Federal Court  Cour fédérale

Date: 20191121

Docket: T-1756-18

Citation: 2019 FC 1474

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 21, 2019

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

MICHEL THIBODEAU

Applicant

and

SENATE OF CANADA

Respondent

JUDGMENT AND REASONS

[1] [TRANSLATION] "I told myself that this made no sense. Why would a unilingual English sign be posted in a government building, on Parliament Hill in Ottawa, the seat of the legislature of a bilingual country? Why renounce one of the two founding peoples this way?"

[2] It is with the above hard question that Michel Thibodeau, the applicant in the matter at hand, introduces his claim against the Senate. The latter is filed with the Court under section 77

of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA], following the applicant's submission of the complaint to the Commissioner of Official Languages [Commissioner].

[3] The Parliamentary Precinct, refit on the grounds of Parliament Hill, houses an important set of symbolic buildings and democratic institutions vital to the smooth running of the country, be it the Centre Block—the permanent seat of the House of Commons and the Senate—, the West Block or the East Block, which is the subject of the applicant's complaint. It is the heart of the nation: hundreds of parliamentarians and federal public servants work there every day. It is also one of the most visited places in Canada.

[4] What must be determined in the case at hand is whether the Senate—a federal institution subject to the OLA—fulfilled its obligation to provide a service and/or signage of equal quality in both official languages and, if applicable, whether the applicant is entitled to a declaration, a letter of apology, damages and costs, which the respondent challenges.

[5] For the reasons discussed later, the present claim for a remedy must be granted in part.

I. **Basis of complaint**

[6] The applicant is representing himself. He has made it his mission to defend French in federal institutions. This life path has made him a regular in the courts of this vast country.

[7] The facts that led to the applicant's filing of the complaint against the Senate are not in dispute.

[8] Between 1999 and 2017, the applicant worked in the House of Commons. He regularly moved around from one part of Parliament Hill in Ottawa to another to fix various computer problems, but has since retired.

[9] Being a member of a minority group can sometimes exacerbate the feeling of injustice in individuals for whom language is an element of identity. The applicant states that during his time as a public servant, he often passed unilingual English drinking fountains and felt [TRANSLATION] “like a second-class citizen compared to Anglophones, who had signage in the language of their choice”.

[10] On September 26, 2016, he filed a complaint against the Senate. A similar complaint had also been filed against the House of Commons; however, the unilingual signage issue was resolved to the satisfaction of both parties. This is not the case for the complaint targeting drinking fountains in the East Block.

[11] It should be noted that the East Block was the nerve centre of the Government of Canada for the country’s first hundred years and notably held the offices of Sir John A. Macdonald and Sir George-Étienne Cartier, which can be visited in season. Today, the East Block still houses the offices of senators and their staff. The House of Commons occupies two spaces in this building.

[12] In the hallways of the East Block, the Senate has about 19 different models of drinking fountains available to visitors and staff. Some are activated by a button, without any particular inscriptions. Others are activated by a large silver metal button with just the English word

"PUSH" in embossed letters or the English word "PUSH" and its equivalent in Braille [unilingual fountains].

[13] A colour photograph of the two unilingual fountains is attached to the applicant's complaint. It was apparently taken on September 26, 2016. Below is a reproduction:

[14] A little less than two years after the applicant filed the complaint, that is, in August 2018, the Commissioner concluded in his final report that there is a basis for the complaint in this case. The Senate had indeed failed to fulfil the language obligations of Part IV (Communications with and Services to the Public) and Part V (Language of Work) of the OLA, in that the signage on the drinking fountains was in English ("PUSH") only.

[15] However, since [TRANSLATION] "new bilingual signage was installed" [my emphasis], the Commissioner made no particular recommendation to the Senate. In this respect, the applicant explains on February 6, 2019, in his cross-examination on affidavit, that he did not return to the East Block after his retirement and that the first time he saw the [TRANSLATION] "new bilingual sign" referred to in the Commissioner's final report was when he was served, on January 18,

2019, the Senate representative's affidavit, which contains an attached photograph of the sign in question.

[16] On September 6, 2018, the applicant sought a letter of apology and monetary compensation from the respondent. Until that date, the name of the individual who filed the complaint had not been disclosed to the respondent. On September 28, 2018, Richard Denis, Acting Clerk of the Senate [clerk], replied to the applicant by letter, in which he [TRANSLATION] "thanks [the applicant] for the having brought the situation [to the Senate's attention]", [TRANSLATION] "[expresses] his sincere regret" and [TRANSLATION] "[reiterates] the Senate's commitment to communicating with and providing services to the public in both official languages and ensuring an inclusive environment conducive to the effective use of and respect for both official languages". Moreover, the clerk informed the applicant that monetary compensation was not appropriate in the circumstances [TRANSLATION] "notably given the prompt action taken to remedy the situation". But what exactly is this prompt action to which the clerk refers in his response?

II. **Actions taken by the Senate in response to the complaint**

[17] The Commissioner's reports are admissible in evidence before the Court, but are not binding on the parties (*DesRochers v Canada (Industry)*, 2009 SCC 8 at paragraph 36). In the case at hand, the respondent relies on the facts set out in the affidavit dated January 17, 2019, of Pascale Legault, Chief Corporate Services Officer and Clerk of the Senate Standing Committee of Internal Economy, Budgets and Administration [the respondent's representative]. In short, the respondent's representative gives a fairly nuanced account, as described below.

[18] First, about ten months had elapsed before the respondent was officially notified that an investigation was underway. In July 2017, after it had received notice of the investigation from the Director of Investigations at the Office of the Commissioner of Official Languages, the respondent states that it [TRANSLATION] "promptly contacted" Public Services and Procurement Canada [PSPC] to ensure [TRANSLATION] "that all drinking fountains in the building had a bilingual sign".

[19] On July 31, 2017, PSPC agreed to take an inventory of drinking fountain signs. The Parliamentary Precinct's buildings and grounds belong to the Crown, and both their operational management and their long-term maintenance are the responsibility of PSPC. In other words, PSPC is responsible for all of the basic facilities, which includes, for example, maintenance of the roof, windows, doors and plumbing, including drinking fountains in the Parliamentary Precinct.

[20] On August 15, 2017, PSPC informed the respondent that the unilingual buttons on the drinking fountains could not be replaced because the models were obsolete. However, PSPC could produce plastic Lamicoid self-adhesive labels with the French word "POUSSEZ". These labels could be adhered directly on the fountains. Before mass production, a sample would be sent to the respondent for approval. However, for whatever reason, which was not explained by the respondent's representative in her affidavit, this practical solution was not implemented.

[21] On September 27, 2017, PSPC informed the Senate that it had installed bilingual signs above unilingual fountains with the following wording:

To activate the water fountain, please push the button.	Pour activer la fontaine d'eau, veuillez appuyer sur le bouton.

[22] Below is a reproduction of a colour photograph, provided at the request of this Court, showing the bilingual sign in question above two unilingual fountains. This photograph was substituted for the black and white photograph attached to the affidavit of the respondent's representative (Exhibit F):

[23] According to the respondent, the bilingual sign above the unilingual fountains now makes the Senate compliant with all its language obligations, [TRANSLATION] "meaning that a violation no longer exists". Of course, the applicant is not of the same opinion.

III. **Constitutional and quasi-constitutional nature of Senate language obligations**

[24] First, let us address the Senate's language obligations and the undisputed nature of the violation reported by the applicant in his complaint of September 26, 2016. This enables us to weigh the value of the arguments as to whether or not the new bilingual sign is sufficient in the case at hand, as the parties debated extensively before the Court.

[25] The term to "communicate" presupposes interactions, bilateral actions between the parties (*Knopf v Canada (Speaker of the House of Commons)*, 2007 FCA 308 at paragraph 40). We live in a complex world where language is a special part of communication between humans. Complete words, abbreviations, ideograms—all have but one very specific purpose: to communicate and to make oneself understood.

[26] The fact that language is part of the collective culture and heritage is something that is reflected in the everyday life of every single person. Language is the colour of time. It is also what graces avenues, walls and doors; in short, language gives shape and meaning to everything around us. It is language that defines us, unites us, sets us apart, divides us and makes us who we are: us as a society; he or she as an individual. To sum up, language is an identifying factor and displaying it is steeped in indisputable symbolism. (See, in this regard, Denise G. Rhéaume, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?" (2002) 47 McGill LJ 593 at pages 617-619; Monica Heller, "Language and Identity" in U. Ammon, N. Dittman and K. Mattheier, dir., *Sociolinguistics – an international handbook of the science of language and society*, 1st ed., Berlin, De Gruyter Mouton, vol. 1 at pages 780-784.)

[27] While the rule of law principle is a cornerstone of our democratic system, language rights in Canada are based on the constitutional principle of the protection of minorities (*Reference re Secession of Quebec*, [1998] 2 SCR 217 at paragraph 79). The axiom is simple. It is also undeniable. French and English are Canada's official languages; they have equal status, rights and privileges as concerns their use in the institutions of Parliament and the Government of Canada (subsection 16(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]).

[28] In practice, a number of federal laws—including the OLA, which is of a quasi-constitutional nature—give effect to this equality in law between both official languages, equality which must also be practised. We are not talking about formal equality or a superfluous legal concept. On the contrary, actual equality between English and French is the institutional norm, while language rights are substantive, non-procedural rights that belong exclusively to individuals (*R v Beaulac*, [1999] 1 SCR 768 at paragraphs 22 and 28 [*Beaulac*]).

[29] In particular, under Part IV of the OLA, the public in Canada has the right to "communicate" with, and to receive "services" from, any head or central office of an institution of the Parliament or Government of Canada in English or French (subsection 20(1) of the Charter and sections 21 and 22 of the OLA), even though "[t]he content of the principle of linguistic equality in government services is not necessarily uniform" (*DesRochers v Canada (Industry)*, 2009 SCC 8 at paragraph 51 [*DesRochers*]). Moreover, under Part V of the OLA, English and French are the languages of work in all federal institutions and their officers and employees therefore have the right to use either official language (section 34 of the OLA),

whereas institutions have the duty to ensure that, within the National Capital Region, their work environments are conducive to the effective use of both official languages and accommodate the use of either official language by their staff (section 35 of the OLA).

[30] In this respect, the respondent, which states that it takes its language obligations seriously, adopted a policy that establishes the principles, rules, roles and responsibilities governing the use of official languages in its communications with and provision of services to the public and in the workplace. In its most recent version, this policy establishes that the Senate Administration's approach to official languages is based on the principle of [TRANSLATION] "institutional bilingualisms" (paragraph 2.1.2. of the *Senate Administration Policy on Official Languages*, approved by the Standing Senate Committee on Internal Economy, Budgets and Administration on April 22, 2012 [Senate Policy]).

[31] In the case at hand, the Senate Policy expressly recognizes as follows:

> [TRANSLATION]
>
> (a) Members of the public have the right to communicate in English or French and to receive services in these languages, including services from a third party acting on behalf of the institution. Services are defined as any oral or written communication and comprise activities that provide information to the public or a specific audience (paragraph 2.2.1);
>
> (b) All signs that indicate the location of Senate offices or facilities as well as panels that contain words, written notices and standard public announcements concerning

the health or safety of members of the public, will be in both official languages (paragraph 2.2.9);

(c) While English and French are the languages of work in the Senate, managers will create and maintain an environment conducive to the effective use of both official languages to allow their staff to use either language (paragraph 2.3.4).

[32] In practice, from an operational standpoint, it is up to the Clerk of the Senate to ensure that the Senate Policy is implemented and enforced correctly and to take appropriate action in the event of non-compliance (paragraphs 3.3(a) and (b) of the Senate Policy). Therefore, any communication that the Senate has with the public or staff must be in both official languages; it is the rule. For example, if the English word "EXIT" appears in large letters above a door, a Francophone will undoubtedly understand that it is an exit. But that, as I am sure you will understand, is not the purpose of the OLA or the Senate Policy. If the Senate wants to claim substantive equality between the two official languages, the words "EXIT" and "SORTIE" must be used side by side, unless both of these vernacular words from the institutional vocabulary are replaced, instead, by a small figure (often in green) running towards an exit.

[33] Is communication not, by its purpose, an object of universal attention?

[34] The operation of a drinking fountain may seem obvious. To activate a drinking fountain that has a button, the button in question must be pushed. It's child's play. And yet, the manufacturer took the trouble to write, in large, embossed, separated print on the button that

activates the water fountain, the letters P-U-S-H, which it also reproduced in Braille on some models for the visually impaired.

[35] Let's just say that, in this signage story, the water fountain is the [TRANSLATION] "elephant in the room". Or, to borrow from Marshall McLuhan: "the medium is the message" (*Understanding Media: The Extensions of Man*, 1964).

[36] Like the Commissioner, I am therefore satisfied that the complaint of September 26, 2016, is well-founded and that the language obligations contained in Part IV (Communications with and Services to the Public) and Part V (Language of Work) of the OLA were not fulfilled by the Senate, in that the signage on a number of drinking fountains in the East Block is in English ("PUSH") only or in English and its equivalent in Braille ("PUSH") only.

IV. **Does the bilingual signage above the unilingual fountains defeat the applicant's legal recourse?**

[37] Today, the respondent believes that the bilingual sign placed by PSPC above the unilingual fountains in September 2017 is conducive to ensuring compliance with all of the Senate's language obligations. However, according to the applicant, this is the kind of "accommodation" that the Charter and OLA do not tolerate because their guiding principle is that of substantive equality between the two official languages.

[38] The applicant's position in the case at hand is simple: he would have no legal reason to complain if a bilingual self-adhesive label with the words "PUSH" and "POUSSEZ" was placed

on the button of each unilingual fountain or if the English word “PUSH” was covered up with a thick enough self-adhesive label in a neutral colour.

[39] I fully agree with the applicant, who bases his argument on the decision rendered in the summer in *Thibodeau v Air Canada*, 2019 FC 1102 [*Air Canada 2019*]. The latter was not appealed and is therefore authoritative.

[40] This Court determined that Air Canada, which is subject to the OLA, had failed to meet its language obligations. In its communications with the public, the English word “LIFT” on seatbelts aboard Air Canada aircraft breached Part IV of the OLA (because it did not appear with the word “LEVEZ”).

[41] The unilingual inscription in question had been engraved by the manufacturer and not by Air Canada. Saint-Louis J. notes as follows in this regard:

> [52] I cannot agree with Air Canada’s argument that the engraving of only the word “lift” would not be subject to the requirements of the Act because it is the initiative of the manufacturer. Air Canada has no authority as to whether such a communication is subject to the Act.
>
> [53] The engraving of the word “lift” is a communication from Air Canada to its passengers and, being unilingual, it violates the requirements of the Act. If Air Canada displays this word, it must also display the French equivalent.
>
> [Emphasis added]

[42] The same reasoning applies to the Senate. The latter cannot justify its failure to meet its language obligations by relying entirely on the goodwill of the drinking fountain manufacturer or PSPC, which purchases and supplies drinking fountains in federal buildings.

[43] In the decision in *Air Canada 2019*, the Court also had to determine whether displaying only the word “EXIT”, or the combination of the words “EXIT” and “SORTIE” where the word “SORTIE” is written in smaller characters to designate emergency exits, complied with the principle of equality. In that respect, Saint-Louis J. notes as follows:

> [49] With respect to the words “exit” and “sortie”, I am of the opinion that the difference in the size of the characters suggests an inequality in the status of the two official languages. While Air Canada relies on the decision in *DesRochers* to argue that the service was rendered in both languages and that that is sufficient, the problem is not related to the quality of the service, but rather to the equality in status, which is recognized by section 16 of the Charter and section 2 of the Act.
>
> [50] The difference in the size of the characters is not necessary to ensure substantive equality, and it seems rather obvious that a difference in the size of characters tends to affirm the predominance of one language over another.
>
> [Emphasis added]

[44] I see no particular reason why the same type of reasoning should not be adopted here. It stands today that, by not changing the signage on unilingual drinking fountains, the Senate is still not compliant with the letter, let alone the spirit, of the OLA.

[45] According to the respondent, simply putting a bilingual sign above unilingual drinking fountains made access to drinking fountain services bilingual. The English word “PUSH” put on the button of each drinking fountain by the manufacturer became redundant and no longer constitutes the means of communication with the public chosen by the Senate.

[46] This latter proposal, which is more of a conjuring, is to distract us from the elephant that is still in the room.

[47] Furthermore, I do not think that the distinction made by the Court in *Picard v Commissioner of Patents*, 2010 FC 86, which the respondent invokes, applies to unilingual drinking fountains, which remain utilitarian objects made available to the public and staff by the Senate. This is all the more evident in the case of an individual who is visually impaired and understands English and/or French: this person cannot read the bilingual sign above drinking fountains, unless there are also Braille inscriptions in both official languages, which is not currently the case.

[48] It needs to be said loud and clear: communication goes hand in hand with service, and vice versa.

[49] The overall spirit of the Charter and OLA must also be considered when interpreting the scope of language obligations. It bears reminding that the House of Commons and the Senate are not only subject to the OLA but also embody the constitutional and quasi-constitutional values recognized in the Charter and the OLA, including, of course, institutional bilingualism (paragraph 2.1.2 of the Senate Policy). In addition, as the central purchaser and main provider of services for federal departments and agencies, PSPC plays a key role in fulfilling the OLA objectives (section 2 of the OLA).

[50] What example is being set for other federal institutions, what message is being conveyed to Canadians, by resorting to a subtle nuance between the sign and the drinking fountain?

[51] We already said it earlier: the visual environment is an element of identity inseparable from the language of communication. Yet, that which has an intrinsic value for a minority group does not necessarily have the same meaning in the eyes of a majority whose language rights are not threatened. To ensure advancement toward the equality of status and use of English and French, linguistic biases must be eliminated.

[52] The relics of the past that express the preponderance of the use of one official language to the detriment of the other in an institutionalized context have no place in the buildings of Parliament and the Government of Canada. This is the case of the unilingual drinking fountains in the Senate, which have become, over time and with the passing years, conspicuously obsolete objects, incompatible with the constitutional principle of the protection of minorities.

[53] To sum up, I do not believe that the bilingual sign placed above unilingual drinking fountains achieves "substantive equality" (*Beaulac* at paragraph 39; *DesRochers* at paragraph 51). English is still predominant since unilingual drinking fountains are still in place in the East Block where they have not been replaced with neutral drinking fountains.

V. **What is the appropriate and just remedy in the circumstances?**

[54] To determine what remedy is "appropriate and just in the circumstances," I exercised the discretion vested in the Court under subsection 77(4) of the OLA based on my careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at paragraphs 52–59). We already described it at length above.

Declaration

[55] The applicant is seeking a declaration that the respondent violated his language rights on September 26, 2016, and that these rights continue to be violated today.

[56] A litigant is entitled to declaratory relief, where the language obligations provided for in the Charter and the OLA are breached (see subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F‑ 7; *Thibodeau v Air Canada*, 2014 SCC 67 at paragraph 132; *Leduc v Air Canada*, 2018 FC 1117 at paragraph 41).

[57] In the case at hand, I feel that a general declaration in this matter, rather than a declaration of a particular violation, or a mandatory injunction, is appropriate and just in the circumstances.

[58] Consequently, the applicant is entitled to a declaration by the Court that the unilingual drinking fountains in the East Block with the English word “PUSH” only, or the English word “PUSH” and its equivalent in Braille only, breach the respondent’s language obligations.

[59] In passing, I note that the restoration and modernization of the Parliament Hill buildings will take a number of years still. In the meantime, Ottawa’s old central train station, which, until just recently, housed the Government Conference Centre, has become the interim Senate Chamber. We can therefore hope that after this judgment, the refit plans for the Centre Block and East Block will include the outright replacement of unilingual fountains in the near future.

Letter of apology

[60] The applicant is also seeking a formal letter of apology.

[61] In the past, this Court recognized that a letter of apology could constitute an appropriate remedy for the violation of an applicant's language rights (see *Thibodeau v Air Canada*, 2005 FC 1621, and *Thibodeau v Air Canada*, 2011 FC 976). The respondent does not oppose this type of remedy, in principle, and submits that the letter of September 28, 2018, is sufficient in the circumstances.

[62] In the case at hand, the clerk thanks the applicant for bringing the situation to his attention and implicitly acknowledges that the Senate failed to fulfil its language obligations and [TRANSLATION] "expresses [his] sincere regret for this situation." While I am sympathetic to the nuance offered by the applicant, who says that [TRANSLATION] "one can express regret for something without apologizing", there is no need to intervene in this case.

[63] Although the clerk's letter does not say [TRANSLATION] "we apologize" in those words, it is clear in the Court's opinion that the Senate's recognition of its language obligations and its willingness to comply with them, and the sincere regret expressed, are sufficient in the case at hand.

Damages

[64] Lastly, the applicant is claiming $1,500 in damages.

[65] These damages seem justified and reasonable to me, given the circumstances and the judicial precedent (see *Thibodeau v Air Canada*, 2019 FC 1102; *Air Canada v Thibodeau*, 2012 FCA 246).

[66] First, it is worth recalling that the wording of subsection 77(4) of the OLA is consistent with subsection 24(1) of the Charter. In *Vancouver (City) v Ward*, 2010 SCC 27, the Supreme Court lists a certain number of factors relevant to damages that enable the fulfilment of the general objectives of the Charter. The function of *compensation*, usually the most prominent function, recognizes that breach of a right guaranteed by the Charter may cause personal loss which should be remedied. The function of *vindication* recognizes that Charter rights must be maintained and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

[67] In short, for damages to constitute an "appropriate and just remedy" pursuant to subsection 77(1) of the OLA, their award must be functionally required to fulfil one or more of the objects of compensation, vindication of the right or deterrence of future Charter breaches (*Ward* at paragraph 32). That is indeed the case here, in the Court's opinion.

[68] On the one hand, although the applicant did not suffer a financial loss, one certainty remains: had it not been for the applicant's complaint, the Senate would have continued to be non-compliant with its language obligations. The violation noted by the Commissioner and the Court was ongoing and lasted for decades before the Senate understood that unilingual drinking fountains are a problem and that a bilingual sign is needed. The applicant's complaint contributes

to this institutional awareness-raising. The applicant is entitled to compensation for the time and effort he invested in asserting the language rights of the French-language minority.

[69] On the other hand, while acknowledging that this could be a good-faith omission or oversight on the Senate's part, there is no *de minimis* violation of a protected constitutional or quasi-constitutional right; any violation that is tolerated, not reported or not corrected ultimately erodes the relevance of protected rights, normalizing their perpetration. The past is an indication of what the future holds. Awarding damages to the applicant speaks to the value that the Court places on protecting minorities and ensuring that this type of remedy has a place in advancing the equality of status between the two official languages.

[70] All things considered, $1,500 is not excessive in the circumstances.

VI. **Costs**

[71] Subsection 81(1) of the OLA provides that costs are at the discretion of the Court and follow the event, unless the Court orders otherwise. There is no reason not to award the applicant costs given the importance of the issues raised and the unique nature of this proceeding. The sum of $700 seems reasonable to me in the circumstances (see *Norton v Via Rail Canada*, 2009 FC 704; *Thibodeau v Halifax International Airport Authority*, 2018 FC 223).

JUDGMENT in T-1756-18

THE COURT ORDERS that:

1. The applicant's legal recourse is allowed in part;
2. The unilingual drinking fountains in the East Block with the English word "PUSH" only, or the English word "PUSH" and its equivalent in Braille only, breach the respondent's language obligations;
3. The letter of September 28, 2018, sent to the applicant is a letter of apology and is sufficient in the case at hand;
4. A sum of $1,500 is awarded to the applicant as damages; and
5. The applicant is entitled to costs in the amount of $700.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michel Thibodeau	FOR THE APPLICANT (ON HIS OWN BEHALF)
Justin Dubois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Emond Harnden LLP Ottawa, Ontario	FOR THE RESPONDENT