to ensure that all necessary human and material resources are devoted on an ongoing basis to the fulfilment of the obligation set out in paragraph (a) without undue executive interference and cuts; and
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> (*c*) an obligation to remove the systemic barriers to the fulfilment of the obligations in paragraphs (a) and (b) and to replace them with structures and operational rules that protect and promote these obligations rather than conflict with them.

Why is this so? The reason is that the OLA cannot be understood without reference to the constitutional rights it is involved in protecting. Under the modern understanding of constitutional law, as established clearly by the Supreme Court in recent decades, that is not acceptable.

The problem is that the current system for translating federal court judgments, consisting of federal institutions that supposedly work together, violates these statutory and constitutional obligations due to its structure and the entrenched practices that stem from it.

Why does it make sense to challenge or question these structures, and why is the government required to reform them? The answer to that is straightforward and controlling: these practices constitute government action, and are therefore subject to constitutional and OLA review. And since the practices result from a deficient structure, the government action will not be reformed until that structure is reformed.

In order to understand the constitutional rights and correlative obligations in question, the key role of legal translation in *securing* them, and the systemic barriers that will continue to hinder their fulfilment unless removed, one must first understand certain facts and legal principles.

This must include an understanding of the institutional framework within which court translations are requested and carried out. Once that framework is understood, the violations for which it is responsible will be easier to comprehend.

The Commissioner named the Courts Administration Service as the respondent in my complaint, and I certainly agree that it has legal obligations by virtue of its role as a federal institution, and that it is violating them.

However, the CAS does not operate in a vacuum. It is part of a government translation system, other parts of which are committing even worse violations: an unseen actor that has been withholding adequate funding from the CAS for translation and other operations, thereby violating the OLA and the Constitution; and the Translation Bureau, a special operating agency under the authority of Public Services and Procurement Canada. The latter agency translates our Federal Courts' judgments under a "contract" with the CAS, or sends such translations to external "suppliers" who are not seen as professionals but as businesses on whom all kinds of risks and insecurity should be offloaded. Toward the end of this document, notably in Section VI, specific examples of these unconscionable practices will be discussed.

The Bureau's processes and structures also violate the OLA and the Constitution. Added to this mix are private translation suppliers with whom these players choose to deal. Sometimes, these suppliers do not have the necessary skills. Other times, they actually have very useful skills and insight, but their services are considered too expensive, and they are therefore shut out to the disadvantage of the government and the administration of justice. That is what happened to me.

Being an agency of Public Services and Procurement Canada, the Translation Bureau is part of the same government department that procures toilet tissue for the washrooms of the state, and other commodities. Its thinking is often "business" thinking, not constitutional thinking. It is headed by a CEO, much like a business. It is a key player and violator of language rights in this case. Under a "business" contract with the Courts Administration Service, it performs much of the judgment translation work in question, through its in-house translators, and external translators to whom it subcontracts work with cost-cutting constantly in mind.

I have had many occasions to experience how this institutional framework operates, and why it does not live up to its obligations. My experience and knowledge stem largely from my work as a provider of legal translation services to the federal government and, indirectly, the Federal Courts, for roughly 15 years. They also stem from my interest in government operations and policy that affect my profession, and its role in providing access to justice.

I am a graduate of the Faculty of Law of McGill University, which emphasizes a systemic understanding of law and government in its curriculum, and is both bilingual and bijural, two assets of particular help to a Canadian legal translator, and, more generally, any concerned Canadian. My remarks must be seen as those of a person who is able to look at the issues from a very informed standpoint – one that few other people have.

The work of legal translators is part of a function of delivering legal information to a public that needs that information to exercise its rights and duties. That information is the very *basis* of access to justice. You cannot have access to justice without understanding the rules and governing documents in your language.

Properly skilled legal translators are the professionals who make that possible. Improperly skilled ones are the people who hamper that. A translator involved in legal translation should have an understanding of our laws. However, due to the "business" thinking so often applied in this field, the system focuses on saving money, *at the expense* of that professional knowledge and skill.

Actual decisions are made that compromise quality and the ongoing ability to deliver good legal translations. Quality requirements are reduced. Unspecialized translators are hired because they can be paid lower salaries. The managers and administrative assistants involved have no special legal or paralegal training or background. The system is not designed with the specificities of legal translation in mind. It is not even under the aegis of the right government department for that.

Members of the executive branch of government will be reading this response, and some of the content is intended to assist them in understanding legal concepts already known to the courts. One important principle to grasp is that constitutional law does not consist of narrow technical rules. It consists of broad yet fundamental principles that interact with each other, and cannot be considered separately in watertight compartments. In fact, many well-versed lawyers can often *anticipate* how the Supreme Court would rule in a matter, since it is often simply an extension of existing jurisprudence. That is precisely what could be predicted in a Supreme Court reference concerning the topic of this position paper.

It must also be realized that quick and minor changes will not really address the problem. The problem from the fact that the purse strings can be tightened with little notice, and that the whole structure in place is a "business" structure, not a "rights compliance" structure. Staffing, contracting, management and many other functions are exercised to achieve business aims, not government or constitutional aims.

Parts III and IV of the *Official Languages Act* certainly apply to the translation and posting of federal judgments. They articulate some rules, and might at one point in our history have created the only obligations. One might also say that they embody some of the *demand* for legal translation, and some of the governmental *obligation* to translate legal documents. But the OLA is by no means the last word on the topic. The Constitution, and our Supreme Court's case law, kick in. They have a lot to say about all this, if we know how to listen. They are part of an indivisible and interdependent set of rules that are an integral part of Canada's fabric.

This is why we must keep *Beaulac* and its progeny in mind. Distinctions and origin theories that tend to separate language rights and obligations from each other are largely irrelevant now. That compartmentalized view has been *passé* for decades. Given the nature of our modern constitutional system — including the justice system — and the needs that arise within it, the statutory rules and the statutory "demand" for translation under Parts III and IV of the OLA are not in isolation. They can't be viewed that way if the government is to comply with the law. They *must* be considered and interpreted as part of a broader constitutional and quasi-constitutional whole that guarantees additional and/or inextricably related rights, and imposes additional and/or inextricable correlative obligations.

The inextricably linked constitutional rights attached to the OLA, without which the OLA cannot be properly understood or enforced, should even give the OCOL the jurisdiction needed to help protect those inextricable rights from violation. Where there are constitutional rights, there is always a remedy (s. 24(1) of the *Charter*). And since the Office of the Commissioner of Official Languages has a central role in monitoring and regulating the linguistic duties of federal institutions, that role *should* be exercised in keeping with these binding rights and correlative

government obligations. Yet the OCOL took six years to report to the Governor in Council, and its report is still too narrowly cast to enable the government to see the real systemic problem.

As mentioned earlier, it is not just the public that needs excellent judgment translation so its rights are respected. The federal government needs the same thing. Everyone needs to be able to understand the law properly. Mistakes in translations that can affect meaning are unacceptable, because that jeopardizes the ability to understand one's rights and duties.

We are talking about true public needs here, not business needs. These needs cannot be contingent on the availability of resources, as decided unilaterally by the executive branch.

In fact, *resource allocation in matters of constitutional and quasi-constitutional import, including language rights, has been the subject of Supreme Court instruction for more than two decades*. It is not discretionary. It is an obligation. The funding of French schools and boards is an example. It is the area in which much of the "resource allocation" case law on language rights and duties has evolved.

The obligation to publish federal judgment translations simultaneously, or perhaps in some cases, merely very *promptly*, flows naturally from the needs and fundamental values of our modern and officially bilingual constitutional democracy. One vital part of this democracy is the federal justice system and the people who are part of it, if not in official title, then in substantive deed. That is why we are dealing with a true constitutional question here, not just a statutory OLA question.

What follow are some additional elements to help understand why this terrain is constitutional and not just statutory.

The obligation to translate, and to do so very well, flows from the principles of ***minority rights and access to justice***, constitutional imperatives that have existed since Confederation, and have sometimes merely been assumed or taken for granted, but have nonetheless been specifically identified and discussed in recent Supreme Court jurisprudence.

It is also informed by the ***right to take part in public debate***, a right protected by s. 2(*b*) of our *Charter* but far older than that.[2] These are the true sources of the "demand" and "need" for the translation of judgments, a kind of translation that is part of a wider phenomenon of government legal translation. It is quite clearly a public demand, *not* a business demand, but it is not being regarded or treated that way.

Crucially, the ***quality* of the translations themselves**, not just the quality/promptness of the service of "posting" these translations in some way, has to be seen as part of the statutory rules in Parts III and IV of the OLA. A judgment translation *has* to be a very good translation, or else it is not conveying meaning of the judgment, but something *different from* the judgment. Possibly with

[2] As McLachlin J., as she then was, stated in *R. v. Zundel*, [1992] 2 SCR. 731 at 752, the purpose of s. 2(b) "is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment." (Emphasis added.) This decision was recently cited with approval in *Hudson Bay Mining & Smelting Co v. Dumas*, 2014 MBCA 6 (CanLII).

dangerous results for the public and government alike. The quality obligation therefore must be seen as inherent and integral.

Somehow, the Commissioner is not acknowledging this. That is a serious problem, and I argue that the government must step in to remedy it.

This quality obligation is not "merely" statutory and quasi-constitutional. It is a *fully* constitutional obligation as well, because of the role of such quality in providing access to justice, as opposed to linguistically equal *non-access*, or *equally barriered* access to justice, neither of which would pass constitutional muster. Distorted legal "rules", in the form of poorly translated judgments, does not dispense access to justice. Rather, they *hamper* such access, because they create *misinformation* rather than information, and could result in mistaken conduct in *reliance* on that misinformation.

Obviously, no government system can be perfect. There might occasionally be mistakes in government translations of judgments, or even in one linguistic version of a regulation, or a piece of legislation. However, what is unconscionable, and well below the acceptable minimum, is allowing a system to continue that has *proven* itself to be inadequate and vitiated by conflicts of interest.

Think of it this way. Without a translation *quality* requirement inherent in Parts III and IV, the government structure set up to translate judgments could decide to deliver quasi-gibberish machine translation via Google or Bing Translate, declare it to be an official translation, and end the matter there.

Surely this is not what our Constitution and laws are about.

The public's access to justice right must be exercisable in either official language before federal courts and Parliament, and in dealings with government. Thus, the public has a right *to understand* the law in its official language, not distortions caused by poor translations done by unqualified people who are not skilled in or mindful of the special duties inherent in the translation of judgments, and in legal translation. This problem was identified by the Commissioner of Official Languages back in 1984. And yet it remains current today, due to decades of inadequate structure and management.

Access to justice in Canada *necessarily implies* access to *reliably translated legal content*, such as judgments.[3] Such content is the documentary basis of access to justice. It is what parties rely upon in the procedures they must utilize to seek redress or simply defend themselves.

There is no telling whether the case law relevant to a justiciable's efforts to seek redress or defend herself will have been originally written in French, English, or a combination of both. Thus, it is

[3] The right to reliable legal information in the form of judgments released in their *original* language is already systemically provided for, by virtue of the process of appointing judges recognized as leading thinkers and writers in the legal profession, and by the appellate court structure that reviews judgments of the lower courts that have erred in law.

not possible to have justice in one's official language of choice without the distinct possibility, or even probability, that translation will have been necessary *as part of* that process.

Thus, government legal translation cannot *ever* be seen merely as an administrative function. It is a legal and constitutional function.

While I submit that the translation of judgments and the posting thereof are *not* a judicial function,[4] mediocre translation in this area can *certainly* bring the administration of justice into disrepute.

For example, many non-judicial actors, such as the police or law enforcement agencies, are involved in the administration of justice. They are not exercising a judicial function, but they are certainly capable of bringing the administration of justice into disrepute when they violate people's rights.

That is what happens when translations of unacceptable quality are provided or published and then allowed to have years of adverse effects on people's understanding of the law. Their understanding is distorted. Their ability to interact with the justice system and our democratic institutions is thereby compromised. And their right to equal-quality communication with government institutions in their official language is also compromised. This is not about the ability to get 7UP aboard an Air Canada plane. It's much more serious and far-reaching and is not just "symbolic", as official languages rules are often perceived.

For all the foregoing reasons, there are no superficial fixes. For example, merely inserting quality-related clauses in contracts for the supply of legal translation services between the government actors involved in judgment translation is not sufficient. That amounts to passing the buck with a duty is clearly governmental.

The current statutory and regulatory structures, staffing and procedures are fundamentally inappropriate. They put the actors in a conflict of interest, because they wish to save money and pursue money-saving human resource practices at the expense of compliance with their OLA and constitutional duties, and at the expense of compliance with the public's OLA and constitutional rights. This has been proven time and time again. There was the case of *Devinat v. Canada (Immigration and Refugee Board)* from 1998 but it was merely an illustration of a government-wide problem. And the Commissioner has identified many Federal Courts decisions that have gone untranslated for months, years or even a decade.

Furthermore, the fact that judgment translation and posting are not judicial functions does not mean the judiciary should be uninvolved. Indeed, the judiciary is the first and most important step in a kind of justice system writ large, which brings legal content such as legislation, regulations and judgments to Canadians in both official languages, *thanks to the work of translators*. The judiciary has a stake in the quality of translations, because it is their thought and their

[4] Once a court has stated the law, and the judgment has been entered, it applies to the parties, and everyone else concerned. It essentially "declares" the law to the public, and the translation of its judgments and the posting thereof online are also a service to the public. One can certainly not invoke the kinds of distinctions from the *Blaikie* era of official language law. That era is long past.

statements of the law that translators have an obligation faithfully to convey as part of giving Canadians access to justice.

Perhaps the system should place judgment translators closer to the judges whose judgments they serve. The system was probably a lot more like that in the past. But I do not think it is like that now.

The current government legal and judgment translation system, involving the federal Translation Bureau and the Courts Administration Service, is created by statute, regulation and government policy.[5] Since the Constitution is the supreme law of Canada, every statutory instrument or government action, including action pursuant to government policy, that is inconsistent with the Constitution, is of no force or effect: section 52 of the *Constitution Act, 1982*.

The system for translating Federal Courts judgments is not just in violation of the OLA, but *unconstitutional*, and the government and courts must take notice and implement changes. In doing so, they would not be acting judicially, but as guardians and constituent parts of a government legal translation system that has obligations flowing from its nature and its role in relation to the institutions of our constitutional democracy.

I am freelance translator with no income security,[6] but have nonetheless undertaken great efforts to speak with the relevant government players about the many systemic problems on repeated occasions, over a period of many years, and to no material or lasting effect. Yet government organizations that are part of the justice system are legally bound to uphold the Constitution, and are capable of implementing structural reforms, provided they get the appropriate input and keep their obligations in mind.

It should be possible to get a good deal of input from various stakeholders on this subject. However, the conflicts of interest, and that ever-present desire to "protect turf", must always be borne in mind.

It is worth noting that various players in the minority language rights community agree with the views I have shared with them on this topic, and have offered me private encouragement. But under the previous federal government, some told me that they hesitate to get involved because of a fear of reprisals from government, similar to ones I have experienced. For example, certain universities (law faculties in particular) involved in teaching and research on legal translation receive federal funding for terminological codification and standardization efforts, and for other language rights and legal translation initiatives. That funding can be reduced or cut off at any time, resulting in job losses and unstable operations.

[5] *Translation Bureau Act*, RSC 1985, c T-16, *Translation Bureau Regulations*, CRC c 1561, *Public Service Employment Act*, etc.

[6] Largely as a result of the unfair and unconstitutional structure of the government legal translation system itself, and government reprisals for my inquiries and my attempts to bring issues to the attention of relevant government actors.

II. What makes up the system, and why is that so important?

In the current system, the Translation Bureau, a special operating agency under the government's procurement department, is a main provider of translation services to the many departments and agencies of the federal government.

Things were not always this way. Translation used to be part of a Secretariat of State, rather than a procurement, buy-and-sell, body with cost-recovery, billing and procurement models that put it in a conflict of interest as far as judicial and legal translation are concerned.

The Supreme Court has its own translation team. That is worth noting. It is also worth noting that Justice Canada knows a great deal more about the government's constitutional and linguistic obligations than the procurement arm of the state. It has the professionals in place. The specialized constitutional lawyers and official language lawyers.

Canadian Heritage has some knowledge too. So does the Commissioner of Official Languages. Nonetheless, they are all part of government, and feel certain constraints and pressures that can limit their willingness to speak frankly about certain topics, or exceed their "mandate", even though the public interest is more important than all those things.

But even the most senior players in government don't always seem to realize something. The translation of legal documents, and judgments in particular, plays a unique, essential but often overlooked and trivialized role in our justice system. It is directly involved in the fulfilment of constitutional rights. Therefore, the system that provides it must be consistent with those rights, rather than violate them.

Indeed, the high-quality and *ongoing* translation of government legal documents such as statutes, regulations, legal submissions, and judgments, without undue executive interference and interruption, is crucial. It is crucial because people, businesses, governments and other groups *rely on it* to know and exercise their rights *and* obligations in their language, or in a language they are required to use in dealing with others, in a *timely* fashion, before the passage of time makes things more difficult or impossible.

They might need to appear in court. They might need to submit a brief to the CRTC about their telecommunications industry. They might need to complain about violations of their language rights. They might need to inform a taxpayer of his obligations to make certain remittances despite a precedent he thought he could rely on, because that precedent has recently been reversed on appeal. They might need to protect their assets from administrative or government action they consider unjust.

The possibilities are endless, and time is often of the essence. For all this, people and organizations need timely access to legal content in both official languages. If they cannot understand the content because it is not in their language, it is as though that content did not exist. If they misunderstand it because it was not translated very well, they are not getting access to content and justice in their official language. They are getting something far worse.

Why can't anyone do this job? Isn't it enough to be bilingual, or to have taken translation courses? Absolutely not, but somehow, the previous government did not want to admit this. Unspecialized translators. Machine translation. Cutbacks. Reduced quality requirements for external legal translation suppliers. That is what happens when the procurement arm of the state sets the tone. This must stop.

Legal translation does not consist in looking up individual words in a dictionary and stringing them together. It is a much more involved and demanding process. The words of a judgment form a complex and interdependent whole, which relies on complex and often specialized language and legal concepts to ensure that binding legal principles are conveyed properly, to an audience that is often far broader than merely the parties involved in the case.

Legal terms often incorporate a whole body of case law and/or commentary, e.g. "pith and substance" (constitutional law) or "income from property" (taxation law). Judges often use these terms without pointing to their source, so a legal translator must realize that many concepts are officially enshrined in legislation, regulations or case law, and have precise translations. Only if the translator uses the right terms will the reader be able to do further research using the right keywords and concepts. For example, "*égalité réelle*" in the field of equality law is not translated as "real equality", but as "substantive equality" – a whole area of the law unto itself, with several Supreme Court of Canada judgments that discuss that concept at length.

Thus, good legal translators have to know about the governing rules (statutes and regulations) in a given area, e.g. securities regulation, building permits etc., so they can find the concepts and terminology, often used in judgments and other legal documents without quotation marks and pinpoint references. Judges simply could not go to the trouble of defining each concept in their judgments; the judge must assume that the parties and readers know some of the legal context, with its associated terminology, or will read up on it using keywords. The translation process will inevitable presume and require the same things. In order it to happen properly, the people need to be qualified, and supported by a suitable system, with suitable human and material resources.

Another challenge occurs regularly. The same word can often have entirely different meanings and translations depending on the area of law involved, so a dictionary can be of illusory benefit unless the translator working on the judgment is

- trained in these different areas of the law (such as corporate law, family law, maritime law, taxation law, insurance law or employment law),
- understands the distinctions *between* these areas of the law, and
- knows which legal and reference sources (cases, statutes, treatises, scholarly papers, etc.) would be most helpful in understanding and properly carrying out a given legal translation mandate.

One must truly understand the document at hand, not only in its details, but also as a whole, including any <u>implications</u> for the area of the law involved. A broad and yet sophisticated view is called for. Not everyone is suited to such work. But governments devalue all this, and nonetheless seem to treat translator-jurists like me as disposable, and unworthy of any greater income security than a purveyor of some commodity.

There are even more pitfalls for legal translators. Terminological choices can be counter-intuitive. For example, in some instances, *défendeur* must be rendered as *respondent*, not defendant, because that is the translation in the part of the code of procedure applicable to the type of proceeding involved. And in France, a *Conseiller référendaire* is not an advisor involved in plebiscites, but a kind of appellate justice, and *conclusions* can mean legal arguments or pleadings, not conclusions or findings.

How could an unspecialized translator know things like this? How, really, can any one legal translator even know all this? The reality is that only a system with several experts, whose areas of knowledge complement each other, can do the job. The management and staffing must always be mindful of these needs, specific to legal translation. The Bureau is hopelessly underqualified and underequipped to address these issues. And the people who know the area are not in control, and never will be.

How does it make sense for the Government of Canada to hire translators and revisors who have never studied law, to translate legal documents like judgments for the public and the government? It usually makes sense *only from a commercial perspective*, because such people are cheaper to hire and employ.

But the people put in charge lack the specialized knowledge to realize or care about this. The mistake was entrusting legal and court translation to Public Works and Government Services Canada in the first place. The managers and executives don't hire the right people because they themselves are not the right people. They didn't study, say, both civil and common law. They didn't study law at all. Even the decision of whom to assign to a translation might make no sense. Unless you know the challenges of the legal document before you, and can match the document with a translator who has the right skills, the enterprise is set up for failure.

Let me continue on the topic of the difficulty of judgment translation. Because the government will only do something if it truly understands.

Canadian judgments can even involve foreign law and foreign institutions. Courts sometimes have to apply foreign law, because an incident arose in another country or the parties made a contract in which they chose to apply that law to their dealings.

International law, such as treaties and conventions, can also apply. Thus, in addition to knowing quite a bit about *internal* law, legal translators must be *alert* to the fact that foreign law and international law have their own concepts and sources, and their own translation problems, possibly because there is not even any equivalent to these concepts in our domestic law.

In short, there is a lot to know, and many translators have no idea how much their deficient knowledge and training, often happily accepted by their government superiors, can frustrate the objectives that judges and other legal decision-makers are seeking to pursue.

Furthermore, many judgments cannot properly be understood without some knowledge of the case law. That case law is full of relevant concepts and terminology that apply only to that area of the law. This kind of knowledge is very difficult for ordinary translators to have. Where would ordinary, unspecialized translators have acquired such knowledge, and the kind of culture

necessary to realize that one must keep abreast of legal developments? Even someone like me, who spent four years in law school and spends many hours reading, could not possibly keep up fully with every area of the law. The institutions must be designed to create an environment that makes it possible for each legal translator to pursue a certain amount of continuing education, as part of his or her career.

Wouldn't it make sense to help us, rather than hinder us? Do we not deserve support, encouragement and income security? Unlike even lawyers, who specialize in one or two areas of the law, legal translators can *rarely* specialize in just one area, such as labour and employment law, leaving the other areas for others to practice. If we did, we would not survive economically. And I am not even surviving economically as it is.

In my language combination, the best way to survive as a legal translator, at this time, is to work in the securities field. But that field is under provincial jurisdiction. Since it pays better, it keeps people from federal legal translation.

As we have seen, *a good legal translator is a good and eclectic legal scholar*, and since the law applies to all fields of human endeavour, a good legal translator must be a well-rounded person. But instead of incentivizing and rewarding this, the federal legal translation system penalizes it, by empowering insufficiently qualified human resources as managers, translators and administrative support. And this is done at the expense of appropriately *qualified* human resources, thereby pushing away or keeping away the most qualified people.

In determining what needs to be translated, one must remember that, to many litigants, the "fact pattern" of a judgment can be as the law discussed therein. Thus, even a lower court decision that adds no new law *per se*, helps understand the application of existing law to a set of facts. The translation of such judgments provides important access to justice too, in a concrete way. Its value must not be underestimated.

The codes of ethics binding on certified translators require us not to accept any work unless we have the necessary knowledge and skill or can acquire it within the appropriate time. See the *ATIO Code of Ethics*, sections 1.2.1 and 1.2.2, and the *Code of Ethics of the Ordre des traducteurs, terminologues et interprètes agréés du Québec*, section 3. However, the government legal translation structures currently in place, including the procurement practices, often make it difficult, if not impossible, for government legal translators to comply with these obligations. Why? Because they do not have the necessary qualifications and are not given enough time under the contracts designed by procurement people, not legal translation specialists.

Nonetheless, the translators are encouraged or required to perform the work. Ironically, it could be better to keep legal translation experts or certified translators *away* from the texts, since they will not complain about this ethical dilemma.

Furthermore, since there is so much to know, revision is an important process in producing legal translations of high quality. This is not proofreading, but a real revision of the initial work, to make sure the translator understood the legal concepts, did not create meaning drift, etc.

But what happens in practice? It might be a matter of pure chance whether someone qualified is free to revise the translation, or whether they even know a revision is needed. That is what the existing and woefully insufficient structures make possible.

Over the years, have seen many cases in which the wrong people were assigned to a translation, resulting in needless expense and trouble afterwards. These sorts of decisions are inevitable when the people in control do not know better, because they never got the related education or training. But they are also far too frequent when the people in control do better, but have no systemic reason to care.

Legal translation is not regarded as a separate profession, but it should be. Its practice is closely tied to the content of the law in specific places at a specific times, since the content of the law is different in each jurisdiction, and changes over time. Biology and chemistry are the same in all countries. Law differs in each jurisdiction. That makes our work uniquely challenging, and Canada has many jurisdictions, whose laws interact with federal law.

Here is another difficulty. It is not unusual for judgments to deal with *former* versions of statutes, which have since been amended or repealed. This is yet another thing that legal translators must bear in mind in their research, and that distinguishes legal translation from many other kinds of translation.

Thus, legal translation is different from, and more difficult than, many other forms of translation. Yet federal government translation structures and operations, including financial structures and relationships, do not take this into account. They do not allocate the appropriate human and material resources to the tasks involved. They depend on *people who do not know* to set their budgets. In view of the frequent lack of relevant credentials of their staff, they reward cost savings at the expense of obtaining the appropriate resources.

Due to their statutory, regulatory and policy design, all of which are constitutionally reviewable because they constitute law and government action, they often minimize such considerations. And I have seen that when those considerations are pointed out, players have sought to sweep them under the rug by ignoring the input and not responding to concerns. It is well past the time for this to change.

The Commissioner's findings do not recognize these specificities and institutional shortcomings in his final report. Nor, really does the April 2016 report to the Governor in Council.

There is therefore a risk of severely underestimating the harm that would result from a failure to reform the system currently responsible for the translation of the judgments of our Federal Courts: the Tax Court of Canada, the Federal Court, and the Federal Court of Appeal.

Such reforms must include all structural and budgetary reforms necessary to guarantee consistent and equal quality of judgment translation. It might be necessary to agree on a timeline for this, in much the same manner as courts have imposed certain timelines to bring other unconstitutional systems in line with language-rights requirements: *Reference re Manitoba Language Rights*, [1985] 1 SCR 721.

Even if a Reference is made, the parties should start thinking about the reforms now. The consultations should begin right away, and be led by someone truly knowledgeable and aware of the stakes.

III. The potential impacts of errors in the translation of judgments, and why these can occur

Although the potential impacts of translation errors in this area should be obvious to anyone versed in the law, the Supreme Court of Canada specifically noted the potential for problems in *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) Inc*., [2004] 1 SCR 456, 2004 SCC 18 at paras 28-29. The case involves a distinction between Quebec professional secrecy (*le secret professionnel* as defined by Quebec law) and the Canada-wide concept of privilege.

As a freelancer providing translations to the Courts Unit of the Translation Bureau, I had a disagreement with a Courts Unit revisor five or six years earlier on precisely the same subject. He wanted me to render the concept of *secret professionnel* as "privilege" because, unlike me, he had no training in Quebec law, and he wanted to standardize terminology across various Federal Courts decisions despite a significant conceptual difference that would be ignored and would result in misinforming readers. He was thinking and acting like a general translator and functionary, rather than a legal translator and scholar. I knew this was wrong but was powerless, and the misguidance to the public, which can result from translating a concept incorrectly in legal documents such as judgments was ultimately discussed in a Quebec Court of Appeal decision, and, later, a Supreme Court of Canada decision.

If a legal translator is not appropriately trained, he or she can unknowingly use the wrong term from an inapplicable area of the law, or even from a materially different country or province, *and that mistake will be immortalized in writing*. The more mistakes find their way into the translations of federal judgments due to "business-oriented" staffing practices and underfunding, the more readers will think that principles applicable to one area of the law apply to other areas where they are in reality inapplicable.

More generally, inaccuracies in translations can cause mistaken assumptions and mistaken conduct on the readers' part. After all, people, businesses, NGOs and governments rely on the content of judgments to know what to do. I have seen quite a few such mistakes in translations of judgments, administrative board and tribunal decisions, and even a few statutes and regulations.

The primary reason is usually the translator's lack of legal background, but this happens for a reason: inappropriate and insufficiently accountable structures, which reward conduct precisely contrary to what is suitable, such as hiring a translator with no legal background for $25,000 a year less than one who does have such background, or accrediting cheaper translation suppliers with no legal background, thereby putting them in the most privileged position as part of a competitive bidding structure. This is horrendous, and creates a terrible morale and economic security problems for qualified legal translators.

IV. The importance of *equal* translation services

Hopefully, what has already been said has sufficiently demonstrated that this is a context where prompt services of equal quality in both languages are particularly important, in way that is more acute than ordering beverages aboard a passenger aircraft. The reason is that the translation of judgments is not only of symbolic importance to linguistic communities, but of very practical importance in communicating the law to these communities in their language. Judgments sometimes have far-reaching or surprising effects well into the future. Their translation must convey all the intent of the original, with all the complexities, nuances and priorities, and with due regard for the differences between Canada's two private law systems, the civil law system and the common law system, when this is relevant to the judgment to be translated. There is no justification for access to this content to be better, quicker or more reliable in one language than another, in one province than another, etc.

V. What does the current inappropriate system look like, and what does it produce?

In the current structure, badly needing reform, the Courts Administration Service (CAS) calls on the Translation Bureau or translation "suppliers" to provide translations of judgments. These translations are done by in-house Bureau employees at Courts Unit, or by the "suppliers" who result from a subcontract or a sub-subcontract. Small tweaks in these structures are done over the years, but the basic "business" orientation and framework remain, and produce their foreseeable economic exploitation and adverse effects.

In any event, qualified legal translation specialists are not "suppliers." We are professionals and legal scholars, and must be treated as such.

The Courts Administration Service is statutorily mandated to deliver administrative services,[7] such as registry services, to the Federal Courts. Translation is considered an administrative service for these purposes, but the CAS contracts this work to the procurement arm of the state or to private businesses that seek to make profits by paying translators as little as possible. For example, $10,000 saved by not hiring or retaining a legal translation specialist can mean a few thousand dollars in the owners' pockets as profits, or as executive pay.

The Bureau provides translation services to government departments and agencies such as the CAS under "business" arrangements, and gets payment for these services. Since it operates on a cost-recovery model,[8] it is reasonable to infer that the Bureau, too, will seek to make a "profit" on some of these arrangements, by charging its "business clients" more than cost. Sometimes the Bureau loses some money these arrangements, and sometimes it makes some money. At least that is what

[7] Courts Administration Service Act, SC 2002, c 8.
[8] The Commissioner himself took notice of this: http://www.ocol-clo.gc.ca/html/stu_etu_022006_12_e.php

is safe to assume. So the Bureau, too, has an incentive to keep costs down as part of this general logic. Why hire specialized people if you have a limited budget and it costs more to hire them? What happens if there are cuts?

Presumably, the Bureau allocates the revenues it receives, and perhaps additional resources allocated by the government treasury, to its internal operations. But experience, and my conversations with Bureau management, have shown that it does this based on an operational logic of *uniformity*.

In this logic, each of the Bureau's areas of translation are managed in the same way, with interchangeable managers at the head of each Translation Bureau unit, and the same kinds of administrative employees in each unit. No paralegals. No legal research specialists. No legal translation research budgets that include the expensive research tools priced for big law firms, accounting firms or corporations, but nonetheless very useful to legal translators, accurate, and time-saving. No true and sustained attention to legal skills, legal training or an understanding of the specificities of legal translation. In this system, legal translation is often seen as just one area among many.

Many of the people in the Courts Unit, especially management and administrative support but also translators and even revisors, have no significant educational background in law or paralegal sciences. They have the same training as people who work within the "non-legal" units of the Bureau. For example, the Courts Unit has often been managed by a person without a law degree, let alone both a civil law and common law degree. How, then, to ensure the translations are done and revised by the right people? This requires staffing and management decisions specifically tailored to legal translation and all its challenges and pitfalls.

This lack of specialized training means that the people involved sometimes cannot understand the meaning and implications of the documents put before them, and the requirements associated with their translation, such as specialized research and terminology, in the way that people with such training *would* understand.

This can result in inappropriate deadlines being accepted, inappropriate human resources being assigned, or a translation sitting around undone that will require a disproportionate amount of unusual and technical research, and therefore should be started immediately to ensure that there are no delays. I have seen all this happen, again and again. And I only found out about them on occasion, since I was not on site, but working remotely.

In particular, one of the most crucial components of the translation process is an initial skimming of the document by someone who has the kind of knowledge and broad general culture needed to identify the fields and complexity involved, so that the translation will be done by the person, or persons, with the skills and experience best suited to the task.

If this is not done, or if, as was often the case, it is done by an administrative assistant with no university background, no understanding of areas of the law, and no understanding of the different professions and disciplines addressed in a judgment or other complex legal document, how can this crucial initial task, on which the remainder of the translation process hinges, be done properly?

It must be remembered that judgments can touch on all kinds of fields. Science, engineering, history, finance, taxation, the environment, families, corporations, veterans, international conventions and treaties, are just a few examples.

If the documents in question had no impact on people's rights, it would be one thing. But judgments, by their very nature, have an impact on access to justice, because they, and their translations, constitute legal information, without which that access cannot be exercised.

Moreover, this kind of translation constitutes information / service to the public. It's not just for lawyers. NGOs, individuals, corporations and many other players read judgments and seek to understand how they affect their respective areas of concern. It's a vital part of the way society functions. The phenomenon of self-represented litigants is an important one as well.

There really are stakes each time a legal document like a judgment has to be translated. Each translation is a kind of mission. The translation requires mission specialists.

Consider a judgment involving the impact of mining operations and the rights and obligations associated with those operations. The document is legal, but it might *also* contain many pages about engineering, geology, resource extraction, environmental impact, occupational health and safety, the practices and rights of First Nations on certain land, and other matters that needed to be addressed in the judgment. If many of the pages are more technical than legal, the document will need to be assigned to a uniquely talented individual, or a *part* of the translation will need to go to a technical translator. Indeed, translations sometimes need to be shared. Occasionally, different kinds of expertise might be needed in order to translate the same document.

It is often more expensive to get people with the right knowledge. And they have to be available at the time. Who is more affordable to hire and pay: an ordinary administrative assistant, or a legal assistant or law clerk? Who is more affordable to hire: a person with a translation degree (which typically requires very little training in legal translation) or a person with both a translation degree and a law degree? Who is more affordable to retain as a freelance translator: a long-time certified translator with considerable experience in legal translation, or a more junior translator with little such experience? Who is easier and cheaper to find: a person with a translation degree *and* an engineering degree, or a translator with only a translation degree?

In all these cases, "business" logic means cutting corners in these areas to save money. I know that this happens in the Translation Bureau quite often. I have seen it many times.

The "market", highly affected by the decisions made by the Government of Canada, has been smashed by that government in a way that has greatly devalued and demoralized experienced and specialized translators. I am one of them, and despite devoting much of my life to serving the Government and the people of Canada in my work, I am marginalized in favour of people who are "cheaper."

In view of these specificities, and the problems that inevitably stem from the current maladapted structures, the need for a remedy is clear. A far more independent and function-specific court/legal translation system must be set up. This new system must have the necessary resources to pursue best practices and to develop, maintain and train a stable, well-qualified and eclectic body of

respected professionals who are truly suited to professional duties involved, and whose job security and income security do not depend on the whims of the executive branch of government.

I urge the Government of Canada to commence consultation and planning of the necessary reforms immediately. This should be done regardless of the choice made in response to the Report to the Governor in Council from the Commissioner of Official Languages on the publication of judgments in both official languages. Even if a Reference is pursued, a step that seems reasonable because it will be more impartial, the thinking and consultations about a new system need not wait.

The Translation Bureau is not the appropriate body for this. In addition to the inherent conflicts of interest already outlined above, or perhaps in *keeping* with them, it has commissioned studies about machine translation[9] and about the "global" translation marketplace, noting that translators in other countries charge less than Canadians.[10] It has required the use of translation memory software by its suppliers in many instances, imposing lower costs per word for "fuzzy matches" to previous translations than for passages that must be newly translated.

This seems fair on the surface, but it is not. I have used such mandatory translation memory software, and I notice that much of what that memory populates for the translator contains dissimilarities that take longer to correct and save no real time or effort. Moreover, use of this software requires a painstakingly slow process of "format painting" that takes twice or three times as long as simply including the same formatting (quotation marks, bold, italics, indents) in a word processing document. The result is that the translator makes considerably less money per hour, but the Bureau or CAS saves by being able to pay only 50% of the base fee for the "partial matches."

However unfair these human resource or procurement practices may be, perhaps they are not always unlawful. Perhaps it is lawful to cut and burden translators with ever more tasks, in exchange for less and less money. Perhaps it is lawful to issue stop-work orders because budgets for translation are lacking, as happened with judgments in 2010. But those practices, even if lawful, will inevitably result in constitutional and quasi-constitutional violations. Thus, they are only lawful on the surface, if at all. And they are morally unconscionable in any event.

I often wonder whether I would be, or would have been, better off being a plumber or welder. Less education is required and the pay seems attractive in comparison. Similar feelings have been expressed to me in recent years by other skilled translators who have been affected by Bureau and government-wide translation cost-cutting practices.

One Bureau official told me, roughly three years ago, that there is a frequent, government-wide practice of not translating documents, which *have* to be translated by virtue of the OLA, until someone complains about it. This could account for why the volume of Bureau translation, and Bureau subcontracting, has declined in recent years.

Sadly, most trades such as plumbing are inaccessible to me because of a physical disability. I can certainly translate many federal legal documents quite skilfully, bringing decades of specialized

[9] http://rali.iro.umontreal.ca/rali/sites/default/files/publis/0ASLI-AMTA.pdf
[10] http://webcache.googleusercontent.com/search?q=cache:pE3hEM5WKEoJ:www.ailia.ca/dl359+&cd=4&hl=en&ct=clnk&gl=ca

knowledge years of specialized education to bear, but alas, that does not seem to be worth much, in the eyes of the system as currently constituted.

I must note that the Courts Administration Service would not provide any information to me in response to requests for information about its translation and related budgetary policies. It wrote me a brief letter saying it was not bound by access to information legislation, and referring me to two unhelpful lines in an annual report stating that it had "addressed" an issue of insufficiently swift translations.

But there was no explanation of what it had done, and whether the improvements were in any way stable. Although its enabling legislation states that it should be at arm's length from the Government of Canada, I must say that, to me, the CAS does not truly appear to be independent from the executive branch of government in one crucial and legally reviewable matter: funding. Indeed, the following can be found in its 2013-2014 annual report:

> CAS continued to face significant financial pressures that threaten its long-term sustainability. While CAS implemented a number of initiatives aimed at optimizing the use of resources, there remain significant program integrity concerns. Consequently, in 2013-14, CAS continued to work with central agencies and stakeholders to identify viable, long-term solutions to address program integrity issues.[11]

How is it even possible that an institution with such an important role the administration of justice and, in the realm of judgment translation, such an important role in delivering legal information crucial to the public's *access* to justice, can be put in a position to complain that its sustainability is threatened?

Of course, this by no means reduces the government's obligations. Despite all the buck-passing, and the deliberate obstruction of my efforts to identify the relevant players who operate in the shadows, the Government of Canada's obligations are in no way diminished.

It seems reasonable to believe that the Courts Administration Service is a direct victim of variable government budgetary priorities that do not take the constitutional nature of certain duties, and the importance of its independence, sufficiently into account. If its translation budget runs out at the end of a fiscal year, it can no longer afford to get judgments translated, despite the role of such judgments in access to justice and official language rights for the public. Where, as here, all this violates OLA and inextricably connected constitutional language rights, this becomes a concern for the Government of Canada, and specifically, Cabinet.

It is for reasons like this that some organizations have to be at arm's length from government in a true sense, including financially. The reasoning in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 SCR 3 is perhaps applicable by analogy. There, the Supreme

[11] http://cas-ncr-nter03.cas-satj.gc.ca/CAS/AR-RA/2013-14/ar-ra2013-14/images/14-062-SATJ-Rapport-Annuel-ANG_R5-Web.pdf

Court held that three core characteristics of judicial independence are security of tenure, financial security, and administrative independence. It held that an institution should be interposed between the executive and the judiciary in order to avoid political interference or the appearance thereof. Henceforth, the government would be required to deal with that institution in a way that meets certain constitutional and financial ground rules.

A similar independent institute of government legal/judgment translators, with a mandate and budget that promote standards of excellence and stability based on the considerations important to the mission of *that* field (staffing, research, credentials, skills testing and the like) would be of immense benefit, and could cause major improvements that ensure compliance with linguistic obligations, and access to justice obligations, on an ongoing basis.

In short, despite the important shortcomings — which are constitutionally reviewable because they are based on statutory instruments and government action — and despite my having pointed out these shortcomings to those who manage Canada's institutional government translation system, that system often treats legal translation as a *commodity in trade*, and seeks to save costs with insufficient regard for the special implications, sometimes because the most senior players, who seem to turn over every few years, do not even *realize* what human resource selection criteria should be relevant to the translation of a specific legal document, or to the hiring of legal translators generally.

In fact, even if they *do* understand all these factors, there no real incentive or structure for taking them into account. This is already bad enough, but it becomes even worse when one realizes it this has an impact on constitutional and quasi-constitutional rights that are often in play, and must therefore be part of the calculus of determining the content of the obligation to translate and disseminate translations of our Federal Courts' judgments.

Before delving into these constitutional and quasi-constitutional issues in greater detail, it will be helpful to understand how I came to be *aware* of the deficiencies and their implications for the public.

VI. My background and training, my ability to identify problems in the current unconscionable "business" system, and my efforts at reform

I am what people call a freelance translator, even though my passion and preference have always for been serving the people of Canada and the interests of justice. In reality, of course, I am a professional legal translator. Moreover, my "freelance" status is not entirely by choice; I have a physical disability.

For many years (1997 to 2011) I worked primarily for the Translation Bureau's Courts Unit, and by 2001, was considered one of best external translators of that Unit. In fact, I was considered better and objectively more experienced than many of the Unit's internal translators, by reason of my bijural legal background, my broad general knowledge, my research skills, my thoroughly bilingual pre-university *and* university education, and my ability to identify and call on a network of experts who can resolve technical or scientific translation difficulties, often without charge.

(Sadly, these things are rather uncommon among federal government "legal" translators, because so little effort is made to train and/or find and retain people like me.)

It is important to understand how the Translation Bureau's contracts with external "suppliers" of judicial and other translation services function. There is a bidding process for contracts that provide for the translation of a certain number of words, usually 25,000 to 1,000,000 words, over a period typically ranging from three months to three years.

The winning supplier is not guaranteed anything *close* to the specified contract volume, usually just 5% of contract value, but must nonetheless remain available throughout the contract period in case there is such work. Indeed, a few refusals of work can result in contract termination. Repeated unsatisfactory work can result in financial penalties and a kind of suspension of the supplier's ability to get further Bureau work.

There is no obligation to inform the supplier of anticipated stoppages or work or resumptions of work. If, at the end of the term, the supplier has not received the small volume guarantee, typically now 5% or less, though it has varied from 3% to 20% over the years, the supplier may claim the small guarantee from the Bureau. Thus, the external supplier might get no work for months, still be required to be on call, and have to wait an additional several months for a small payment. The goal of getting "something for next to nothing" from highly skilled external translators, and of driving prices down by smashing the market through unlawful reductions in government translation, was pursued with great vigour by the Government of Canada and the Translation Bureau, especially starting in 2010-2011, but well before that as well.

Even clauses stating that the maximum volume of work set out in the contract represents a good-faith estimate of anticipated need have been removed from the Bureau adhesion contracts. There is no negotiating specific terms or conditions based on the special skills and reasonable commercial requirements of specialized translators. The only contracts are contracts of adhesion, filled with all kinds of clauses placing heavy financial burdens on actors with far less bargaining power or income security than the government as an institution, or the government workers who impose or seek to enforce these clauses. This has been the case since the late 1990s, when I began working primarily as an external supplier to the Courts Unit of the Bureau.

There was a time when I received a reasonable amount of work, and valuable input from Courts Unit staff. I was very grateful for this and provided all kinds of added services and advice in the Bureau's interest and the public interest, free of charge. It was my pleasure to work collaboratively with many of their staff, even if they were clearly not suitably qualified. Sometimes, when I saw systemic problems (inappropriate staffing, inappropriate resources, inappropriate assignment of internal or external people to projects) that could compromise quality, I tried to point them out in a spirit of public service. I was usually thanked for my input, but in most cases, nothing material changed.

I was often able, without any fee of course, to help the Unit split up complex documents between internal and external translators working for several Bureau units, and recommend government officials capable of answering pertinent questions, by turning my mind to the legal, scientific and/or technical translation skills that I could tell would be needed after my preliminary review of

the document. I also carefully bore in mind the structure of the Translation Bureau, and the structure and operations of other government bodies such as Justice Canada, with its diverse practice groups. This was knowledge I cultivated in order to serve. All the while outside government. Many people inside government did not do the same.

I was able to avoid much trouble for the Bureau with its paying "clients", by warning non-translator administrative staff of pitfalls I could anticipate with certain translation projects. Again, this was done in a spirit of public service. I want the public to have access to excellent legal information in the official language of their choice. Law and justice are passions for me.

I also tried to address unfair procurement practices that put unreasonable financial and administrative burdens on legal translators. For example, I managed to persuade Bureau management that they were being patently unfair when attempting to enforce, in an unreasonable way, the strict letter of a contract clause stating that external translation suppliers should have "all the tools necessary to perform their work." Does this include a $10,000 tool when the contract does not even guarantee $10,000 in revenue?

Bureau management were arguing that I should not occasionally be asking for access to the government's legal research tools, and that I should pay for any research sources necessary for any specific project whenever required.

But it must be understood that many such tools, especially if they involve business or tax law, are priced with large and very wealthy law firms and other large organizations in mind. Should I have CCH tax law collections that would cost me tens of thousands of dollars to maintain, in addition to all kinds of other subscriptions costing hundreds or thousands of dollars a year, with virtually no guarantee of revenue in exchange for all these requirements? Even if in many cases, I would only need access to such resources once or twice a year? Should I have an annual Quicklaw subscription if the Courts Unit can simply stop sending me work without notice?

This horrendous exploitation is precisely what the current "business" structure of the Bureau empowers. It must end.

All of these things had to be constantly reargued to Bureau management over the years, because they had no specific understanding of legal translation or its special context and challenges, and the people in the relevant positions changed. I was sometimes valued and respected for my unique skills and broad vision, but was eventually regarded as someone who "knew too much" about systemic deficiencies, and deliberately marginalized.

In a way, this was only natural: The Courts Unit's manager had no law degrees; the unit's revisors overseeing translators (even those with law degrees) often had no law degrees; the administrative staff included no law clerks, paralegals or legal technicians; the "documentation specialist" had no training in the legal sources necessarily involved in legal translation; many of the translators had no law degrees; and the distinction between Quebec civil law and the common law system of the other provinces, something that is surprisingly relevant to the translation of many Federal Courts decisions, was disregarded in staffing or in choosing whom to assign to work.

The Courts Unit was, and most likely still is, staffed like many other units of the Translation Bureau, in such a way that managers and employees can be interchangeable between units such as Human Resource Translation, New Brunswick Translation, Agriculture Translation, Border and Police Services Translation, Health Translation, Immigration and IRB Translation, and the like.

VI The legal principles governing the translation of judgments and government legal translation generally, and their relationship to the problems and their resolution

Part IV of the *Official Languages Act* certainly does apply, because the delivery of a judgment's content in the official language other than the one in which it was initially written is an institutional service to the people of Canada. It is a service that involves both translation and publication, neither of which is a judicial function.

However, the OLA cannot be regarded as a stand-alone statute, and Part IV cannot be understood in a vacuum. The Commissioner has not stressed the unique constitutional nature and importance of the service of delivering *legal content* in both official languages, one which *depends on translation to exist*, and one from which the *Charter* and other constitutional imperatives and values cannot be cut off, no matter the "terms of reference" that might *appear* to apply. The main constitutional imperatives and values are minority rights, access to justice, and freedom of expression on matters of public importance, including freedom to appear before public bodies with a view to providing input on such matters or obtaining redress.

It must be understood *that access to justice can only be obtained if there is access to the legal content that forms the basis of the interaction with justice.* And since access to justice and to public bodies in Canada always happens in an official language, the idea of seeing legal translation (the translation of statutes, regulations, legal pleadings and judgments), and the right to such translation, as independent from these imperatives, is far more artificial than anything else proposed in the context of the complaints in issue.

Organizations, including governments, need prompt access to judgments in both languages, not just to understand their rights, but also to deliver services to citizens in the official language of their choosing. After all, all government action is pursuant to some law. Each government department, in accordance with s. 91 or s. 92 of the *Constitution Act, 1867*, administers a series of statutes and regulations and is affected every month by new court decisions which constrain or dictate their actions. This is part of the rule of law, another basic premise of our Constitution. I have translated many regular legislative/case law updates produced by government departments for their internal audiences in this realm. It is only nature that such updates would be needed. The general implementation of the rule of law requires the production of such information in both official languages because our federal government *functions* in those official languages, government workers have the right to *work* in either or both official languages, etc. Judgments are a way for governments to understand their obligations, and the federal government is entitled to such judgments in both languages, just as the public is.

At the risk of repeating myself, the availability of judgments immediately, or at least very promptly, in both official languages does excellent, rights-giving things. It unlocks other rights, such as access to legal content, access to justice (which requires such access to legal content) and freedom of expression on matters of current public concern.

And it is important to point out that matters of current public concern are often legal matters addressed by court decisions the translation of which is at issue here. The controversy regarding a prostitution-related statute, Bill C-36 (the *Protection of Communities and Exploited Persons Act*) assented to November 6, 2014, and whether it complies with guarantees of security of the person enunciated in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101, is a current example.

But Supreme Court judgments are not the only judgments of public interest. Although I often mention decisions that eventually made their way to the Supreme Court, the lower court decisions in the same matters are just as much of public concern. For example, I was involved in the translation of Federal Court decisions about security certificates under the *Immigration and Refugee Protection Act*, SC 2001, c 27, including *Charkaoui v Canada (Citizenship and Immigration).* These decisions involved non-citizens suspected of terrorist intentions, certainly a topical matter from anyone's perspective.

Given all this, the translation of judgments is inextricably bound up with matters of constitutional and quasi-constitutional import, and these cannot artificially be excluded from the reasoning about the proper way to understand and implement both Part III and Part IV of the *Official Languages Act*.

The entire justice system writ large, which includes the Courts, the Courts Administration Service, the Translation Bureau, the legal community and the legal translation community, is involved in and/or concerned with the obligation to translate and publish judgment translations and the right to such translations. The players involved have policy and/or implementation roles. *But the system also must be understood as a whole, working collaboratively to safeguard rights and honour duties.*

Since the Commissioner is a government actor, he is bound by the *Charter* and by the modern understanding of language rights and their role in securing the exercise of other constitutional rights. His organization is *also* part of the community that delivers and protects rights. And language rights must "in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada." Restrictive interpretations of the past are often specifically rejected. *R. v. Beaulac*, [1999] 1 SCR 768 at para 25.[12]

[12] Perhaps because these restrictive interpretations date back to the infancy of *Charter* jurisprudence, when the courts were less aware of the interconnectedness of rights, and governments had not yet begun various cutbacks limiting access to justice, such as legal aid cutbacks, so there was less need to address the role of resources.

As part of this modern understanding, which expressly rejects narrow interpretations, our courts have held that *institutions* play an important role in ensuring that language rights can be enjoyed. For example, minority language schools, actually run by the official language minority, are often guaranteed: *Mahe v. Alberta*, [1990] 1 SCR 342; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3. This shows that our *constitutional law is concerned with the structure and staffing of institutions, and with who is involved in their administration and how they are funded*, so as to protect the substantive equality of official language communities and their access to language rights. Access to justice *altogether* is certainly no less important than language rights, and my complaint, and the issue before the Governor in Council, is a case where the two are intertwined.

Similar considerations apply to the Federal Courts, the Courts Administration Service and the Translation Bureau. They are the actors involved in providing access to legal content of equal quality in both official languages. And since they are not structured and run in a way that sufficiently recognizes and implements language rights and other constitutional rights that they, as government actors, are required to comply with and safeguard on a continuous and uninterrupted basis, unaffected by the vagaries of executive funding decisions, their operations and their structure violate the Constitution and Part IV of the *Official Languages Act*, neither of which can be understood without reference to the other.

The equal status of English and French before Canadian institutions, and right to use either official language in receiving communications or services from the federal and New Brunswick government, are, after all, fundamental rights specifically protected by the *Charter*. Under any modern interpretation of official language rights, the right to obtain translated judgments is one of these protected *Charter* rights[13] because of the role of such judgments in access to judicial and other government institution in both official languages. All players in this institutional system are interconnected, and their bilingual functioning is a defining Canadian honour to be cherished.

Not only are the institutions interconnected; so are the rights. It is indeed particularly important to understand that the constitutional rights and quasi-constitutional rights involved in this case depend on each other for their existence and practice.

For example, a person cannot use French in the federal or New Brunswick courts and legislatures (e.g. as an elected representative or committee witness) if she does not have access to French-language legal content, including legislation and regulations written in French, and judgments that are either written in, or translated into, the French language.

Furthermore, in committees of a legislature, witnesses such as experts or concerned citizens are asked to speak about legislation on a section-by-section basis, carefully considering what its impact would be on the ground. One example of such groups are the users of injection drugs at risk of HIV/AIDS, and their caregivers and advocates. Whether one has sympathy for them or not, these groups are sometimes involved in litigation, or they are called upon to consider how certain court decisions, such as the SCC decision in the Insite case, *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, and, before its issuance, the decisions in the British Columbia courts below, affect matters in their sphere of concern. If these

[13] Under sections 16, 20 and 21 of the *Charter*.

court decisions do not exist in the only language they understand, how can they participate in related consultations and make their views known in court or before federal institutions? The answer is translators, including translators in the private sector.

One might be tempted to respond that many people, such as legal professionals who appear before the Federal Courts, have at least an intermediate knowledge of their second official language, but when it comes to legal documents and judgments, nuance is important, and the language is specialized, so the level of bilingualism required to understand legal wording is extremely high. In the federal public service, there is even a special level of bilingualism, called "P" for professional, to reflect this. It is higher than C or E. However, for most people, access to legal information in one's mother tongue is vital.

Similarly, an English-speaking Quebecker cannot really use English in the Superior Court or before his provincial legislature if English versions of laws and regulations, and English versions of Federal Courts decisions from Quebec that could be relevant to his concerns, do not exist. He might be able to speak in English some of the time, but if the subject matter that he is concerned about is published only in French, and has not been translated into English, what is he to do? How will he understand? He might even have to pay a translator himself. This shows how section 133 of the *Constitution Act, 1867,* and sections 16 to 23 of the *Charter*, can so easily and frequently be directly involved in matters related to legal translation, and the translation of judgments in particular. It is most unfortunate that even Quebec's appellate court judgments are not being translated into English as a matter of right. This was not always so.

As far as Manitoba and the Territories are concerned, there are *constitutional* instruments dealing with the status of English and French there as well, so the issue of Federal Courts translations can obviously be of interest to communities in those places and can also be seen as a matter of constitutional right for them.

It is interesting that the concept of access to justice in both official languages has been formally recognized by the Government of Canada *for decades*. An organization known by its old French acronym PAJLO, which receives federal government funding, was originally called *Programme pour l'accès à la justice dans les deux langues officielles* (hence its acronym). It changed its name to the National Program for the Integration of Both Official Languages in the Administration of Justice. It is involved in training, research and documentation efforts. There is also a federal government Access to Justice in Both Official Languages Support Fund.

Many of these programs and funds are administered in whole or in part by the federal Department of Justice. It could well be that this department should take over government legal translation from the Translation Bureau. At least the people at the Department of Justice are versed in the law, and they have more sensitivity to bilingualism and bijuralism issues than they once did. They have institutional expertise that other departments are much shorter on.

In fact, there is even a Department of Justice policy on legislative bijuralism. Expressly from a standpoint of *access to justice*, it explains the importance of texts and professionals that are mindful of four legal audiences: common law Anglophones, common law Francophones, civil law Francophones and civil law Anglophones. http://www.justice.gc.ca/eng/csj-

sjc/harmonization/bijurilex/policy-politique.html These audiences are obviously important to bear in mind when translating judgments, since Federal Courts judgments often involve the interaction of federal law with the civil law of a province.

Why does such bijuralism, or even law degrees at all, get no recognition as a factor that would qualify some external legal translators better than others? And why is so little done to recruit bilingual and/or bijural lawyers as government translators? In my view, it is because the value of it would have to be recognized monetarily, and because the people in power often do not even realize the significance of this and other relevant factors. And even if they do, they have neither the power, nor the incentive or resources, to apply it in practice.

In any case, from a "business" perspective, the smaller the pool of qualified people, the more they might be able to charge as freelancers, or be paid as employees, so it makes economic sense to enlarge the pool by including underqualified people in it. I have seen this happening throughout Canada's translation "industry" since around 2010, which, interestingly, coincides roughly with the government stop-translation order that was the subject of my OL complaint. The most qualified and specialized translators are being shut out because low prices, high volume, and the bundling of two or more language combinations into a single contract with external suppliers, are being promoted and favoured in government.[14]

Another aspect of access to justice must be considered. Litigants or their counsel rely on precedents to argue or assert their cases, not just before the courts, but in administrative law settings such as labour adjudication, refugee status determination, etc. In doing so, they look for previously decided cases involving very similar combinations of legal arguments, and, if possible, very similar fact situations. Where these are not available, they seek things that are a close as possible to their own case, so they can argue by analogy. They might use keyword searches in CanLII or LexisNexis Quicklaw. However, they will usually do these searches in only one language: theirs. If a useful case only exists in the *other* language, the case will not show up in the search results. For them, it is as though the case does not exist.

And what of freedom of expression, guaranteed by s. 2(*b*) of the *Charter*? Some of the most important speech is political or legal speech about court decisions. People can have strong views about these decisions, especially if they are directly affected by them. Should they remain untranslated, or translated poorly, because there is not enough funding, or the most qualified translators have left the field due to unqualified people with no law degrees having been hired as a money-saving measure?

It must always be recalled that there can be no official languages, and no official language rights, without translation. And that many other crucial rights are impaired by a lack of translation, substandard translation, or inadequately regulated and supervised translation.

[14] Some translators have taken cases about bundling before the CITT but were unsuccessful. This was perhaps not the correct venue for such a complaint, because the wrongs involved cannot be remedied by the laws applied by that tribunal.

Accordingly, the legal/judgment translation process, which cannot be performed adequately without a stable, respected and suitably trained and credentialed body of legal translators, plays an essential role providing access to justice and public life in both official languages, and an essential role in helping the government function and protect its own rights.

The current federal system seeks to obtain these services at the lowest price, often at the expense of such credentials and standards. It has pitted professionals against each other, or the unqualified against the qualified, in competitive bidding processes, thereby doing injury to this body and undermining the stability and security that the members thereof, such as I, require in order to ensure that citizens enjoy continuity of service and continuity of access to justice and to other government services in both official languages. It has staffed positions requiring knowledge of the legal system, and the specificities of legal translation, with people who have no training in or special sensitivity to it.

Instead of truly seeing themselves as actors involved in the fulfilment of citizens' constitutional rights, the government players, i.e. the Courts Administration Service and the Translation Bureau, often act as *businesses*, accountable internally for their costs, but unaccountable to the public for the performance of any kind of constitutionally mandated service or duty. This is most unfortunate, but should not be surprising, because their very statutory design accounts much of the problem. The enabling statutes, and the staffing and budgetary decisions made thereunder, create a structure and mode of operation in which constitutional obligations and accountability play an insufficient role.

The Office of the Commissioner of Official Languages did not want to address all this in any significant way. It seems to think its role is far narrower than it is. It should not function this way anymore, if it ever should have. The Supreme Court of Canada has instructed us on many occasions that language rights cannot now be dispensed and understood the way they were decades ago, with narrowly defined institutions and mandates too insulated from accountability for performance of constitutional duties or guarantees, and too readily within the reach of executive interference. That was then, this is now.

The OLA should of course be regarded as a **statute that gives effect to and is necessarily supplemented and informed by** the constitutional principles **of linguistic equality** (a written principle in the *Charter*, the OLA and the *Constitution Act, 1867*) and **minority rights** (an unwritten principle that nonetheless flows clearly from many written ones.) The Supreme Court of Canada discussed some of the unwritten principles that define Canada in the *Reference Re Secession of Quebec*, [1998] 2 SCR 217. Minority rights are a one of these key principles, and the decision in that Reference makes clear that this includes the rights of minority language communities, for example in any negotiations or constitutional amendment on secession.

As for access to justice, the Supreme Court of Canada recently held that it not just a right, but a constitutional one. For example, court fee structures that constitute barriers to court access are unconstitutional: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59. The basis for this is section 96 of the *Constitution Act, 1867*, and the constitutional rights that flow from it according to the modern understanding of constitutional law

as a dynamic and purposive phenomenon that gives rights. The Court even commented that revenue from users who *can* afford to pay should be used in such a way as to facilitate access to justice by those who cannot. Thus, the issue of funding, which the government often thinks is discretionary and well within the executive power to increase, decrease or and take away entirely, simply is not so, as a matter of constitutional law. It is often directly impacted by constitutional considerations. The present case is one such case.

Indeed, when properly understood, the issue of legal translation stands at the intersection of access to justice, minority rights and language rights, such as the right to services in either official language, and there is a corresponding obligation to ensure that federal judicial documents are not just translated, but translated *well* by a system structured to guarantee that consistent and uninterrupted quality rather than to treat legal translation as a commodity, and qualified legal translators as disposable resources. Indeed, without properly qualified legal translators to whom the system provides a certain degree of professional stability and security, as opposed to treating their services as commodities or grossly undervaluing the skills of the best ones, the problems will continue.

The translation of other "government" legal documents, such as statutes and regulations, is also a pressing issue involving access to justice. The English version of the *Civil Code of Québec* recently underwent hundreds of revisions simply bring it in line with the unchanged French version, because the initial translations did not reflect the legislative intent. I have seen federal statutes, such as *the Immigration and Refugee Protection Act*, which do not seem identical in both languages. There has been more than a century of curial guidance regarding situations where two linguistic versions of a statute appear to conflict, or one version seems better to reflect legislative intent.[15] But this phenomenon has a source: poor and/or insufficiently informed legal translation! It is high time to address this once and for all at the federal level.

Access to legal content is a crucial right in itself, because it helps people understand their rights and duties in their official language. The importance of access to law was recognized by the Federal Courts and later by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, 2004 SCC 13. But is also part of the broader and even more crucial and fundamental constitutional value of access to *justice*, because a person who appears before an administrative body or court will need to *know* the legal content first so that he, or his counterpart, will comply with their legal duties or grant the appropriate legal rights and remedies.

The Supreme Court of Canada recently recognized the constitutional dimension of access to justice in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, where it held that this flows from s. 96 of the *Constitution Act, 1867*, and is fundamental to the rule of law. Just as court hearing fees can constitute a barrier to justice even to middle-income persons, so can a lack of timely and high-quality translation of legal content.

When last I had any contact with the Courts Unit, it was responsible for translating not only judgments, but many other legal documents produced or received by the Government of Canada

[15] The Honourable Justice Michel Bastarache addressed this in a presentation he gave in 2000, the text of which can be found here: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b1-f1/bf1g.html

from French into English. This could include academic papers, legal opinions, factums, and the like. Some of this work might now be in the hands of other units; I am not certain. In any event, in order to know how best to assign judgments *or* other legal documents to one's in-house or external translators, one must know each translator's legal/translation strengths and weaknesses.

Does the document involve complex theoretical issues specific to Quebec civil law, which has its own Franco-Roman inspired terminology and concepts? If so, don't give the job to someone who studied translation in Toronto or Moncton, never took courses in Quebec civil law, and never got substantial on-the-job training in it. Does it involve maritime law? Best to assign the work to a person who did a great job on various translations involving the arrest of ships, the carriage of goods in international waters, and the law of average.

The important thing is to make the best decisions possible, and have access to people with a variety of legal skills and interests. This requires knowledgeable people in the right places, and the resources to appoint them and back them up.

I am not saying that the work of the people who form the current system is without value, or that they are generally malicious or uncaring. Most are dedicated people who do what they can with what they have. I am simply arguing that the system in place is woefully insufficient to meet its constitutional obligations, and that it would benefit from reforms that cannot be undone three, five or ten years down the line by an executive branch that is pursuing objectives in conflict with the constitutional ones.

For this is often how the executive branch of government works. There is some kind of restructuring, because a high-ranking official thinks this would make things better. Perhaps it does. But then another government is elected, or another high-ranking official is appointed, and he or she *undoes* these changes, or reduces the funding needed for the department or directorate to fulfil its mandate. There is no stability, and people never know what kind of seemingly random change will happen next.

In view of the constitutional considerations in this matter, such executive flip-flopping and highly variable funding and decisions are precisely the thing that must come to an end. Yes, there must be reform, but that reform must be permanent, statutory, and protected from subsequent interference. Perhaps the first steps would not be statutory, but, within a year or so, they should.

VII. Thoughts on potential remedies, and on whom should be involved

Since systemic issues are often the cause, and systemic reforms the remedy, why are they not happening? Why aren't law schools and translation schools working very closely together, referring suitable students to each other to secure a good supply of legal translators with suitable pay and job security for the nation's future?

Why has the government hired "legal" translators who have only a cursory exposure to and understanding of law gained in their translation schools, rather than at least a year or two of law school?

Why are there not frequent legal seminars for government translators who deal with legal issues, given that our government is a government of laws?

Why has staffing not been profoundly reformed at the Courts Unit so that unqualified people can be let go or transferred to "non-legal" units, and qualified people hired in their place?

Why aren't the documentation specialists hired by the Courts Unit qualified paralegals, law clerks or legal assistants who can help employees and external professionals get access to the relevant information, and know which kind of people at the client end would be most suited to answering questions?

There are so many promising avenues for remedy, but they all cost a bit of money, and require firm action and suitable structures. They must be overseen by people who *know*, and the resources must be there as well. Instead, we often have people who wish to protect the status quo, even if this undermines the interests of justice. I do not think the Translation Bureau is suited to implement the new structure that lives up to legitimate expectations of Canadians and gives the appropriate status to legal translation and legal translators as a profession that needs ongoing stability and support.

A recent Translation Bureau / PWGSC translation procurement reform, announced to great ceremony in early 2014, still gives **no recognition to law degrees** as a relevant factor in legal translation supplier accreditation. Legal translation exists as a category in the Bureau's procurement system, but all that is required is "experience" and not necessarily quality or credentials. There are no legal translation qualification tests for suppliers either. The factors one would think are most relevant are excluded, and I do not think it is by accident.

I have raised such considerations and they were rejected. The problem for the Bureau is that this might make the pool of suppliers smaller, thereby driving up costs. However, had the government respected legal translation as a profession in recent years or decades, there would be more people available today.

The decisions made by the Bureau and the Government of Canada at large over the last five years have had devastating effects on the translation profession, including legal translation. The CEO of the Translation Bureau seems content with the notion that budgets increase and decrease, and that there are good years and bad years for the translation "industry." That is an unacceptable view. Government compliance with official-language and other duties is not a variable option. It is a permanent requirement. And translators are not an "industry". We are a profession whose work is needed for the government to operate properly and respect its obligations.

Translation even helps the government understand its rights when it really *is* operating in a more commercial sphere, such as with real-estate transactions. After all, the contracts and other documents are often translated for public officials and commercial partners to read and interpret, thereby saving time and money resulting from misunderstandings or litigation.

VIII. Conclusion

In this document, I have shown that the translation of our federal courts' judgments is governed by constitutional and quasi-constitutional obligations and rights inextricably linked with the *Official Languages Act* and impossible to sever from it, given the natural and interdependent relationship between the OLA and the constitutional values it implements. I have shown how these obligations and rights are violated by a lack of adequate funding, and many other systemic problems that urgently need reform.

In particular, I have argued that the Translation Bureau of PSPC, and the Courts Administration Service, are structured and positioned in a way that puts them in conflict of interest as regards the obligation to provide ongoing and high-quality legal translation for the courts and government. It is not really in their interest and not really part of their structure to pursue these goals, and they are not equipped or funded to do that. Their interest is in getting the work done as cheaply as possible, at the expense of those most qualified and skilled.

I have also shown that in the realm of federal judgment translation, and legal (other than statute) translation generally, those who *do not know* often have more power and influence than those who *do*. This is often a function of excessive interference and involvement by the wrong people, based on improper considerations. Such interference results in mediocrity rather than quality, and causes translation mistakes that are immortalized in writing and have real impacts on the lives and rights of citizens, businesses and governments. But it is also the result of the very structures in place – structures from which the improper practices follow.

This is the inevitable consequence of a system that too often sees legal translation as an ordinary service or commodity in trade, rather than the fulfilment of a constitutional and quasi-constitutional obligation to ensure that legal content is available in both official languages. An obligation which necessarily *encompasses* the obligation to produce translations of high quality, because the public and the government depend on the reliability of such translations to fulfil their rights and obligations.

What is urgently needed is a system that has the infrastructure, expertise and institutional memory to sustain itself over the long term, through good times and bad, without distinction based on the governing party or partisan priorities. This will never be possible unless the special nature and status of legal translation are permanently recognized and enshrined in law so that people will pursue this profession with confidence and be rewarded for their hard work in acquiring and updating the requisite special legal *and* translation skills.

All of which is respectfully submitted.

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