Federal Court of Appeal

Cour d'appel fédérale

Date: 20210804

Dockets: A-355-19
A-453-19

Citation: 2021 FCA 159

[ENGLISH TRANSLATION]

CORAM: **DE MONTIGNY J.A.**
RIVOALEN J.A.
LOCKE J.A.

Docket: A-355-19

BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

and

CANADIAN NATIONAL RAILWAY COMPANY

Intervener

Docket: A-453-19

BETWEEN:

ANDRÉ DIONNE

Appellant

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

Heard by online video conference hosted by the Registry

on June 9 and 10, 2021.

Judgment delivered at Ottawa, Ontario, on August 4, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

Federal Court of Appeal Cour d'appel fédérale

Date: 20210804

Dockets: A-355-19
A-453-19

Citation: 2021 FCA 159

CORAM: DE MONTIGNY J.A.
RIVOALEN J.A.
LOCKE J.A.

Docket: A-355-19

BETWEEN:

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Appellant

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

and

CANADIAN NATIONAL RAILWAY COMPANY

Intervener

Docket: A-453-19

BETWEEN:

ANDRÉ DIONNE

Appellant

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

REASONS FOR JUDGMENT

RIVOALEN J.A.

I. INTRODUCTION

[1] André Dionne and the Commissioner of Official Languages of Canada (the Commissioner) are appealing the judgment delivered on July 3, 2019 (amended on September 20, 2019) by Justice Annis of the Federal Court (2019 FC 879) (the Decision). That judgment concerns an application for a Court remedy brought under section 77 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (the OLA). Mr. Dionne's application flowed from a complaint made to the Commissioner against his employer, the Office of the Superintendent of Financial Institutions (the respondent).

[2] In the present case, the Court is being asked to determine the nature and scope of the principle of the substantive equality of language rights with respect to the language of work within federal institutions, and the duty of those institutions to ensure that, in prescribed bilingual regions, their respective work environments are conducive to the effective use of both official

languages and accommodate the use of either official language by their employees. Mr. Dionne alleges that the respondent breached its language duties toward him, as an employee holding a bilingual position and working at an office located in a prescribed bilingual region (Montréal), under sections 34, 35 and 36 of Part V of the OLA.

[3] More specifically, Mr. Dionne alleges that, to perform his primary duties, he was forced to work in English with unilingual employees located in a non-prescribed region (Toronto), in breach of paragraph 36(1)(*a*) or, in the alternative, of subsection 36(2) of the OLA. He also alleges that he was required to work with regularly and widely used documents produced exclusively in English, in breach of paragraph 36(1)(*a*), as well as regularly and widely used computer systems available only in English, in breach of paragraph 36(1)(*b*).

[4] The Federal Court dismissed all of Mr. Dionne's arguments in support of his application for judicial review.

[5] As for the Commissioner, intervener at trial, he was granted leave to appeal as a party in an order rendered by Justice Martineau of the Federal Court on January 12, 2017. In particular, that order granted the Commissioner leave to make written and oral submissions and to appeal any decision of the Court on a question of law as could a party, with the understanding that the leave to appeal would be limited to questions of law. The Commissioner submits that the errors of law committed by the Federal Court have serious consequences on the interpretation of language rights in Canada and have the effect of arbitrarily restricting the scope of the provisions set out in Part V of the OLA.

[6] The Canadian National Railway Company was granted leave to intervene in this appeal by order of this Court dated December 3, 2020. Its intervention is limited to questions of law concerning the scope of the rights and duties under section 36 of the OLA.

[7] Part V of the OLA imposes duties on federal institutions in prescribed regions within the meaning of section 35 with respect to the language of work in the public service. This Court is being asked to interpret, for the first time, the provisions setting out the minimum duties of federal institutions in prescribed regions, namely paragraphs 36(1)*(a)* and 36(1)(*b*) and subsection 36(2).

[8] Part XI of the OLA includes general provisions, including section 91, which limits the authorization to impose certain language profiles on staffing. Rejecting the position taken by all of the parties, the Federal Court concluded that this section was highly relevant to the interpretation of subsection 36(2) (Decision, paragraphs 22–23).

[9] Consequently, this Court's task in this appeal is to examine the interpretation of paragraphs 36(1)(*a*) and 36(1)(*b*) and subsection 36(2) of the OLA and the relevance of section 91 of the OLA and to apply those provisions to the facts of this case to determine whether Mr. Dionne's language rights were breached.

II. FACTS

[10] There is no dispute between the parties as to the facts set out by the Federal Court and they refer us in this regard to paragraphs 33 to 36 and paragraph 47 of the reasons of the

Decision. For the purposes of this appeal, it is sufficient to provide a broad overview of the factual and procedural background.

[11] The respondent is a federal institution subject to the OLA. The respondent's mandate includes the supervision of federal financial institutions to ensure their sound financial condition and compliance with the applicable statutes and regulations pursuant to paragraph 4(2)(*a*) of the *Office of the Superintendent of Financial Institutions Act*, R.S.C. 1985, c. 18 (3rd Supp.), Part I. The respondent is divided into four units, and one of those units—the Supervision Sector—is specifically dedicated to the implementation of that mandate.

[12] At the time of Mr. Dionne's complaint, the respondent had four offices, one of which was located in a region prescribed under the OLA (Montréal) and another in a non-prescribed region (Toronto). At that time, all of the employees at the Montréal office were assigned to the Supervision Sector. However, most of the "specialists" in the Supervision Sector worked from the Toronto office. Only one bilingual specialist position existed, and it was located in Montréal (Appeal Book, vol. IV, Affidavit of Natalie Harrington sworn on February 17, 2016, pages 936–37, paragraphs 13, 17).

[13] Mr. Dionne was based at the Montréal office and was a "generalist" and manager in charge of leading a team of four generalists that supervised financial institutions. His position as a manager required him to work on a regular basis with a team of unilingual English specialists located at the Toronto office. The generalists (or, in this case, their manager) frequently rely on the specialists' expertise, especially when it comes to the various types of risk posed by the

practices of regulated financial institutions. In the words of the Federal Court, which accepted the Commissioner's findings, the specialists assist the generalists "in assessing specific inherent risks, so that they can determine overall risk and make recommendations to financial institutions" (Decision, paragraph 33).

[14] In addition to providing support to the generalists and their managers in highly specialized areas, this collaboration involves the sharing of information of a more general nature with the specialists. Indeed, according to Mr. Dionne's testimony, [TRANSLATION] "[m]anagers of supervision work closely with specialists" to ensure that the specialists are fully aware of the overall context of the financial institution being assessed (Decision, paragraph 37) (emphasis in the original).

[15] For Mr. Dionne, the extent of the consultation with the specialists varied depending on the file. For example, Mr. Dionne testified, in reference to a specific file, that he might consult the specialists on a daily basis or several times a week or month. He reports that, for that file, those interactions took place over a period of five years. Though he does not suggest that the support of the specialists in Toronto is always required, most files required their involvement and, thus, interactions in English. Indeed, according to Mr. Dionne, [TRANSLATION] "every time supervisory activity required the participation of a specialist—which was most of the time—a large part of [his] work had to be done in English" (Decision, paragraph 37) (emphasis in the original). In addition, according to Mr. Dionne, all communications with the specialists were conducted exclusively in English, both verbally and in writing.

[16] Mr. Dionne also testified that, as a manager of supervision, he was bound by the reports made by specialists and was required to incorporate them into his final report to the financial institution. The financial institutions served by the Montréal office often requested service in French, requiring Mr. Dionne to act as a translator, a considerable additional task, to issue a report in French to the financial institution in question. In his testimony, Mr. Dionne emphasized that there was a risk of the translation being inaccurate, as translation was not his profession.

[17] It was under those circumstances that Mr. Dionne filed a complaint with the Commissioner against the respondent in a letter dated November 19, 2010. He alleged that his right to work in French had been constantly breached during his 22 years of service for the respondent (Appeal Book, vol. III, Affidavit of André Dionne sworn on December 23, 2015, Exhibit A, page 723).

[18] On January 7, 2014, following an investigation, the Commissioner produced a final report confirming that the complaint was justified with respect to five areas, namely: a) communications among employees in different regions; b) training; c) professional development; d) work tools; and e) computer systems. The Commissioner made a series of recommendations to correct the respondent's breaches of its duties under the OLA. The Commissioner's first recommendation urged the respondent to [TRANSLATION] "[t]ake steps to make, by March 31, 2014, an objective determination of the language requirements for all positions where the incumbent provides Montréal office employees with training and professional development, so that these services are provided in the preferred official language of the employees in that office" (Decision, paragraph 59).

[19] In response to the Commissioner's final report and accompanying recommendations, the respondent heightened the language profile of eleven (11) essential positions at the Toronto office. Those same manager and director positions in the Supervision Sector, which up to that point had been unilingual, were thus designated bilingual. The respondent's official languages duties were also described in an organizational reference tool provided to all human resources specialists and managers responsible for staffing actions.

[20] In March 2015, in a final follow-up report to the recommendations made, the Commissioner stated that he was of the opinion that his recommendations had been implemented.

[21] Dissatisfied with the final follow-up report, Mr. Dionne applied for a Court remedy under section 77 of the OLA because he considered the Commissioner's intervention to be insufficient to correct the problem in three main areas: a) the relationship between the unilingual English specialists at the Toronto office and the bilingual generalists at the Montréal office; b) the dissemination of the quarterly analysis documents prepared exclusively in English; and c) the use of computer systems available only in English.

[22] The Federal Court dismissed in its entirety Mr. Dionne's application and held that: 1) the principles of interpretation set out in *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 [*Beaulac*] did not apply in this case; 2) the unilingual specialists in Toronto do not provide a "service" to the bilingual generalists in Montréal within the meaning of paragraph 36(1)(*a*) of the OLA; 3) subsection 36(2) of the OLA does not impose a duty on the respondent to ensure that

the specialists' support is available in both official languages in prescribed bilingual regions; 4) section 91 of the OLA "has precedence" over the duties set out in subsection 36(2); 5) the dissemination of quarterly analysis documents is not in breach of paragraph 36(1)(*a*); and 6) the computer systems used by the respondent are not in breach of paragraph 36(1)(*b*).

[23] Mr. Dionne is asking this Court to set aside the Federal Court's decision and to issue a judgment declaring that his rights were breached because the respondent did not fulfill its minimum duties under subsections 36(1) and 36(2) of the OLA. Mr. Dionne acknowledges that the evidence on record does not make it possible to determine whether the problems he raised were resolved by the measures adopted by the respondent and that it is therefore impossible for this Court to grant any remedy other than a declaratory judgment.

[24] The Commissioner is asking this Court to set aside the Federal Court's decision and to declare that Part V of the OLA must be interpreted in accordance with its object, according to the principles established in *Beaulac*.

III. ISSUES

[25] Having reviewed the nature of the issues raised by the parties, I am of the view that we must determine whether the Federal Court erred:

A. In holding that the interpretive principles set out in *Beaulac* apply only to the language rights of a provincial language minority and not to Francophones in Quebec;

B. In holding that the unilingual specialists at the Toronto office do not provide a “service” to the bilingual generalists at the Montréal office within the meaning of paragraph 36(1)(*a*) of the OLA;

C. In holding that subsection 36(2) of the OLA does not impose a duty on the respondent to ensure that the specialists’ support is available in both official languages in prescribed bilingual regions;

D. In holding that section 91 of the OLA “has precedence” over the duties set out in subsection 36(2) of the OLA; and/or

E. In holding that the unilingual dissemination of quarterly analysis documents is not in breach of paragraph 36(1)(*a*) of the OLA and that the computer systems used by the respondent are not in breach of paragraph 36(1)(*b*) of the OLA.

IV. STANDARDS OF REVIEW

[26] The application to the Federal Court was brought under section 77 of the OLA. The relevant paragraphs of that provision for our purposes read as follows:

Application for remedy	**Recours**
77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of	**77 (1)** Quiconque a saisi le commissaire d’une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l’article

section 91, may apply to the Court for a remedy under this Part.	91, peut former un recours devant le tribunal sous le régime de la présente partie.
…	[…]
Order of Court	**Ordonnance**
77 (4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.	**77 (4)** Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

[27] This Court discussed the particular nature of the remedy provided for in section 77 of the OLA in *Canadian Food Inspection Agency v. Forum des Maires de la Péninsule Acadienne*, 2004 FCA 263, [2004] 4 F.C.R. 276, at paragraphs 15–21 [*Forum des maires*]; see also *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194, at paragraphs 32–38 [*DesRochers*]). In that case, the Court emphasized, correctly, that any application brought under section 77 concerns the cogency of the complaint made to the Commissioner, and not the cogency of the Commissioner's report. As the Court explained, "the capacity as an 'applicant' to the Court is derived from the capacity as a 'complainant' to the Commissioner", though the report is to some extent a precondition to the exercise of the remedy provided in section 77 (*Forum des maires* at paragraph 17). However, the Commissioner's "decision"—or rather, the Commissioner's report—is not subject to such a remedy; only the arguments made in support of the complaint are truly at issue. The remedy provided for in section 77 therefore does not concern a "decision" of a federal tribunal and cannot be likened to an application for judicial review within the meaning of section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (*Forum des maires* at paragraph 18). In the Court's view, the application provided for in section 77 "is

basically similar to an action" that can be decided by a trial court (*Forum des maires* at paragraph 19).

[28] In such a context, the case before this Court is not an appeal against a decision on judicial review, thus precluding the application of the analytical framework in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, but rather an appeal against a trial decision. Consequently, the standards of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraphs 8, 10, 27 and 28 apply in this appeal. In other words, the standard of review on a question of law is correctness, and the standard of review on questions of fact or of mixed fact and law is palpable and overriding error, except where a question of law can be isolated, in which case it will be reviewed on the standard of correctness.

[29] In this case, the evidence available on the record to the Court is rather limited. The respondent submitted no evidence at trial to explain why, at the time of the complaint, it had decided to locate its team of specialists in Toronto. This factual vacuum makes this type of case poorly suited to remedial orders issued by an appellate court.

[30] I am of the opinion that the Federal Court made a number of errors of law, particularly with respect to the interpretive principles that form an integral part of the case law. Nevertheless, even by applying a broad and liberal interpretation to the provisions at issue in this case, I arrive at the same conclusion on the merits as the Federal Court with regard to the interpretation of paragraph 36(1)(*a*). As for the duties related to language rights derived from subsection 36(2), I

find that the respondent's practices (or rather its inaction) breached that provision at the time when Mr. Dionne made his complaint to the Commissioner.

[31] Regardless, I consider it important to provide a detailed response to the issues raised in this appeal to make the necessary corrections to the approach taken by the Federal Court and thus to clarify the state of the law with respect to language rights.

V. ANALYSIS

A. *Did the Federal Court err in holding that the interpretive principles set out in Beaulac apply only to the language rights of a provincial language minority and not to Francophones in Quebec?*

[32] There is no doubt in my mind that this first question must be answered in the affirmative, because the Federal Court clearly erred in law when it went astray from the principles set out in *Beaulac*. The parties also agree that the Federal Court repeatedly erred by failing to follow and apply the relevant legal principles with respect to the interpretation of language rights.

[33] It appears to me that the starting point for the Federal Court's analysis is based on a false premise: the approach set forth in *Beaulac* applies only to the rights of a provincial language minority (Decision, paragraphs 88, 90). Thus, the purposive approach to interpretation is said not to apply to matters, such as this one, concerning the language rights of the Francophone minority on a pan-Canadian scale (Decision, paragraph 97). As a Francophone from Quebec, Mr. Dionne is said not to be a member of a "provincial" language minority, but rather of a "national" language minority. The Federal Court also says that it is appropriate to examine the language of

the provisions of Part V of the OLA, as dictated by the modern principle of interpretation, before turning to policy considerations typically associated with the purposive approach (Decision, paragraphs 114–15). Mr. Dionne and the Commissioner submit, correctly, that the Federal Court's position is erroneous.

[34] From the outset, it should be noted that the Federal Court's remarks have the effect of contrasting interpretive approaches that are essentially one and the same. Contrary to the Federal Court's conclusion, the purposive approach set forth in *Beaulac* and the modern method of interpretation are not mutually exclusive. Rather, the modern approach dictates that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at paragraph 21, citing E. A. Driedger, *Construction of Statutes*, (2nd ed. 1983), page 87). In this case, the "entire context" is defined by the interpretive principles pertaining to language rights, including the approach set forth in *Beaulac*.

[35] More important still, the distinction the Federal Court makes between the rights intended to protect a provincial official language minority and those of a pan-Canadian Francophone minority is in no way supported by either the case law or the wording of the provisions at issue. Such a distinction could unduly restrict the scope of language rights, contrary to the doctrine of *Beaulac*. That case dictates the approach to be followed for any matters relating to "the equal status of Canada's official languages and to ensure full and equal access to the country's institutions by Anglophones and Francophones alike", as the Supreme Court recently confirmed

in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261 at paragraph 20 [*Mazraani*]. It is therefore appropriate to take a closer look at that case.

[36] In *Beaulac*, the Supreme Court held that the establishment of institutional bilingualism requires "equal access to services of equal quality for members of both official language communities in Canada" (at paragraph 22) and that language rights have a remedial function because they provide redress for previous injustices that have been committed against the minority (at paragraph 19). Furthermore, language rights are positive rights that "can only be enjoyed if the means are provided" (at paragraph 20) and thus create "obligations for the State" (at paragraph 24). In short, they must be given a broad and liberal interpretation "in a manner consistent with the preservation and development of official language communities in Canada" (at paragraph 25).

[37] However, the Federal Court held that *Beaulac* "has nothing to do with institutional bilingualism or the denial of any rights of a pan-Canadian Francophone minority, which has never been recognized as a community to which a purposive interpretation principle should apply" (Decision, paragraph 97). That holding is erroneous. The Federal Court was bound by the case law and erroneously made artificial distinctions from the approach set forth in *Beaulac*.

[38] Canada's courts, including this Court, have confirmed and applied the principles set out in *Beaulac* numerous times with respect to the interpretation of language rights. The case law reflects a broad consensus, and I have no difficulty to conclude that a strict interpretation of

language rights has been definitively rejected in favour of a purposive approach based on the principle of substantive equality (*Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at paragraph 31; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paragraph 22 [*Lavigne*]; *DesRochers* at paragraph 31; *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139, at paragraphs 29–30; *Canada (Attorney General) v. Shakov*, 2017 FCA 250, at paragraphs 75, 111–16, 119–22 [*Shakov*]; *Mazraani* at paragraph 20; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, 447 D.L.R. (4th) 1, at paragraphs 5–20).

[39] It is also important to keep in mind that Part V of the OLA, which pertains to the language of work in federal institutions, derives its legitimacy from subsection 16(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, 1982, c. 11 (U.K.) (the Charter), which provides that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. Moreover, given its constitutional roots and its essential role in bilingualism, the OLA has quasi-constitutional status (*Lavigne* at paragraphs 22–23; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 at paragraph 12 [*Thibodeau*]).

[40] In the light of this rich case law and the principles set out therein, I agree with the appellants in this case, the Commissioner and Mr. Dionne, that the Federal Court erred at paragraphs 88, 90 to 107, 114 to 115 and 485 of the Decision.

[41] More specifically, the Federal Court erred when it held that the purposive approach applied only to the preservation of "provincial minority official language communities" (Decision, paragraph 90 *et seq.*). It created a false distinction between the rights intended to preserve a language minority on the "provincial" scale, and institutional bilingualism, intended to protect a language minority on the "national" scale. That distinction is not recognized in the law and the case law holds the opposite. It is also contrary to Parliament's intent, as I will discuss later in these reasons. Language rights must be interpreted, according to *Beaulac*, "in a manner consistent with the preservation and development of official language communities in Canada" (at paragraph 25) (my emphasis).

[42] Furthermore, *Beaulac* clearly holds that its interpretive approach must be followed "in all cases" (at paragraph 25) (emphasis in the original). It should be noted that the principles established in *Beaulac* have been applied in recent cases, regardless of the official language community in question (see, for example: *Mazraani* at paragraph 20 (SCC); *DesRochers* at paragraph 31 (SCC); *Tailleur v. Canada (Attorney General)*, 2015 FC 1230, [2016] 2 F.C.R. 415, at paragraph 51 [*Tailleur*]; *Shakov* at paragraphs 75, 111–16, 119–21 (FCA); *Thibodeau v. Canada (Senate)*, 2019 FC 1474, at paragraph 28; *Thibodeau v. Air Canada*, 2019 FC 1102, at paragraph 40). In particular, three months prior to this case being heard before the Federal Court, our Court examined in *Shakov* the issue of whether the staffing of a management position that required fluency in English only was equivalent to the improper conduct prohibited by section 66 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13. This Court thereby examined the application of the interpretive principles established in *Beaulac* to Part V of the OLA (at paragraphs 75, 111–16, 119–21).

[43] Similarly, I am of the view that the Federal Court erred at paragraphs 98 to 107 of the Decision when it incorrectly attempted to compartmentalize and differentiate the principles and the objectives of the OLA to go further astray from *Beaulac*.

[44] In its analysis, the Federal Court propounded a narrow interpretation of the language rights of the pan-Canadian Francophone minority on the basis of arbitrary conclusions about the Preamble and section 2 (Decision, paragraph 98). The Court undertook a rather peculiar exercise of associating the various paragraphs of the Preamble with either the objective of official bilingualism in federal institutions or the objective of the preservation and development of "provincial minority official language communities" (Decision, paragraph 100).

[45] More specifically, to support its conclusion, the Federal Court stated, at paragraph 102 of its reasons, that the following paragraph of the Preamble of the OLA "can only refer to" provincial minority communities given that "[i]f one community is part of a larger community, it must be a different and smaller community":

Preamble	**Préambule**
WHEREAS	**Attendu:**
…	[…]
AND WHEREAS the Government of Canada is committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and	qu'il s'est engagé à favoriser l'épanouissement des minorités francophones et anglophones, au titre de leur appartenance aux deux collectivités de langue officielle, et à appuyer leur développement et à promouvoir la pleine reconnaissance

use of English and French in Canadian society;	et l'usage du français et de l'anglais dans la société canadienne;

[46] However, that interpretation is excessively narrow and is contrary to the objectives of language rights. A broad, liberal and purposive interpretation of that paragraph leads to the conclusion that no distinction can be made between provincial and national language minorities, since they are not mentioned. Moreover, that is the only interpretation consistent with "the preservation and development of official language communities in Canada" and the principle that "[l]anguage rights must <u>in all cases</u>" be interpreted in this manner, regardless of the community in question (*Beaulac* at paragraph 25) (emphasis in the original). Consequently, contrary to the Federal Court's conclusion, there is no distinction between the language rights intended to preserve a provincial language minority and those promoting institutional bilingualism.

[47] Lastly, I consider it important to address certain concerning remarks by the Federal Court. In its analysis rejecting a purposive interpretation of the provisions of the OLA, the Federal Court, in particular, rejected the appellants' argument that *Beaulac* prohibits Parliament from restricting the rights of bilingual Canadians to choose the official language they use at work on the grounds that they are able to communicate in both languages; the appellants argued that such a restriction would disadvantage official language minorities whereas the objective of the Act is to support them. By rejecting that argument, the Federal Court also endorsed the idea that the Francophone minority receives preferential treatment in the federal public service. For example, although Parts IV and V of the OLA protect <u>the</u> official language minorities, the Federal Court refutes the appellants' argument by insisting on its view that "the Francophone official language community, by its greater proficiency in bilingualism . . . already holds a

somewhat advantageous position by the effect of the Parts IV and V of the Act” and that “the services and language of work provisions of the OLA provide the Francophone community with a competitive employment advantage in bilingual regions” (Decision, paragraphs 110, 112) (emphasis in the original). However, for the reasons described above and in the light of the objectives of the OLA, which I will address in the paragraphs to follow, I am of the view that these comments are unacceptable and reflect negative stereotypes that call into question the value of Francophone employees in the public service.

[48] For all of these reasons, I conclude that the Federal Court erred in law as it went astray from the principles set out in *Beaulac*.

[49] Nevertheless, even when the interpretive principles of *Beaulac* are followed, for the reasons set out below, I cannot conclude that the unilingual specialists at the Toronto office provide a “service” to the bilingual generalists at the Montréal office within the meaning of paragraph 36(1)(*a*) of the OLA.

B. *Did the Federal Court err in holding that the unilingual specialists at the Toronto office do not provide a “service” to the bilingual generalists at the Montréal office within the meaning of paragraph 36(1)(a) of the OLA?*

[50] Paragraph 36(1)(*a*) of the OLA, which is central to the appellants’ arguments, reads as follows:

Minimum duties in relation to prescribed regions	**Obligations minimales dans les régions désignées**

36 (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(*a*), to	36 (1) Il incombe aux institutions fédérales, dans la région de la capitale nationale et dans les régions, secteurs ou lieux désignés au titre de l'alinéa 35(1)*a*) :
(*a*) make available in both official languages to officers and employees of the institution	*a)* de fournir à leur personnel, dans les deux langues officielles, tant les services qui lui sont destinés, notamment à titre individuel ou à titre de services auxiliaires centraux, que la documentation et le matériel d'usage courant et généralisé produits par elles-mêmes ou pour leur compte;
(i) services that are provided to officers and employees, including services that are provided to them as individuals and services that are centrally provided by the institution to support them in the performance of their duties, and	
(ii) regularly and widely used work instruments produced by or on behalf of that or any other federal institution;	

[51] I will pause here to note that, although the OLA has been in effect for over 50 years, this is the first time that this Court has dealt with a case concerning the interpretation of paragraph 36(1)(*a*) and subsection 36(2). This is unsurprising, given the magnitude of the task for those who wish to litigate such cases before the Courts.

[52] Clearly, cases concerning language of work rights are possible only if employees who feel they have been wronged by their employer's actions (or inaction) make a complaint to the Commissioner. I acknowledge the courage and perseverance that Mr. Dionne has shown

throughout this process, first as a complainant to the Commissioner and later as an applicant before the Federal Court and now as an appellant before this Court. I think it is people like Mr. Dionne who advance the state of the law in the area of language rights and, for that reason, I particularly commend his participation in the controversy concerning the interpretation of Part V of the OLA. In these circumstances, and given the subtleties of the arguments presented by Mr. Dionne and the other parties, I think it is important to consider the various interpretations of paragraph 36(1)(*a*) that have been submitted to us.

(1) Appellants' arguments

[53] From Mr. Dionne's submissions, I essentially gather that he is seeking a certain balance. He is not seeking to have every specialist position in Toronto designated bilingual, nor that every potential interaction be conducted exclusively in French. Instead, he is arguing that it should be possible for certain verbal and written interactions between him and a Toronto specialist to be conducted in French, and that he should not be systematically required to interact in English.

[54] Mr. Dionne submits that the support the specialists provide to the generalists' work constitutes a "service" within the meaning of paragraph 36(1)(*a*) of the OLA. Correctly interpreted, the word "service" designates any assistance required to enable the employees to perform the duties associated with their respective positions. According to Mr. Dionne, the Federal Court provided an excessively narrow interpretation of the meaning of the word "service" in concluding that "the concept of providing a service and being a member of the [same] team are mutually exclusive" (Decision, paragraph 220). He submits that such an interpretation is contrary to the object of paragraph 36(1)(*a*), would lead to absurd outcomes and is not supported by the wording, context or relevant interpretive principles. According to

Mr. Dionne, if any "complementary" support regularly provided within a "team" were excluded from the scope of paragraph 36(1)(*a*), that provision would presumably be stripped of its substance.

[55] In accordance with the modern method of statutory interpretation, Mr. Dionne argues that it is first necessary to define the ordinary and grammatical meaning of the word "service" and of the related phrases "services that are provided to them as individuals" and "services that are centrally provided." In that regard, he submits that paragraph 36(1)(*a*) applies to all "services" intended for employees of a federal institution. The "services that are provided to them as individuals" and "services that are centrally provided" thus constitute sub-categories of a more general concept. Furthermore, Mr. Dionne sees the use of the word "including" in paragraph 36(1)(*a*) as an indication that the specific types of services referred to in that provision do not limit the scope of the general word "service." Mr. Dionne also notes that a common meaning emerges from the definitions of "service" in both languages, namely that a service is an activity or a series of activities intended to assist or support another person, particularly by providing an advantage or performing an act that will be helpful to that person.

[56] Mr. Dionne then invites us to place the word "service" in its overall context, in the light of the objects of section 36 and of Part V and of the general scheme of the OLA. Mr. Dionne insists on the fundamental distinction made in Part V between two types of regions: prescribed bilingual regions and non-prescribed regions. In the light of that distinction, the object of section 36 is to guarantee that, in prescribed bilingual regions, the use of either official language within the public service will be considered a standard, and not an accommodation (*Beaulac* at

paragraphs 20, 24; *Tailleur* at paragraph 44). As for the general scheme of the OLA, or, more specifically, of Part V, Mr. Dionne submits that, in view of the combined effect of section 34 and subsection 35(1), any bilingual employee working in a prescribed bilingual region has the right to a work environment that is conducive to the use of both official languages and that accommodates their use. That would quite logically imply: a) the right to work in the language of the employee's choice; and b) the right to use either language in other work-related activities that are not directly associated with the performance of the employee's duties. The minimum duties set out in paragraphs 36(1)(*a*) to (*c*), intended to promote a "conducive" work environment, are said to relate to the former: employees have the right to work in the language of their choice. As for the duty of federal institutions to take additional measures "as can reasonably be taken" under subsection 36(2), it is intended to protect the right to use either language in other work-related activities.

[57] Mr. Dionne also submits that, if the Federal Court's interpretation were to be accepted, it would follow that the provision is ambiguous because the interpretation it offers is just as consistent with the wording and object of paragraph 36(1)(*a*). Consequently, he submits that his interpretation is the one that ought to be accepted because it is the broadest interpretation that is consistent with the wording and object of paragraph 36(1)(*a*) (*R. v. Stillman*, 2019 SCC 40, 436 D.L.R. (4th) 193, at paragraph 21; *Interpretation Act*, R.S.C. 1985, c. I-21, section 12).

[58] The Commissioner submits that the Federal Court erred in interpreting Part V in a manner that is inconsistent with its object and with Parliament's intent. More specifically, the Federal Court should have considered qualitative criteria, including the specific context of the

institution, how it is structured, its mandate and the nature of the service offered, when it interpreted the concept of “services that are centrally provided”, which is the type of service involved in this case. On the contrary, the Federal Court interpreted those words in an ambiguous and arbitrary manner by holding that, to fall within the category of “services that are centrally provided,” a service must represent a “formal decision” by the federal institution (Decision, paragraphs 248, 258, item 3).

[59] The Commissioner notes that when the English version is read in conjunction with the French version, the result is that the word “central” refers to a service that plays a central role for the institution because the decision to offer such a service was made at a central or relatively high level of its administration. The Federal Court’s interpretation would instead have the effect of introducing a new concept, that of the need for a “formal decision,” which is not defined and which remains ambiguous.

[60] The Commissioner also submits that the Federal Court’s interpretation of the words “services that are centrally provided” as services provided “centrally” would lead to absurd results by excluding certain services that are important for employees and would enable federal institutions to evade their duties.

[61] In this case, the Commissioner is of the view that occasional interactions or exchanges of information among employees do not in themselves constitute services that are centrally provided.

(2) Analysis of paragraph 36(1)(*a*) of the OLA

[62] The controversy therefore bears on the interpretation of the phrase “services that are centrally provided” in paragraph 36(1)(*a*). I will thus examine the principles of statutory interpretation, not with the intent of performing a *de novo* analysis, but rather to determine whether the Federal Court’s interpretation is consistent with the wording, context and object of the relevant provisions. As I stated above, I am of the view that the Federal Court erred in failing to examine the “entire context” by applying the interpretive principles that pertain to language rights, including the approach in *Beaulac*.

[63] Before interpreting the relevant provisions of the OLA, I will make a few general remarks that apply to the entire analysis of the object of the OLA and of Parliament’s intent.

a) *The object of the OLA*

[64] Pursuant to its Preamble and section 2, the object of the OLA is to ensure equality of status of French and English and equal rights and privileges as to their use in all federal institutions across Canada. The Preamble of the OLA highlights the importance of “enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, [by] fostering full recognition and use of English and French in Canadian society.”

[65] The Supreme Court confirmed that the object of the OLA is “ensuring respect for English and French as the official languages of Canada and the equality of status and equal rights and

privileges as to their use in all federal institutions" (*Thibodeau* at paragraph 9). Furthermore, those rights have quasi-constitutional status (*Lavigne* at paragraph 25).

[66] Although this case does not involve the issue of communications with the public and the provision of services to the public under Part IV, this aspect must be kept in mind because it is employees of federal institutions who offer those services. It is critical that the employees receive adequate support and tools in their positions to offer those services to the public. Moreover, I am of the view that there is a close connection between respect for the choice of the language of work and the quality of services that are offered to the public in both languages.

[67] In *Schreiber v. Canada*, 1999 CanLII 8898, [1999] F.C.J. No. 1576 (QL) (F.C.) [*Schreiber FC*], aff'd. by *Schreiber v. Canada*, [2000] F.C.J. No. 2053 (QL), 267 N.R. 99 (F.C.A.), Justice McGillis summarized the objectives of certain provisions of Parts IV and V of the OLA at paragraph 129 of her reasons. She correctly concluded that sections 35 and 36 "constitute legislative recognition of the fact that right to work in either official language in a federal institution is illusory in the absence of an environment that respects the use of both official languages and encourages them to flourish. The purpose of sections 35 and 36 is therefore to ensure that bilingual workplaces are fostered and developed in federal institutions."

[68] In my view, the object and spirit of the OLA make it clear that bilingual employees working in a prescribed bilingual region have the right to adequate support and tools from their employer in their positions in order to be able to provide high-quality services to the public in

both official languages. This right is illusory in the absence of a work environment that respects the use of both official languages and encourages them to flourish.

[69] I will now examine Parliament's intent when it enacted the OLA provisions in question, as expressed in 1988 during the deliberations of the Legislative Committee on Bill C-72, *An Act respecting the status and use of the official languages of Canada*, 33rd Parliament, 2nd session, 1988. With Bill C-72, the *Official Languages Act*, R.S.C. 1968–69, c. 54, underwent a substantial reform that was legitimized by the constitutional provisions enshrined in 1982 (the Charter) and was inspired by the Meech Lake Accord of 1987. Among other things, that bill broadened the scope of the OLA, addressed the language of work (Part V) and established a court remedy (Part X).

b) *Parliament's intent*

[70] In proposing the adoption of Bill C-72 and the relevant provisions in this case, the Minister of Justice at the time, Ray J. Hnatyshyn, intended for the federal institution [TRANSLATION] "to fulfill its language duties, one way or another," given the institutional nature of the duties involved. For example, if an employee is absent or is unable to provide the service in the required language, the federal institution may hire translators or interpreters to provide the service in the required language. It may also, in some cases, transfer employees or make use of language training to increase its bilingual staff (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, 33rd Parliament, 2nd Session, No. 1 (March 17 and 22, 1988) at page 5:5). Moreover, employees have the right to choose to work in the official language of their choice, but this right [TRANSLATION] "must be exercised in a

reasonable manner" (emphasis added) (*Proceedings of the Senate Special Committee on Bill C-72*, 33rd Parliament, 2nd Session, No. 1 (July 19 and 20, 1988) at page 1:50 (Mr. Hnatyshyn)) [*Proceedings of the Senate Special Committee*].

[71] The remarks of M. D. Martin Low, Senior General Counsel, Human Rights Law Section, Department of Justice, are equally relevant:

> It is important that we start with a clear appreciation of the rights that are being conferred through this provision. The right conferred on the individual employee is that to use either official language, in accordance with Part V of the legislation, and Part V sets out a number of institutional obligations, which obligations will establish the highest common standard within a particular institution to maximize the employee's ability to use the language of his or her choice.
>
> All of that comes together in this concept, imposing a duty on federal institutions to ensure that the work environment of the institution is conducive to the effective use of both official languages and such that it accommodates the use of either official language by individual employees of the institution. That is set out in Clause 35(1)(a).
>
> Obviously, those words are carefully chosen. As well, they are words that are intended to make this right workable, in that they would preclude an individual taking such a rigorous and inflexible position as to his/her entitlement that he/she is able to tie up the work of an institution that is attempting, in a pragmatic way, to make the work environment one in which employees of both language groups are comfortable.
>
> It is not possible to set that out by way of a precise rule that is applicable to every work environment of every federal institution. Government institutions are variable, as are those who are employed in them.
>
> The essence of these provisions is to require federal institutions to think in a way that is intended to maximize the opportunities for individuals to work in the language of their choice, without imposing upon those institutions rigorous and inflexible demands such that the administration of the institution itself is adversely impacted.
>
> (*Proceedings of the Senate Special Committee* at page 1:51) (Emphasis added).

[72] From these excerpts of the Parliamentary debates, I understand that Parliament's intent was, as least partially, to recognize a right to work in the official language of one's choice that is not absolute and that employees must exercise in a reasonable manner. However, a nuance must be made. A federal institution in a bilingual region must maximize the opportunities for employees to use the language of their choice. It has the duty to ensure that the work environment is conducive to the effective use of both official languages and accommodates the use of either official language by its employees. Under these circumstances, I consider Parliament's overall intent to maximize the opportunity for employees working in a prescribed bilingual region to be able to use the language of their choice at work, as is their right, provided that this right is exercised in a reasonable manner.

[73] In the light of the object of the OLA and Parliament's intent, I will now examine the wording of paragraph 36(1)(*a*).

c) *The ordinary and grammatical meaning of the words "services that are centrally provided"*

[74] Paragraph 36(1)(*a*) of the OLA applies to all "services" intended for the employees of a federal institution. The word "service" is not defined in the OLA. Paragraph 36(1)(*a*) sets out certain minimum duties that federal institutions must fulfill in prescribed bilingual regions. Among the services that must be made available to employees in both official languages under that paragraph, Parliament includes services provided to them "as individuals" and "services that are centrally provided." The circumstances of this case relate only to services that are centrally provided.

[75] As to the definitions of the notion of "service", French-language dictionaries generally offer two meanings: one related to an organized administrative function and the other to a more individual relationship. The same is true in English, hence, there is no reason to find that there is any discrepancy between the French and English versions of paragraph 36(1)(*a*). I would be inclined to apply an interpretation of the word "service" that refers to a common function organized within an administrative body. I consider such an interpretation to be suited to the context of subsection 36(1) of the OLA, which is a context of institutional and structured work, that of the public service.

[76] While the French version of paragraph 36(1)(*a*) describes these services as "*auxiliaires centraux*", the English version refers to services "centrally provided by the institution to support [its employees] in the performance of their duties." The French word "*auxiliaires*" corresponds in the English version to the phrase "to support them in the performance of their duties," and the word "*centraux*" is expressed in the English version by the phrase "centrally provided." Therefore, there is no discrepancy between the two versions.

[77] The word "*auxiliaires*" and the phrase "to support them in the performance of their duties" in paragraph 36(1)(*a*) refer to the services the institution provides to employees to assist or support them in the performance of their duties. I accept the Federal Court's conclusion to that effect (Decision, paragraph 205).

[78] The respondent submits that to determine whether a service is "centrally provided", meaning that it is made available to all or a majority of the employees of an institution, the

services in question must be analyzed. It submits, indeed correctly, that the Federal Court erred in concluding that "services centrally provided" comprise services provided for the purpose of assisting or essentially supporting the performance of the employee's duties that have been provided for by a "formal designation of senior management of the institution" (Decision, paragraph 258, item 3).

[79] I also accept the Commissioner's submission that the Federal Court's interpretation of the words "services centrally provided" as requiring a formal decision by the institution is ambiguous and arbitrary. The formal decision criterion unduly restricts the scope of paragraph 36(1)(*a*) of the OLA. The Federal Court's addition of the "formal decision" criterion at paragraphs 248 and 258 (item 3) of the Decision shifts the controversy as to whether services are centrally provided and arbitrarily restricts the scope of paragraph 36(1)(*a*) in a manner contrary to the necessary broad, liberal and purposive interpretation.

[80] This formalistic interpretation is also inconsistent with the guiding principle of substantive equality that applies to language rights. On the contrary, I am of the view that the Court must consider qualitative factors, such as the specific context of the institution, how it is structured, its mandate and the nature of the service offered in order to examine these services. Therefore, to determine whether a service is "centrally provided", meaning that it is made available to all or a majority of the employees of an institution, the services in question must be analyzed.

[81] I also accept the Commissioner's submission that, given the wording of paragraph 36(1)(*a*), the words "services that are centrally provided" may be defined as services that assist employees in performing their duties and that play a central role for the institution, in the sense that it decided at a central or relatively high level of its administration to offer this service to its employees.

[82] I am of the view that an interpretation of the notion of "services that are centrally provided" must also take into account qualitative factors, such as the specific context of the institution, how it is structured, its mandate and the nature of the service offered, while it must be ensured that bilingual employees working in a prescribed bilingual region are adequately supported by the services made available to them and are equipped by their employer in their positions in order to be able to provide high-quality services to the public in both official languages.

[83] This approach is flexible enough to enable federal institutions to adapt to changing circumstances, while complying with the limits established by paragraph 36(1)(*a*). Thus, this interpretation is more consistent with the wording and the spirit of the OLA.

[84] I will pause here to note that a Treasury Board Secretariat Policy on Language of Work in effect from 2004 to 2011 provided a non-exhaustive list of examples of "central services" and "personal services." Although that policy is no longer in effect, it provides examples that are relevant for our purposes (Treasury Board Secretariat "*Policy on Language of Work*" rescinded on November 19, 2012, online: https://www.tbs-sct.gc.ca/pol/doc-

eng.aspx?id=12520§ion=html). Among others, some examples of central services that remain relevant are administrative services; computer services; library, archival and information/communications services; materiel management services; security services and translation services.

[85] I note that these examples support my finding that the federal institution specifically structured the offering of centrally provided services to support or equip employees in the performance of their duties.

[86] Moreover, at the time of the complaint, the Treasury Board of Canada Secretariat had a Policy on Language of Work in effect (Appeal Book, vol. IV, Affidavit of Natalie Harrington sworn on February 17, 2016, Exhibit F, page 982). That policy stipulated that, for interregional communications, an institution located in a prescribed bilingual region must communicate in the official language of the unilingual region for which the communication is intended.

[87] With the interpretive principles in mind, and following the ordinary and grammatical meaning of the words used in paragraph 36(1)(*a*) to ensure that they are consistent with the scheme and object of the OLA, while respecting Parliament's intent and applying the principles set out in *Beaulac*, I arrive at the conclusion that the "services that are centrally provided" referred to in paragraph 36(1)(*a*):

A. Are those that serve a common function and are provided in an organized manner within an administrative body by the federal institution in a prescribed bilingual region;

B. Are made available to the majority of employees by the federal institution;

C. Are provided by employees to provide auxiliary support to other employees of the institution in the performance of their duties;

D. Do not include all forms of assistance required to enable employees to perform the duties associated with their positions—employees must exercise their right to use the official language of their choice in a reasonable manner; and

E. Exclude occasional interactions or exchanges of information among employees on the same work team. Rather, those interactions are examples of interregional communications as provided for in the aforementioned language of work policy.

[88] In this case, the exchanges among generalists and specialists take place within the work team. The generalist determines the overall risk code of the financial institution based on the advice or assessment of the specialist (Appeal Book, vol. V, cross-examination of Natalie Harrington, page 1251; Decision, paragraph 42). The work of the specialists does not “support” or “equip” the generalists in their work. Instead, the generalists and specialists work together on shared files to serve the same clientele (financial institutions).

[89] For the above reasons, notwithstanding the Federal Court’s error in failing to follow the principles set out in *Beaulac*, I arrive at the same conclusion. In this case, the employees who collaborate to carry out an institution’s mandate and are part of a team do not provide a service. The specialists do not provide “services” to the generalists within the meaning of paragraph 36(1)(*a*). Thus, the Federal Court did not err when it arrived at this mixed conclusion of fact and law.

[90] I will now examine subsection 36(2) of the OLA.

C. *Did the Federal Court err in holding that subsection 36(2) of the OLA does not impose a duty on the respondent to ensure that the specialists' support is available in both official languages in prescribed bilingual regions?*

[91] It is relevant to reproduce subsection 36(2) of the OLA:

Additional duties in prescribed regions	**Autres obligations**
36 (2) Every federal institution has the duty to ensure that, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(*a*), such measures are taken in addition to those required under subsection (1) as can reasonably be taken to establish and maintain work environments of the institution that are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees.	**36 (2)** Il leur incombe également de veiller à ce que soient prises, dans les régions, secteurs ou lieux visés au paragraphe (1), toutes autres mesures possibles permettant de créer et de maintenir en leur sein un milieu de travail propice à l'usage effectif des deux langues officielles et qui permette à leur personnel d'utiliser l'une ou l'autre.

(1) Submissions of the parties

[92] Mr. Dionne submits that even if this Court were to decide that the word "service" excludes the support provided by the specialists, it should still hold that the respondent has a duty under subsection 36(2) to make the specialists' support available in both official languages in prescribed bilingual regions.

[93] The Commissioner submits that the Federal Court's interpretation of subsection 36(2) does not reflect the institutional nature of the duties set out in that provision and the standard of substantive equality established in *Beaulac*. It should be noted that the Court rejected the interpretation that was applied in *Tailleur* and instead held that the Parliamentary intent behind that provision was for "bilingual employees to accommodate unilingual employees to some degree" (Decision, paragraphs 24, 265, 348–50, 562).

[94] In its memorandum and oral submissions, the intervener invites us to endorse the analytical framework in *Tailleur*, but suggests restricting its scope with additional criteria. According to the intervener, in addition to the factors listed in *Tailleur*, a measure will also be unreasonable if: a) the measure is out of proportion with its overall effect on the objective to be achieved, that is, a work environment conducive to the effective use of both official languages; b) its implementation would completely or largely prevent French-speaking or English-speaking Canadians from having equal employment and advancement opportunities in federal institutions; and/or c) its implementation would require the use of collateral bilingual staffing.

[95] Lastly, the respondent argues that the submissions of the appellants and of the intervener are contrary to subsection 36(2) and the object of Part V and section 91 and are impractical given the reality of the workplace in federal institutions. The respondent notes that, although it does not agree with every aspect of the Federal Court's interpretive approach, it considers the holding that subsection 36(2) does not preclude the possibility that bilingual employees must accommodate unilingual employees to some degree to be well-founded. Before this Court, in its oral submissions, the respondent raised the following distinction for the first time: the minimum

duties set out in subsection 36(1) concern duties [TRANSLATION] "among employees", while subsection 36(2) concerns duties related to [TRANSLATION] "work environments". Again during oral argument, the respondent sought to distinguish *Beaulac* by suggesting that substantive equality applies only to existing rights, whereas, in this case, Mr. Dionne is basing his argument on the false premise that he has a right that must be interpreted in the same way among bilingual and unilingual employees. According to the respondent, Mr. Dionne's right to use the language of work of his choice when he is working on a team with unilingual specialists does not exist.

(2) Analysis of subsection 36(2) of the OLA

[96] I accept the Commissioner's arguments that the Federal Court erred in law when it made a narrow interpretation of subsection 36(2), particularly by omitting to apply the principle of substantive equality established in *Beaulac* and by rejecting the interpretation of subsection 36(2) applied in *Tailleur* (Decision, paragraphs 24, 265, 348–50, 562).

[97] In *Tailleur*, the Federal Court applied, correctly in my view, the relevant interpretive principles when it analyzed subsection 36(2) (*Tailleur*, at paragraphs 49–53, 55, 61 *et seq.*). It interpreted the phrase "all possible measures" to mean "all measures that it is reasonable to take" and that a federal institution must consider and adopt in order to create a work environment that is conducive to the use of both official languages. It thereby identified a non-exhaustive list of three factors that can be considered in determining whether a measure is unreasonable: "[1] if it imposes significant or serious operational difficulties on a federal institution or [2] if implementing it would cause a demonstrable conflict with Part IV of the OLA on language of

service or [3] with a federal institution's mandate" (*Tailleur* at paragraph 81) (emphasis in the original).

[98] In this case, the Federal Court rejected *Tailleur* on the basis of its previous rejection of the interpretive principles of *Beaulac* (Decision, paragraphs 20–21, 457–62, 474, 477, 485). According to the Federal Court, "'reasonable measures' is the endpoint as Parliament's instrument to ensure that non-compliant work environments, revealed by a well-founded complaint . . . are rendered compliant" (Decision, paragraph 463). To respond to a complaint made under subsection 36(2), it is necessary to begin by determining whether the institution has established the required appropriate official language work environment; if that is not the case, it must be determined what reasonable measures are necessary to ensure an appropriate work environment (Decision, paragraphs 369, 460). In this context, I conclude that the Federal Court erred in law given the applicable interpretive principles, as discussed at paragraphs [32] to [49] above.

[99] For the reasons set out below, this Court should endorse the interpretation of subsection 36(2) of the OLA as expounded in *Tailleur*.

[100] Firstly, subsection 36(2) must be given a broad and liberal interpretation, in accordance with the principles established in *Beaulac*. In *Tailleur*, the Federal Court stated that such an interpretation of subsection 36(2) creates "a positive duty for federal institutions to take measures to establish and maintain work environments that are conducive to the effective use of both official languages" (at paragraph 44). I cannot accept the respondent's submission that

Mr. Dionne is basing his argument on the false premise that he has a right that must be interpreted in the same way among bilingual and unilingual employees. The concept of substantive equality with respect to language rights of an institutional nature "require[s] government action for their implementation and therefore create[s] obligations for the State . . . . It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation" (*Beaulac* at paragraph 24).

[101] The analysis pertaining to substantive equality in this case must determine whether there is a disproportionate negative effect between a unilingual employee and a bilingual employee who wants to work in the official language of his or her choice. Therefore, when we attempt to define the scope of the right that exists for a bilingual employee working in a prescribed bilingual region, it is necessary to ask this question: "What are the needs of a unilingual employee?" It is with respect to that criterion that the scope of the right must be defined. The needs of unilingual employees are relevant because they make it possible to determine what truly constitutes a work environment that is conducive to the use of the official language of one's choice.

[102] Secondly, if we go back to the provisions of Part V of the OLA and to the Parliamentary debates reproduced above, it is clear that Parliament intended to establish a series of standards common to all federal institutions "to maximize the employee's ability to use the language of his or her choice" (*Proceedings of the Senate Special Committee* at page 1:51):

A. Section 34 sets out the general principle that English and French are the languages of work and that everyone has the right to use them;

B. Section 35 introduces a geographic distinction between bilingual and unilingual regions, the former being defined by the general duty of federal institutions to ensure that their work environments are conducive to the effective use of both official languages; and

C. Section 36 specifies the rights of employees and the duties of federal institutions in prescribed bilingual regions.

[103] Thus, the principle set out in section 34 establishes the right of employees to work in the official language of their choice. In the light of the principle of substantive equality, as described in *Beaulac*, it must be assumed that individuals have the right to perform all of their duties in the official language of their choice and that the use of both official languages is the standard for all of the institution's activities. That is precisely what enables a unilingual person to work at a federal institution. Any deviation from these principles must be an exception.

[104] Thirdly, in the same vein, I accept the respondent's submission that bilingual employees must interact with their unilingual colleagues in their official language, to some extent. Nevertheless, the burden of the duties set out in subsection 36(2) remains on federal institutions, which must maximize opportunities for bilingual employees to work in the official language of their choice, without going so far as to impose such rigorous and inflexible demands on them that the administration of the institution would be adversely impacted. This is consistent with the standard established in *Tailleur* that a federal institution cannot circumvent its language of work duties by resorting to bilingual employees, thus shifting its burden onto those employees (Decision, at paragraphs 448–49).

[105] All things considered, *Tailleur* stands for an interpretation of subsection 36(2) that reflects the institutional nature of the duties arising from that provision, thus leading to a broad, liberal interpretation that is consistent with the object of the provisions of Part V and that accounts for the principle of substantive equality. It also stands for an approach that makes it possible to assess whether subsection 36(2) has been breached on a case-by-case basis. In this regard, I do not consider it necessary to add criteria, as suggested by the intervener in order to restrict the scope of subsection 36(2) of the OLA. It is clear that subsection 36(2) does not establish an absolute right for employees in prescribed bilingual regions to work in the language of their choice at all times.

[106] Turning now to the facts at the time of Mr. Dionne's complaint, I note the following:

A. According to the Commissioner's final investigation report, Mr. Dionne's complaint concerned five aspects: a) communications among employees in different regions; b) training; c) professional development; d) work tools; and e) computer systems (Appeal Book, vol. III, Final Investigation Report, page 833);

B. According to the Commissioner's final investigation report, in the context of communications among employees in different regions, the respondent was required to ensure that it had sufficient bilingual capacity to provide services in the aforementioned areas in both official languages (Appeal Book, vol. III, Final Investigation Report, page 829);

C. According to the Commissioner's final investigation report, with regard to training, although the respondent had made some progress, the problem was not resolved because most of the training sessions were still given only in English, by employees from the Toronto office to the employees of the Montréal office (Appeal Book, vol. III, Final Investigation Report, page 829);

D. According to the Commissioner's final investigation report, with respect to professional development, the oral and electronic communications between the Montréal and Toronto offices were conducted exclusively in English, whereas the respondent was required to ensure that the work environment is conducive to the Montréal employees being able to use the official language of their choice (Appeal Book, vol. III, Final Investigation Report, pages 830–31);

E. According to the Commissioner's final investigation report, with regard to work tools, the specialists prepared and exchanged internal documents with the Montréal employees exclusively in English, and the urgency of the constant distribution of regularly and widely used work tools did not dispense the respondent from its duty to provide those tools simultaneously in both official languages (Appeal Book, vol. III, Final Investigation Report, page 832);

F. In the context of his duties, Mr. Dionne was regularly required to work with unilingual English specialists to prepare reports intended for Francophone financial institutions, where a significant portion of the content of the report had been contributed by a

specialist in English (Appeal Book, vol. IV, Affidavit of André Dionne, sworn on April 6, 2016, paragraphs 15, 24, 36, pages 1065–66, 1069);

G. As part of their duties, the bilingual generalists, including Mr. Dionne, had the additional task of acting as translators of documents prepared by the unilingual specialists because, as a result of timeline constraints, it was impossible to wait for a translation, which could take a number of weeks or even months to be completed. In addition, according to Mr. Dionne, there was a risk of the translated content being inaccurate, since translation is not his profession (Appeal Book, vol. IV, Affidavit of André Dionne, sworn on April 6, 2016, paragraph 30, page 1068; Decision, paragraphs 37, 47);

H. The Federal Court found that the bilingual generalists, such as Mr. Dionne, were required to work on a regular basis in both official languages to accommodate their unilingual colleagues (Decision, paragraph 47);

I. The Federal Court found that the bilingual generalists, such as Mr. Dionne, assumed the additional “onerous” burden of translation tasks, unlike the specialists and other generalists who speak English only (Decision, paragraph 47);

J. According to Mr. Dionne’s testimony, during his 22 years of service for the respondent, all of his communications with the employees of the Toronto office took place exclusively in English, including all communications related to the preparation of reports for the public (Appeal Book, vol. IV, Affidavit of André Dionne, sworn on April 6, 2016, paragraph 28, page 1067);

K. According to Mr. Dionne's testimony, since 1990, he has been witness to a number of complaints made by the management of the Montréal office against the management of the Toronto office regarding the ongoing failure to comply with the OLA. Despite those complaints, the respondent took no action to remedy the gaps in the organization's staffing. Consequently, the Montréal employees were forced to perform a very significant portion of their work in English, while serving a predominantly French-speaking clientele (Appeal Book, vol. IV, Affidavit of André Dionne, sworn on April 6, 2016, paragraph 36, page 1069); and

L. According to the conclusion of the Commissioner's final investigation report, despite the commitments the respondent had made since the complaint was filed in 2010, certain longstanding practices were still impeding the use of French in the work environment by the employees of the Montréal office in 2014 (Appeal Book, vol. III, Final Investigation Report, page 832).

[107] In my view, all of these facts demonstrate that the federal institution has breached its positive duty to take measures to establish and maintain a work environment that is conducive to the effective use of both official languages, as required by subsection 36(2). That conclusion is supported in particular by the fact that Mr. Dionne has been systematically forced to work in English even though he was required to write his reports in French. It is also supported by the fact that only bilingual employees, such as Mr. Dionne, performed the onerous task of translating reports intended for the public under Part IV of the OLA. Lastly, I note that the respondent took a considerable amount of time to implement measures to attempt to resolve these problems.

[108] Furthermore, the burden of translation should never rest entirely on bilingual employees. The ability to translate or interpret from one official language to the other is not innate. Indeed, training is provided to individuals who wish to work as translators or interpreters. A bilingual employee in the same position as a unilingual employee should not be required to act as a translator when preparing documents intended for the public. The ability to speak both official languages does not automatically enable a bilingual employee to work as a translator, especially when it comes to the preparation of documents intended for the public under Part IV of the OLA.

[109] Therefore, an example of possible measures for establishing and maintaining a work environment that is conducive to the effective use of both official languages would be to provide a robust translation service. By applying the approach in *Tailleur* to the facts of this case, while incorporating the concept of substantive equality, it would follow that a unilingual English employee would be entitled to an effective translation service that meets the needs of the public if the employee's duties involved, for example, the preparation of reports in English using documents written in French or information that is partially in French. Consequently, in my view, regardless of the ability to communicate in both official languages, employees who hold a bilingual position in a prescribed bilingual region whose work involves preparing reports for the public in French, using documents written in English or information that is partially in English, would be entitled to receive an effective translation service from their employer. The institution is therefore responsible for providing an effective translation service to support and equip bilingual employees in the performance of their duties.

[110] I would add that it follows from this conclusion that a unilingual specialist working on a team with a bilingual generalist to serve a French-speaking public will also be entitled to a translation service for all documents that employee prepares as part of his or her duties, since those documents will be included in a report intended for the French-speaking public.

[111] I am of the opinion that this measure, namely an effective translation service, is not unreasonable. A translation service did exist at the time of the complaint, but it was certainly not adequate to meet the needs of bilingual employees like Mr. Dionne. I do not see how this measure would impose significant or serious operational difficulties on the federal institution. Moreover, its implementation would not result in a conflict with Part IV of the OLA on the language of service, but, on the contrary, would enrich the duties set out in Part IV. I also note that there is no conflict with the federal institution's mandate (*Tailleur* at paragraph 81).

[112] In this case, in response to the Commissioner's final report and accompanying recommendations, the respondent has heightened the language profile of eleven (11) essential positions at the Toronto office. Those same manager and director positions in the Supervision Sector, which up to that point had been unilingual, have thus been designated bilingual. I consider that action to be another example of a possible measure to support the establishment and maintenance of a work environment that is conducive to the effective use of both official languages and that accommodates the use of either language. It is up to the federal institution to choose the measures to be taken.

[113] For all of these reasons, I conclude that the respondent had breached its duties under subsection 36(2) of the OLA at the time of Mr. Dionne's complaint.

D. *Did the Federal Court err in holding that section 91 of the OLA "has precedence" over the duties set out in subsection 36(2) of the OLA?*

[114] Since I am favour in endorsing the approach and comments of the Federal Court in *Tailleur*, I am of the view that section 91 of the OLA does not apply in this case. It was not raised in the complaint made to the Commissioner, and neither Mr. Dionne nor the Commissioner have ever raised its scope. Therefore, I will not discuss this issue any further.

E. *Did the Federal Court err in holding that the unilingual dissemination of quarterly analysis documents is not in breach of paragraph 36(1)(a) of the OLA and that the computer systems used by the respondent are not in breach of paragraph 36(1)(b) of the OLA?*

[115] It is relevant to reproduce paragraph 36(1)(*b*) of the OLA:

Minimum duties in relation to prescribed regions	**Obligations minimales dans les régions désignées**
36 (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(*a*), to	**36 (1)** Il incombe aux institutions fédérales, dans la région de la capitale nationale et dans les régions, secteurs ou lieux désignés au titre de l'alinéa 35(1)*a*) :
…	[…]
(*b*) ensure that regularly and widely used automated systems for the processing and communication of data acquired or produced by the	*b*) de veiller à ce que les systèmes informatiques d'usage courant et généralisé et acquis ou produits par elles à compter du 1er janvier 1991

institution on or after January 1, 1991 can be used in either official language; and	puissent être utilisés dans l'une ou l'autre des langues officielles;

[116] Paragraphs 36(1)(*a*) and 36(1)(*b*) provide that, as minimum duties of federal institutions in prescribed bilingual regions, they must make available to their employees, in both official languages, regularly and widely used work instruments produced by or on behalf of that federal institution. They must also ensure that regularly and widely used automated systems can be used in either official language.

[117] These issues raise mixed conclusions of fact and law that warrant our intervention only in the event of a palpable and overriding error.

[118] According to the evidence, the documents in question do not constitute "regularly and widely used" work instruments. Thus, the Federal Court's mixed conclusion of fact and law on this issue was not in error (Decision, paragraphs 610–11).

[119] As for the computer systems, the Federal Court stated that it was of the opinion that it was unnecessary to examine that issue since the evidence showed that one of the two software programs was no longer in use, and the other was being replaced by a system available in both official languages. Moreover, the software program that was being replaced was highly specialized and was therefore not regularly and widely used (Decision, paragraphs 617–21). I do not find any error.

VI. CONCLUSION

[120] For all of the above reasons, I am therefore of the view that Mr. Dionne's complaint was well-founded. The respondent breached its language duties toward Mr. Dionne under subsection 36(2) of the OLA.

[121] Therefore, the Federal Court's decision to dismiss Mr. Dionne's application should be set aside, and that the appeals of Mr. Dionne and of the Commissioner should be allowed.

[122] The evidence on record is insufficient for me to be able to determine the remedy that the respondent must provide.

[123] As agreed between the parties, no costs will be awarded.

"Marianne Rivoalen"

J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKETS:	A-355-19 A-453-19
DOCKET:	A-355-19
STYLE OF CAUSE:	COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA v. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS and CANADIAN NATIONAL RAILWAY COMPANY
DOCKET:	A-453-19
STYLE OF CAUSE:	COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA v. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS and CANADIAN NATIONAL RAILWAY COMPANY
PLACE OF HEARING:	BY ONLINE VIDEOCONFERENCE
DATE OF HEARING:	JUNE 9 AND 10, 2021
REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	AUGUST 4, 2021

APPEARANCES:

DOCKET:	**A-355-19**
Elie Ducharme Isabelle Bousquet Roxanne Comeau	FOR THE APPELLANT COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Nadine Dupuis	FOR THE RESPONDENT OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
Alexa Biscaro Patrick Lévesque	FOR THE INTERVENER CANADIAN NATIONAL RAILWAY COMPANY
DOCKET:	**A-453-19**
Érik Labelle Eastaugh Gabriel Poliquin	FOR THE APPELLANT ANDRÉ DIONNE
Nadine Dupuis	FOR THE RESPONDENT OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

SOLICITORS OF RECORD:

Office of the Commissioner of Official Languages of Canada Legal Affairs Branch Gatineau, Quebec	FOR THE APPELLANT COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS
Norton Rose Fulbright Canada, L.L.P. Ottawa, Ontario	FOR THE INTERVENER CANADIAN NATIONAL RAILWAY COMPANY
CAZA SAIKALEY, S.R.L./L.L.P. Ottawa, Ontario	FOR THE APPELLANT ANDRÉ DIONNE