Federal Court  Cour fédérale

Date: 20190920

Docket: T-759-15

Citation: 2019 FC 879

Ottawa, Ontario, September 20, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

ANDRÉ DIONNE

Applicant

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES

Intervenor

AMENDED JUDGMENT AND REASONS

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I. Introduction

[1] This is an application under subsection 77(1) of the *Official Languages Act*, RSC 1984, c 31 (4th Supp.) [OLA] by the Applicant in response to a final investigation follow-up report [Follow-up Report], in docket 2010-0783, issued by the Office of the Commissioner of Official Languages [OCOL] in March 2015.

[2] The Applicant raises intractable issues of interpretation of two languages of work provisions found in Part V of the OLA pertaining to bilingual regions. Nonetheless, both issues have the potential of requiring significant staffing changes of unilingual positions in federal institutions to a bilingual designation, not only in prescribed regions [“prescribed” or “bilingual” regions], but as well in non-prescribed regions [“non-prescribed” or “unilingual” regions] of Canada.

[3] The Applicant is a bilingual Francophone employee of the Office of the Superintendent of Financial Institutions [OSFI]. Mr. Dionne has been on sick leave since 2009. At that time, he was leading a team of supervisors, described as “generalists”, who monitor various financial institutions. He is situated in Montréal, a bilingual region prescribed under the OLA. He worked regularly with unilingual employees, described as specialists, situated in Toronto, a unilingual region under the OLA. The generalists and specialists worked regularly together to carry out the functions of supervising financial institutions for the OSFI.

[4] The first issue relates to the interpretation of section 36(1)(a)(i) of the OLA. The Applicant claims the specialists in Toronto are providing him with services pursuant to this provision, and therefore they must be provided to him in his first language, i.e. allow him to work entirely in his first language. Accordingly, the unilingual specialist positions in Toronto are required to be staffed by bilingual personnel. In settling the complaint, the OSFI agreed to change the language requirements to staff 11 specialist positions with bilingual personnel. The Applicant seeks a remedy that would require further specialist positions to be staffed bilingually.

[5] Section 36(2) of the OLA is the second provision of interest. It requires federal institutions to provide work environments that are conducive to the effective use of both official languages and accommodate the use of either in bilingual regions. If applied, this would only permit the Applicant to use his first language in communications with the specialists in Toronto. The Applicant argues that by this provision, he is entitled to communicate using his first language with the specialists in Toronto, thereby similarly requiring their positions to be occupied by bilingual specialists. I use the term "collateral bilingual staffing" to describe the effect of the Applicant's argument, whereby the Toronto specialists' positions would be required to be staffed bilingually due to the exercise of language rights by the Applicant pursuant to section 36(2) in a bilingual region, although not required by the objective functions of the position.

[6] In priority to requirements arising out of Parts IV and V, i.e. section 36(2), section 91 prohibits staffing of a position unless the official language requirements are objectively required to perform the functions for which the staffing action is undertaken. By its wording, the bilingual designation of the specialist positions in Toronto could not be objectively required to perform the functions of the position and would infringe the provision. It is therefore, a significant contextual provision limiting the application of section 36(2).

[7] I disagree with the Applicant's interpretation of section 36(1)(a)(i), which is supported and enhanced by the Commissioner. I find that the generalists and specialists work in a team environment and that skills and lessons learned from the specialists while carrying out their duties would not qualify as a service pursuant to section 36(1)(a)(i). I also conclude that the

relationship of the specialists and generalists working together is not a centrally provided service, or "services . . . centraux", as these terms are used in the provision.

[8] I similarly disagree with the interpretations of the parties and the Commissioner that 36(2) can be interpreted to apply the principle of collateral bilingual staffing, including that such an interpretation is not contextually supported by section 91 of the OLA. Both provisions I conclude express the intent of Parliament that bilingual employees are required to accommodate to some degree unilingual employees in their shared work environment.

II. Abridged interpretive conclusions

[9] I believe it is useful to present a form of executive summary describing somewhat my analytical and interpretive paths that lead me to reject the Applicant's two principal issues based on my interpretations of sections 36(1)(a)(i) and 36(2) of the OLA. I present them at the introductory stage to assist what is a lengthy and detailed decision that considers two highly ambiguous provisions. The intention is for these comments to serve as a roadmap of my analysis that lies ahead. The relevant legislation is contained in an appendix to these reasons. However, I present the key provisions, with my emphasis, in this introduction to facilitate understanding my analysis and when addressing interpretative issues.

[10] Section 36(1)(a)(i): the services claim:

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,	**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

that is prescribed for the purpose of paragraph 35(1)(a), to	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	

[11] The Commissioner supported the Applicant, although with a much broader interpretation of what constitutes a service under section 36(1)(a)(i) and with a different construction from that originally described in the Final Investigation Report. All parties concluded that the bilingual versions were irreconcilable and that the English version was preferred as being the clearer of the two, with reference to the French version when it suited their purpose. This is perhaps understandable given that four different interpretations in total were provided, as well as two Treasury Board policies that did little to clarify the provision's meaning. I took a different path from all of the submissions and concluded that the bilingual versions are reconcilable.

[12] The Court's task of interpreting section 36(1)(a)(i) was not assisted by 2004 and 2012 TBS Language of Work Policy Directives. The policies use the somewhat misleading term "personnel" [les services personnels] to describe the provision of services to employees "as individuals" [à titre individuel]. This adds to the confusion surrounding the distinction with the term "services auxiliaires" in the French version, which is the most ambiguous phrase in the provision. The policies also required a service under section 36(1)(a)(i) to be essential to the performance of duties, which I found was not a requirement of the provision.

[13] On a related matter, I am concerned by the happenstance manner that I came upon the Treasury Board 2017 TBS Policy on Learning, Training, and Development [2017 Learning Policy]. The document is highly relevant to the definition and provision of a service; particularly as training and professional development services were the centerpiece of the Applicant's and Commissioner's submissions, at least initially. I ultimately relied upon the 2017 Learning Policy as the example of what should constitute a centrally provided service in section 36(1)(a)(i).

[14] I ultimately concluded that the two versions could be reconciled in light of the more deductive approach used by French language drafters, for example, that did not express the definition of the term "services", which was implicit by the dictionary definition of the word. As a former director of a French language translation centre I perhaps have an appreciation of the different approaches to interpretation used by Canadian legislative drafters. Broadly speaking, the results of the deductive interpretation of the French version led me to understand that the purpose of the term "auxiliaire" was not to describe an underlying character of a service, but only to distinguish between the two categories of services. This, with the recognition that the

English version was somewhat pleonastic, unlocked to some degree my interpretation of the remainder of the provision.

[15] With respect to the category of services provided to employees as individuals [à titre individuel], this refers to those provided by the simple fact of being an employee of the institution; in other words, available to all employees of the institution. This would include, for example, health, administrative and professional career development services, unrelated to supporting the employees in the performance of their duties.

[16] With respect to the category of services centrally provided to support employees [à titre de services auxiliaires centraux] by the English version in the performance of their duties, I rejected the Applicant's and Commissioner's interpretations of section 36(1)(a)(i) that the specialists were providing services to the generalists, because they were in a "team-like" relationship. This describes a group of employees with complementary skills, operating with a high degree of interdependence, accountable for their collective performance towards a common goal and shared rewards. A team relationship is mutually exclusive to that of a service relationship.

[17] I further rejected the Commissioner's submission by concluding that a "centrally provided" service was one arising from a formal decision of management to recognize the activity as a service, as opposed to the nature of the relationship between employees. This is similar to the decision taken by the Treasury Board in the 2017 Learning Policy. It provided for the provision of training and professional development services in the Federal Public Service. I

also concluded that Individual services are centrally provided, but that this requirement is implied by the definition that such services apply to all employees of the institution and by that fact could only be centrally provided.

[18] Section 36(2): work environments that accommodate [permettra à] the use of either official language

(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 [1st category] conducive to the effective use of both official languages and [2nd category] accommodate the use of either official language by its officers and employees.	**(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 [1ere catégorie] en leur sein un milieu de travail propice à l'usage effectif des deux langues officielles et [2e catégorie] qui permette à leur personnel d'utiliser l'une ou l'autre.

[19] Section 91: staffing required to be based on merit

91 Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.	**91** Les parties IV et V n'ont pour effet d'autoriser la prise en compte des exigences relatives aux langues officielles, lors d'une dotation en personnel, que si elle s'impose objectivement pour l'exercice des fonctions en

cause.

[20] The Parties and Commissioner considered themselves bound by this Court's earlier decision in *Tailleur v Canada (Attorney General)*, [2016] 2 FCR 415, 2015 FC 1230 [*Tailleur*]. Accordingly, the Applicant argued that section 36(2) must be strictly interpreted to impose a peremptory duty on institutions to justify any occasion when bilingual employees are required to use their second language of choice ["second language"]. Justification of the use of second language required the institution to meet a three factor test created by the Court, including that "significantly serious" detriment to the operations of the institution would otherwise result. The Applicant relied upon this reasoning in seeking the collateral bilingual staffing of additional specialist positions in Toronto.

[21] I respectfully disagree with many aspects of the reasoning in *Tailleur*. It appears that the decision largely endorsed submissions of the Commissioner, which are similar to those made before me. Also the Court was not required to consider section 91 of the OLA.

[22] There was a dispute over whether the Court should consider section 91. I tentatively concluded that the Respondent's highly circumscribed submission that section 91 should prevent the requirement for additional bilingual specialist positions in Toronto would similarly apply to the staffing of all of the specialists positions. Accordingly, I sought directions from the parties which delayed the completion of these reasons. Both parties submitted that I did not have the jurisdiction to consider the application of section 91, as it was not the subject matter of a complaint which provides the foundation of my jurisdiction. The Commissioner did not

challenge my jurisdiction, only that section 91 was not relevant for a number of reasons provided, all of which I rejected.

[23] I concluded that section 91 was highly relevant to the interpretation of section 36(2). I concluded that the provision was the embodiment of the merit principle. Parliament has drawn a bright line based on merit indicating that the application of the provisions in Parts IV and V should have no bearing on the staffing of positions unless required for the performance of the positions. This means that work environments in bilingual regions will in some degree comprise a mixture of bilingual and unilingual employees, further meaning that bilingual employees will be required to apply their bilingual skills to accommodate their unilingual colleagues.

[24] Apart from section 91, I also concluded that Parliament's intent in enacting section 36(2) was to provide for some degree of accommodation in work environments by bilingual employees of their unilingual colleagues. It is in this regard that I respectfully disagree with several of the opinions expressed in *Tailleur*, including the following:

- As mentioned, the adoption of a purposive interpretation of section 36(2) intended to maintain and develop the Francophone Canadian minority community applied throughout the decision. This purpose would usurp and contradict Parliament's clear expression that the purpose of institutional bilingualism, as specifically described in the Preamble and other provisions of the OLA, is that of maintaining the equality of status and privileges of the use of both official languages. I disagree with the Applicant's argument that this would disadvantage Francophones who have a higher incidence of bilingualism, because bilingual Canadians are already advantaged in bilingual regions by the application of the

merit principle in respect of the service and career requirements, among others, for employment in federal institutions.

- The interpretation of the scheme of section 36(2) that did not focus on the requirement that institutions provide linguistically appropriate "work environments" as the overall requirement. This required institutions to comply in meeting the two objectives described in the provision. Recognizing the scheme of the provision being on attaining appropriate official language work environments, directs the attention of the Court to focus on a more collective use of official languages in an institution's work environments, rather than the sole consideration of the individual complaint. The interpretation of the scheme of section 36(2) that examines the totality of the linguistic work environment therefore follows a different evidentiary trajectory from that of a single work relationship. Because the parties and Commissioner did not consider the Respondent's obligations in broader terms of providing a suitable linguistic environment, the Court did not have the appropriate evidence with which to decide whether the OSFI failed to comply with section 36(2) by not providing the Applicant with a compliant work environment.

- With further respect to the scheme of section 36(2), the failure to recognize that compliance by the institution was for it to achieve a threshold of providing appropriate official language work environments. It must first be determined that the institution failed to provide an appropriate official language work environment. If not, then it is required to take measures to correct the situation.

- The omission to consider or interpret the second objective in the English version that "work environments … accommodate the use of either official language" [the

accommodation objective]. This extended to considering the preference of the English version over the French co-equivalent “qui permet à leur personnel d’utiliser l’une ou l’autre”. It also led to the failure to consider the term as requiring a compromise of conflicting language use. This is corroborated by related contextual terms in section 36(2), which also suggest flexibility in the application of language requirements.

- The related omission to interpret or consider the other significant terms in section 36(2) that contextually support the accommodation objective, i.e. “work environments/milieu de travail”, “conducive/propice” and “either/both” suggesting flexibility in the application of language requirements.

- The interpretive methodology and interpretation of the phrase “such measures as can reasonably be taken” and its co-equivalent “toutes autres mesures possibles”. This failed to recognize that “such” and “reasonably” describe a discretionary approach to the consideration of a compliant work environment, thereby further contextually supporting a solution-oriented resolution of language of work concerns required where linguistic accommodation is necessary.

- The differences of opinion regarding (1) the contextual effect of section 36(1)(c)(i) [requirement that managers use an “appropriate or necessary” choice of language with subordinates] for the maintenance of a work environment that is conducive to the use of both official languages; (2) the precedential support of the jurisprudence cited; and (3) the extrinsic evidence from the Parliamentary debates at the time of passage of the language of work provisions, which I concluded support the conclusion that Parliament

intended workplaces wherein bilingual employees will accommodate unilingual employees to some degree to allow them to work together.

[25] I further concluded that the determination of appropriate official language work environments would require the development of assessment instruments comprising factors that could be applied across a variety of different work environments to determine the compliance of work environments with section 36(2).

[26] In this regard, I conclude that the first objective of work environments, that of being conducive to the effective use of both languages, should be accorded a degree of priority over the accommodation objective when presented with the choice. This reflects the essential need for a bilingual workforce and the longer-term goal of achieving highly bilingualized work environments in bilingual regions for federal institutions to properly function in both bilingual and unilingual regions. I also recommend that institutions consider technological and other measures to alleviate the extra burden imposed by working in two languages, which in no way is reflected by the bilingual bonus.

[27] Although relevant to employees working in differently designated regions, the issue of communications between bilingual and unilingual regions was not meaningfully addressed in the proceedings. I conclude that in most cases employees in bilingual regions are required to use the language of unilingual employees in unilingual regions. In most cases it is understood that communications are not just with individuals, but are intended to be shared in work environments with other employees. This makes the requirement for translation in a unilingual

region operationally wasteful in comparison with the use of the bilingual skills of the employee in a bilingual region.

[28] There is also the presumption that bilingual and unilingual regions reflect the linguistic skills of employees' in those regions, such that Parliament intended that bilingual employees will communicate in the language of unilingual employees in a unilingual region, without which communications cannot occur.

[29] In addition, as noted by the Applicant's remedy seeking the bilingual staffing of the specialist co-worker's positions, this would be an exercise of impermissible collateral bilingual staffing, not based on merit under section 91, which has application to all positions in federal institutions.

III. Facts

A. *The Applicant's duties within the OSFI*

[30] The Canadian Office of the Superintendent of Financial Institutions [OSFI] was created in 1987 under the *Office of the Superintendent of Financial Institutions Act*, RSC 1985, c 18 (3rd Supp), Part I. The OSFI is a federal institution within the meaning of the OLA. One of its objects, set out in paragraph 4(2)(a), is to supervise financial institutions in order to determine whether they are in sound financial condition and are complying with their governing statute law and supervisory requirements under that law.

[31] The OSFI has approximately 700 employees spread across four (4) offices, located in Ottawa, Toronto, Montréal and Vancouver. The Ottawa and Montréal offices are in regions designated as bilingual, whereas the Toronto and Vancouver offices are in unilingual English regions.

[32] The OSFI's activities fall under two general functions: supervision and regulation. At the time of the complaint, the OSFI was composed of four (4) units: the Supervision Sector, the Regulation Sector, the Corporate Services Sector, and the Office of the Chief Actuary. The employees at the Montréal office were part of the Supervision Sector.

> [TRANSLATION]
>
> The Supervision Sector includes the following divisions: the Deposit-taking Group, the Life Insurance Group, the Property and Casualty Insurance Group, the Supervision Support Group, and the Supervisory Practices Division.
>
> While OSFI's Head Office is in Ottawa, most of the employees in the Supervision Sector, including all senior directors, are in OSFI's Toronto office. The senior supervisors at the Montréal regional office report to the managers and directors in the Deposit-taking Group, the Life Insurance Group, or the Property and Casualty Insurance Group.
>
> [Emphasis added.]

[33] The members of the Supervision Support Group in Toronto are specialists who analyze various types of risk, including credit or capital risk. They assist supervisory staff in the Deposit-taking Group, the Life Insurance Group, and the Property and Casualty Insurance Group in Montréal in assessing specific inherent risks, so that they can determine overall risk and make recommendations to financial institutions. These specialists are also part of other levels of employees and managers who may be called upon to participate in a file.

[34] Most of the staff at the Montréal office are Francophones, and all employees, except the director and her administrative assistant, are generalists supervising financial institutions. The vast majority of the specialists in Toronto who provide support to Montréal employees hold English essential positions or speak English only.

[35] Very often in the course of supervisory work, internal supervisory processes require generalists to leverage the expertise of specialists in various areas at the OSFI's Toronto office to determine the compliance of a situation in a regulated financial institution, because they do not have this specialized knowledge. Generalists should rely heavily on the support of specialists in the performance of their duties.

[36] The Applicant indicated that specialists were used on a case-by-case basis. They could be used less frequently in some files, and more frequently in others. The Applicant was once assigned a file that involved highly technical issues that had been in play for five, six years. For that specific file, specialists could be relied upon on a daily basis or several times a week or month. This went on for five years. The Applicant explained that the file [TRANSLATION] "was somewhat special". He said that, sometimes, support from the specialists in Toronto was not required for a specific supervision.

[37] The Applicant's supplementary affidavit contains the following additional evidence regarding his ongoing work with specialists:

> [TRANSLATION]
>
> 12. Under OSFI internal policies, specialists had to prepare their own reports on the issues within their expertise. These reports had to make observations as well as recommendations as to the course

of action required of OSFI. As a manager of supervision, I was bound by specialists' reports, which I actually had to incorporate into my final reports to the financial institutions.

13. Managers of supervision work closely with specialists as these people assess the file, to share the information required and thereby allow the specialists to properly understand the overall context of the company and the report being assessed. These communications are verbal or written.

14. In addition to having to incorporate specialists' final reports and recommendations into my own final reports, I had to consider their various observations in making my own recommendations. Sometimes, specialists' reports would influence or even dictate my assessment of the file aspects directly under my purview.

15. This means that while the final report issued to the financial institution bore my signature, a very large portion of its contents had been imposed on me by another employee, in accordance with internal supervisory processes.

. . .

28.(a) Throughout my 22 years at OSFI, all of my communications with staff at the Toronto office were exclusively in English, including all the communications described above.

29. Thus, every time supervisory activity required the participation of a specialist—which was most of the time—a large part of my work had to be done in English. Any communication with the specialist was in this language, including the specialist's final report.

30. If the financial institution being supervised had asked to be served in French, which is the case for many of the clients served by the Montréal office, the specialist's report had to be translated before it could be incorporated into my final report. Since I could not, because of deadline constraints, allow myself to wait for the translation, which could take several weeks, if not months, to complete, most of the time I had to work with the specialist's English report in preparing the parts of the final inspection report that were under my purview. In addition to having to use this essential work tool in English, I had to act as a translator—a considerable additional task—before I could send my communication to the financial institution. Moreover, and as a result, there was a risk of rendering words inaccurately, as translation was not my profession.

[Emphasis added.]

[38] The Applicant testified that roughly half of his institutions had selected French as their language of correspondence (questions 24 and 25). His relevant evidence continues as follows:

[TRANSLATION]

32. As another example, the Securities Administration Unit manages the eligibility of the assets in trust that financial institutions have to deposit. Nobody in that unit speaks French, even though it often has to deal with Francophone supervisors. This unit must also serve the public, that is, our regulated institutions, which it is unable to do in French. I often had to act as an intermediary between this unit and Francophone institutions.

37. In 2006, OSFI senior management decided to hold a formal meeting in Montréal to have a serious discussion on language issues. The meeting was mandatory for all members of senior management and all senior directors in Toronto. The director of human resources gave a presentation, entirely in English, on the importance of respecting both official languages at OSFI, and shared copies of the presentation, written only in English, with all Montréal staff.

[Emphasis added.]

[39] The Respondent provided more detailed evidence that does not contradict but rather complements the Applicant's evidence. The most comprehensive explanation of the way in which the specialists and generalists work together in a larger work environment, as indicated at paragraph 22 of Natalie Harrington's supplementary affidavit dated June 19, 2016, is as follows:

[TRANSLATION]

22. Thus, the generalists in charge of supervision are not required to become experts in all areas covered by the specialist groups. Rather, they are required to incorporate the specialist groups' risk assessments into their consolidated risk assessments after discussing with these specialists and within the Supervision team the risks they had identified and the best ways to respond to them. I

> am told that the generalists in charge of supervision are not bound by the specialists' reports. The specialists provide their opinions, and it is up to the generalists in charge of supervision to decide on the best way to incorporate them into the overall assessment of the institution's risks. This decision is made within the Supervision team after discussion. Following these discussions, the specialists' recommendations are incorporated as is, modified or even left out.

[40] Moreover, the Applicant did not attempt to describe or specify why he considered that his communications with specialists fell within the nature of services, when he generally understood the meaning of the expression, as the term has a broad application and use. I concluded that Mr. Dionne was a fair and honest witness who did not evade in any way or fail to answer the questions asked. He never claimed in his initial complaint or in his affidavits that he received services in the course of his work with the specialists. It seems that it is not necessarily his opinion that the specialists provided him with services.

[41] The Respondent's affiant testified that it was in fact the Commissioner who had interpreted professional development as including all meetings and discussions between employees (paragraph 51 of his affidavit), and rejected this conclusion at paragraphs 53 and 54:

> [TRANSLATION]
>
> 51 More specifically, in this regard, OCOL concluded that when Montréal office employees consulted supervision specialists at the Toronto office for advice or input, or when Montréal employees met with Toronto employees, this was professional development that had to be offered in the preferred official language of the employee receiving the professional development.
>
> 53 Contrary to OCOL's conclusion, OSFI is of the view that when generalists at the Montréal office consult specialists in the Supervision Support Group at the Toronto office, they are not receiving professional development. Rather, they are getting the specialists' views on certain topics of expertise to incorporate them into their overall risk assessments . . . .

> 54 . . . In responding to generalists, supervision specialists are not providing job training. They are simply performing a task that is included in their regular workload. In short, the interactions between generalists and specialists are part of the regular work of each group.
>
> When describing the degree of knowledge required of the Applicant to work with specialists, the affiant writes that [TRANSLATION] "[h]e has to understand the specialists' advice and the work that they do".

B. *Findings of fact*

[42] Overall, I conclude that the generalists and specialists work as interdependent members of a team that can sometimes involve more experienced staff in the hierarchy. While the specialists have superior knowledge of the factors relating to specific areas of risk, they also rely on the generalists to obtain relevant information and to update this information.

[43] When involved, the specialists provide a general, but not final, direction for the reporting and communications provided by the customer institutions. The generalists exercise their decision-making authority independently, and the two parties agree that there may be situations of disagreement by the generalist who has to sign the report, which seems to be an assignment of certain delegated responsibilities. This will involve the participation of senior managers to finalize the report or the issue.

[44] Generalists need sufficient knowledge of the issues that specialists deal with, to understand what they are recommending and why. But I conclude that this would not extend to knowledge of the level of complexity of specialists. It would seem that they work at another level of analysis.

[45] There is no doubt that specialists share some knowledge with generalists in their reports and recommendations so that the generalists who have to work with customer institutions can explain the reports and other communications if necessary. However, the Applicant clearly lacks evidence describing exactly what this knowledge transfer consists of. The Court was not provided with any examples or analogies to better understand the alleged job training or development of the Applicant resulting from these exchanges, if applicable. To some extent, this undermines the case that the Applicant must make.

[46] However, given the very broad meaning that OCOL ascribes in its initial memorandum to the definition of service, it does not seem that a service requires a [TRANSLATION] "professional development" aspect as presented in the Final Investigation Report. Instead, a service is simply defined as one [TRANSLATION] "that makes it possible to support or assist employees and that is therefore useful in the performance of their duties". Thus, if a group of employees' work is useful on a regular basis, but not essential, in carrying out another employee's work, it is a "service auxiliaire" within the meaning of subparagraph 36(1)(a)(i). It should be noted at this point that the requirement not to render the service essential is an additional change in the Commissioner's position compared to the one stated in her Final Investigation Report.

[47] Two other factors seem to play into the Applicant's complaint. First, the bilingual generalists have more tasks than the specialists and the generalists who speak English only. They are forced to work in both languages regularly to accommodate their unilingual co-workers, which include the onerous tasks of translating documents and interpreting conversations to make the organization's client-institution communication system work.

[48] Second, it would seem that certain relevant service issues could justify the need for bilingual specialists. Of course, services to the public have priority, under Part IV of the OLA, over employees' right to work in the language of their choice under Part V of the Act. If a Francophone institution in Montréal needs to get to the heart of a problem or an issue with a report or risk assessment, it is very possible that these discussions will require the involvement of specialists, given their in-depth knowledge of the analysis of the underlying assessments. Staffing positions according to services is merit-based and inherent in the requirement that the public receive services in the language of their choice.

C. *History of the complaint*

(1) Chronology

[49] In a complaint filed with the OCOL in November 2010, the Applicant alleged that his right to work in French had been violated constantly throughout his 22 years of employment with the OSFI, but more flagrantly in the latter years. In support of his complaint, he had included six (6) documents.

[50] In June 2013, the OCOL issued a preliminary investigation report [Preliminary Report]. Then, on July 23, 2013, the OSFI forwarded to the OCOL its comments regarding the Preliminary Report.

[51] On January 7, 2014, the OCOL published its Final Investigation Report. At the end of the Report, the OCOL concluded that the complaint was justified, and made seven (7)

recommendations to the OSFI. The Final Report indicated that the OCOL would follow up on the recommendations in April 2014.

[52] On March 3, 2014, the OCOL sent the OSFI a letter, indicating that it would soon follow up on the recommendations in the Final Report.

[53] On March 11, 2015, after various exchanges between the OCOL and the OSFI, the OCOL published its Follow-up Report, in which it concluded that the OSFI had satisfactorily implemented the recommendations in its Final Report.

D. *Final investigation report*

(1) Training and professional development services

[54] The purpose of the OCOL's investigation was to [TRANSLATION] "determine to what extent OSFI has met its obligations". It touched on, among other things, training, professional development, work tools and computer systems, with the first two topics being the most relevant.

[55] During the hearing, the OCOL and the parties indicated that the Court should not rely upon or consider the definitions and distinctions made in the Final Investigation Report concerning the terms "formation" [training] and "perfectionnement professionnel" [professional development]. Similarly, it was suggested that the Court disregard the categorization of these services under the two service categories described in the report as "les services personnels et centraux" [TRANSLATION] "personal and central services". I agree that the definitions of these

terms and how the Commissioner would apply them to the two categories of the services under section 36(1)(a)(i) is not correct in many respects in the Final Investigation Report.

[56] The alleged services provided by the specialist to the generalists was said to fall under the category of professional development. It should have been described as a training service. The distinction between the two types of learning services is basically that professional development services are intended to assist employees further their careers, whereas training is for the successful performance in a job. I believe that the Commissioner may have been misled in part by the use of the term "personal services" used in the TBS Policies.

[57] Regardless of this distinction, the pertinent passage from the Final investigation report found at paragraph 4.3 of the report that describes the nature of the generalists' work relationship and dependency on the specialists is as follows, with the Court's emphasis:

> [TRANSLATION]
>
> Employees who work in regions designated as bilingual for language-of-work purposes, for example Francophone employees at the Montréal regional office, are entitled to receive professional development in the official language of their choice. . . . To perform their tasks, they depend on their co-workers in the Supervisory Practices Division and the Supervision Support Group in Toronto.
>
> . . . As part of their supervisory duties, Montréal employees consult specialists in Toronto for advice on their analysis and supervision of financial institutions. Specialists in the Supervisory Practices Division in Toronto develop frameworks and models, draft guides and guidelines, and train and advise the senior supervisors who work in Montréal. The members of the Supervision Support Group in Toronto are specialists who analyze various types of risk, including credit or capital risk. They assist supervisory staff in the Deposit-taking Group, the Life Insurance Group, and the Property and Casualty Insurance Group in Montréal in assessing specific inherent risks, so that they can determine overall risk and make

> recommendations to financial institutions. The specialists who design products, draft material and analyze risk train their co-workers [the generalists] who supervise financial institutions. These same people assist and support them in their work once they have been trained.

[58] As a result of these factual determinations, the Commissioner indicated that the OSFI would have to change its linguistic environment for the employees in Montréal to encourage them to use their first language, which, although not transparently stated, is a facet of all of the submissions and decisions in regard to this matter and would require the bilingual re-designation of specialist positions and their bilingual staffing in Toronto, by indicating as follows:

> [TRANSLATION]
>
> In light of the foregoing, OSFI must see that the work environment encourages Montréal employees to use the official language of their choice. To that end, the language requirements of positions where the incumbent is responsible for providing professional development, training or other personal and central services must be determined in a way that truly reflects the tasks to be performed. OSFI must take corrective action in this regard.
>
> [Emphasis added.]

[59] The Commissioner made a number of recommendations based on the OSFI undertaking the bilingual re-designation and staffing of specialist positions in Toronto so as to enable them to provide bilingual learning services to the generalists, the most relevant being the first of two recommendations, which are as follows:

> [TRANSLATION]
>
> 1. Take 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;

> 2. Put on hold all staffing actions for all positions where the incumbent provides Montréal office employees with training and professional development, until recommendation 1 has been fully implemented;

[60] The OSFI disagreed with the Commissioner that the specialists were providing services to the generalists. The OSFI claims that the Commissioner agreed with the OSFI, which statement was not contradicted by the Commissioner. The OSFI nevertheless re-designated 11 bilingual specialist positions. In its March 2015 Follow-up Report, the OCOL concluded that recommendations 1 and 2 and related recommendations had been implemented.

(2) Work tools and computer systems

[61] The OCOL described the regularly and widely used work tools for employees as including, but not being limited to, the instruction manuals, procedures and directives, policy documents, terminology and specialized documents that employees need to perform their tasks. The OCOL indicated that specialists produced and shared with Montréal staff internal documents that were available only in English, including section notes, supervisory review notes and quarterly supervisory reports, and that Montréal staff needed and used regularly to carry out their tasks.

[62] The Commissioner made the following recommendations with respect to the subjects:

> [TRANSLATION]
>
> "See that all computer systems used regularly by employees in bilingual regions are available in both official languages;
>
> See that all work tools used regularly by employees in bilingual regions are available in both official languages."

[63] In its initial response, the OSFI indicated that all programs, for instance those of the Microsoft Office suite and the intranet platform, were available in both official languages. However, OSFI acknowledged that some professional in-house applications were available in English only, including BI Tool, which Montréal supervisory staff use for financial analyses.

[64] In December 2010, the OSFI informed the OCOL that the Information Technology [IT] Sector was planning to remedy the situation, but that the project in question had been delayed. The OSFI added that the application would soon be replaced and that the new application would be available in both official languages.

[65] Finally, OCOL's conclusion was as follows:

> [TRANSLATION]
>
> Despite the outstanding issue of the computer systems and the impending end of the working group's mandate, we can say that, overall, OSFI satisfactorily implemented the recommended measures, in accordance with its official languages obligations. We will close this file.

IV. Legal framework

[66] The relevant provisions are reproduced in Annex A.

V. Issues

[67] The issues are as follows:

1. What is the Court's jurisdiction to hear this application?
2. What are the principles for interpreting the provisions of Part V of the OLA?

3. What are the nature and scope of federal institutions' duties under section 36(1)(a) of the OLA?
4. What are the nature and scope of federal institutions' duties under sections 35(1) and 36(2) of the OLA?
5. What are the nature and scope of federal institutions' duties under section 36(1)(a) and section 36(2) of the OLA in non-prescribed regions?
6. What are the nature and scope of federal institutions' duties under section 35(1)(b)?
7. What are the interpretation and scope of the remedy under Part X of the OLA?
8. Is the remedy sought appropriate and fair?

VI. The Court has jurisdiction to consider whether the OSFI has complied with paragraph 36(1)(c) and subsection 36(2)

[68] The Respondent contends that the Applicant never raised a specific complaint regarding either section 36(1)(a) requiring the provision of services by the specialists in the first language of the generalists, or section 36(2) regarding the right of the generalists to communicate in their first language with the specialists.

[69] Its submissions at paragraph 32 of its initial memorandum apply to both circumstances, as follows:

> [TRANSLATION]
>
> 32. Since the role of the Court is limited to verifying the merits of the complaint filed with OCOL and since OCOL did not raise this specific issue, the Court should not consider those interactions between generalists and specialists that would be contrary to the OLA.

[70] Accordingly, it is argued that the Court does not have jurisdiction to entertain either of these issues, as neither is a violation of a right or a duty mentioned in the complaint for which a remedy could be sought pursuant to section 77(1) of the Act.

[71] This submission raises two questions for consideration. First, what is the content of the Applicant's complaints? Second, to what extent can the Commissioner elaborate on the complaints, specifically?

[72] There may have been a third issue as to whether the Applicant may raise a further ground in the court case that arises from the facts of the complaint, but not considered by the Commissioner, i.e. the OSFI's noncompliance with section 36(2), but it has not been raised, nor have submissions been provided to the Court and I will therefore not pursue it.

[73] I think the first two questions may be answered by drawing an analogy of sorts with the pleading rules in a court action. First, in terms of the requirements of a statement of claim, the underlying rule is that the plaintiff need only plead the facts that he or she relies upon. There is no need to plead the law which would give rise to the remedy. ~~[Please find Canadian authority to the same effect below: https://books.google.ca/books?id=E4w6jrivaHkC&pg=PA302&lpg=PA302&dq=lord+denning+pleading+facts&source=bl&ots=jA0T7LhL4d&sig=u-7sufBzaoCHMjr5DofkC4MjmQs&hl=en&sa=X&ved=0ahUKEwiYg9eV-rzcAhVO4VMKHY3PAhgQ6AEIUjAE#v=onepage&q=lord%20denning%20pleading%20facts&f=false]~~See for example, the *Federal Courts Rules*, SOR/98-106 ~~with my emphasis~~ at sections

174: “Every pleading shall contain a concise statement of the material facts on which the party relies, …” and 175: “A party may raise any point of law in a pleading.”

[74] Given that it is common ground that the provisions of the OLA must be interpreted liberally and generously for the purpose of fulfilling Parliament’s intention of providing a broad inclusive remedy to repair situations of noncompliance of the Act, the interpretation of the facts to some extent may be interpreted in the same fashion: *Thibodeau v Air Canada*, [2014] 3 RC8 340 at paragraph 112 and the *Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[75] Secondly, in court pleadings there is a distinction made between providing particulars of a claim for clarification purposes, as opposed to amending the claim by adding a new one based on different facts. That rule would similarly apply to the limits of the Commission’s ability to interpret the complaint in terms of the scope of its investigation and findings of fact related to the complaint and the application of suitable remedies.

[76] Using this analogy somewhat, the Commissioner may particularize the complaint by seeking additional related facts of the complaint in an investigation that could provide relevant details about the nature of the complaint. This obviously extends to thereafter determining whether and to what extent the institution has failed to comply with the OLA and seeking the appropriate remedy to repair the situation. Accordingly, the only real issue is whether the facts stated in the complaint are sufficient to permit an investigation that particularizes those facts and applies appropriate remedies as a result.

[77] Given that the Respondent's submission is that the Applicant [TRANSLATION] "did not raise this specific issue", it would be my view that this would not prevent the court having jurisdiction so long as the facts described in the complaint, liberally and generously interpreted, while being subject to further particularization by an investigation into those facts, bear no relation to the violations of the OLA claimed by the Applicant.

[78] The Court agrees with the Respondent that the complaint makes no specific reference to relations between the specialists and generalists in terms of the services they provide, or for that matter, in any regard, including any reference even to the specialists being the unilingual co-workers situated in the non-designated region of Toronto. The Court nevertheless concludes that there is sufficient factual information in the Applicant's complaint to support the Commissioner framing the issue raised as one pertaining to training "services", as well as the Applicant's additional submission alleging a violation of section 36(2) of the Act.

[79] It is recalled that the Applicant's formal complaint is set out in two letters dated November 19 and 24, 2010. The letter of November 19, 2010 described the complaint in general terms, specifically the claim that [TRANSLATION] "disregard for French is firmly entrenched in the organization's culture" and further that "my right to work in French was violated constantly throughout my entire career with this federal employer, but more flagrantly in the latter years".

[80] The second letter provided particulars of the complaint in six accompanying handwritten documents, some with attachments. Most relevant to this issue are documents #1 and #2 that

referred to « un exercice trimestriel appelé ‘Quarterly Monitoring’ », which describes the circumstances of English being the language of inter-worker communications, as follows:

> [TRANSLATION]
>
> “The supervision teams that work in French never obtain these analyses in French. Moreover, they never have discussion forums in French, because all meetings associated with this process are always and systematically held executively in English. This significantly prejudices the supervisors who work in French, having chosen French as their language of choice in their exchanges with OSFI.
>
> Although the documentation is translated into French, all training is administered by unilingual Anglophone employees, and therefore provided exclusively in English.”

[81] In assessing the pith and substance of the Applicant’s complaint as a layperson not informed of the intricacies of the OLA, the Court concludes that in the first letter the objection referred to a work place environment which was not conducive to the use of French ([TRANSLATION] “disregard for French is firmly entrenched in the organization’s culture”), while the particulars in documents #1 and #2 express the Applicant’s frustration at not being able to use his language of choice in communications with fellow employees because English is the normal language of work at the OSFI and raises this issue in the context of training.

[82] The Applicant has largely described his complaint in terms of his work environment relating to communications between the generalist and the specialists not being conducive to the use of French in that most if not all communications in the OSFI generally occur in English, with a training issue being raised as a further example. With this factual foundation, the Court sees no overreaching on the part of the Commissioner to conclude that the Applicant’s complaint relates to a possible language of work violation under sections 35 and 36 of the OLA.

[83] Again, it is not to be overlooked that the protection of language rights constitutes a fundamental constitutional objective and requires particular vigilance on the part of the courts. This perspective extends not only to the requirement of generously construing the provisions of the Act that confer rights along with the remedies that may be applied, but should similarly avoid the adoption of technical and restrictive interpretations of what is sufficient in terms of describing the essence of a complaint to be processed and acted upon by the Commissioner.

[84] Moreover, the Commissioner and the institution involved are not in a true adversarial relationship, as both seek the same objective, which is to adhere to the requirements of the Act. The concept is to get to the bottom of the problem, and having arrived there, to set out the circumstances of the complaint and the alleged violation of any right or duty in the Act.

[85] Accordingly, the Court does not find that the issues raised in this application exceed the bounds of the Applicant's complaint.

VII. Principles of interpretation of institutional official language provisions of the OLA

(1) Purposive interpretation

[86] The purpose of the language of work Part V provisions of the OLA is to ensure equality of status and equal rights and privileges as to their use in all federal institutions. Beyond the recognized principle that the OLA, as a quasi-constitutional statute, must be given a liberal and generous interpretation, there is no other principle of interpretation that applies except the modern one. It requires a court to read the words of an Act 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 SCR 27, 1998 CanLII 837 at para 21.

[87] The Applicant, supported by the Commissioner, argues that all language right provisions must be purposively interpreted with the view to maintaining and developing what is described as the official language communities in Canada (as opposed to provincial minority communities). The Applicant acknowledges that "official language minority communities" whether provincial or pan-Canadian refers to the minority Francophone communities, particularly in the institutional setting because of greater bilingual proficiency in comparison with the Anglophone community.

[88] The obvious intent of the Applicant's argument is that the principle should apply to prop up his arguments respecting his language rights under sections 35(1)(a)(i) and 36(2) of the OLA. This opinion has been adopted and applied with great vigour in the *Tailleur* decision, relied upon by the Applicant. As indicated, I respectfully disagree with the application of such an interpretive principle to the institutional official language provisions of the OLA for the reasons that follow.

(2) The jurisprudence only supports a purposive interpretation to assist provincial official language minority communities

[89] The Court in *Tailleur* commences its review of the principles of interpretation of the OLA by declaring that they are "widely accepted", as described at paragraph 50 of the decision, which is as follows with my emphasis:

> [50] It is widely accepted that language rights in Canada "are meant to protect official language minorities in this country and to insure the equality of status of French and English" and "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities" (*R v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768 [*Beaulac*] at para 25, 41).

[90] I am in agreement with this statement, but only in so far as it refers to the specific context of provincial official language communities. Understandably in the circumstances of provincial official language minority community rights, it is absolutely essential that a purposive interpretive approach be adopted with the view to their preservation and development. Policy underlying this purposive approach is based upon the fact that Francophone provincial minority communities, are highly "at risk" because of the assimilative forces that act on them. See for example *Association des parents de l'école Rose des vents v. British Columbia (Education)*, [2015] 2 SCR 139, 2015 SCC 21 at paragraph 28: "Left neglected, the right to minority language education could be lost altogether in a given community. Thus, there is a critical need both for vigilant implementation of s. 23 rights, and for timely compliance in remedying violations."

[91] The maintenance and preservation of provincial Francophone communities provide essential linguistic bridges between the two unilingual official language communities in Canada, and therefore represent important real and symbolic bulwarks supporting national unity. The principles applying to official language institutional bilingualism are completely language neutral.

[92] The Court in *Tailleur* did not attempt to define the phrases "official language minorities" or "official language communities", nor how exactly this purposive interpretation should be

applied to support his interpretations. In the circumstances, this merits a consideration of the statement in *Beaulac* in relation to the context of the statement being made.

[93] In the first place, I am satisfied that the reference in *Tailleur* to the Supreme Court decision in *Beaulac* refers to provincial minorities when addressing the interpretative purpose of preserving and developing official language communities in Canada. The short passage in *Beaulac* at paragraph 25 where the interpretive statement is made is as follows:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, supra, at p. 850.

[94] The citation at page 850 in the *Reference re Public Schools Act (Man.)* decision is devoted to the protection of provincial official language communities, even though at times it refers to minority language rights without identifying that they relate to those in provinces. The relevant passage from the decision at page 850 under the heading of "General Interpretative Principles" is as follows, with my emphasis:

> 'Several interpretative guidelines are endorsed in *Mahe* for the purposes of defining s. 23 rights. Firstly, courts should take a purposive approach to interpreting the rights. Therefore, in accordance with the purpose of the right as defined in *Mahe*, the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French- language minority in the province. Secondly, the right should be construed remedially, in recognition of previous injustices that have gone unredressed and which have required the entrenchment of protection for minority language rights. As M. A. Green observed in "The Continuing Saga of Litigation: Minority Language Instruction" (1990-91), 3 Education & Law Journal 204, at pp. 211-12:
>
> > The Court conceded that the majority cannot be expected to understand and appreciate all of the

> diverse ways in which educational practices may influence the language and culture of the minority, and thus if section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that the minority have a measure of control over both facilities and instruction.
>
> In passing, one should note, as this Court held in *Ford v. Quebec (Attorney General), 1988 CanLII 19* (SCC), [1988] 2 S.C.R. 712, at pp. 777-78, that the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province.'

[95] Preservation of provincial minority communities was relevant to the *Beaulac* decision, inasmuch as Mr. Beaulac was an accused in a criminal matter taking place in a provincial criminal court, which is not a federal institution. As a member of the Francophone provincial minority in British Columbia, he sought a form of judicial service - that of being tried for murder by a judge and jury in the Superior Court of British Columbia who could understand French.

[96] As a form of service, had it been sought from a federal institution, such as the Federal Court sitting in British Columbia, the right to receive the service in French would be unquestioned. It would be guaranteed simply by the interpretive principle of the *Charter* and the OLA that stipulates the requirement that the two official languages should enjoy an equality of status and use in federal institutions.

[97] *Beaulac* involved official language minority rights where judicial services were being denied in the province of British Columbia. These facts define the *ratio decidendi* explaining why reference was made to the preservation and development of provincial official language

minority communities in a matter and involving the denial of the provision of judicial services, although not provided by a federal institution. The case 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.

(3) Parliament distinguished between the purpose of official bilingualism in federal institutions, and that of supporting provincial minority official language communities

[98] It is also evident from the Preamble and purpose provision (section 2) of the OLA that Parliament provided two distinctive purposes for the interpretation of distinct objectives of the Act, one of which already includes the protection of provincial official language minorities.

[99] The first six preamble paragraphs address the purpose of ensuring the equality of status and equal rights and privileges as to the use of the official languages in federal institutions – what is known as official bilingualism. On the other hand, the last two paragraphs describe an entirely different purpose with respect to preserving and developing provincial official language minority communities, absent any connection to language rights or official bilingualism in federal institutions.

[100] These distinctions can be seen by comparing the preamble paragraphs (as I have numbered them) relating to the two interpretive purposes relating to federal institutions and the preservation and development of provincial minority official language communities. They are as follows, with my emphasis:

Preamble

1. WHEREAS the Constitution of Canada 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;

2. AND WHEREAS the Constitution of Canada provides for full and equal access to Parliament, to the laws of Canada and to courts established by Parliament in both official languages;

3. AND WHEREAS the Constitution of Canada also provides for guarantees relating to the right of any member of the public to communicate with, and to receive available services from, any institution of the Parliament or government of Canada in either official language;

4. AND WHEREAS officers and employees of institutions of the Parliament or government of Canada should have equal opportunities to use the official language of their choice while working together in pursuing the goals of those institutions;

5. AND WHEREAS English-speaking Canadians and French-speaking Canadians should, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment in the institutions of the Parliament or government of Canada;

6. AND WHEREAS the Government of Canada is committed to achieving, with due regard to the principle of selection of personnel according to merit, full participation of English-speaking Canadians and French-speaking Canadians in its institutions;

7. 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 use of English and French in Canadian society;

8. AND WHEREAS the Government of Canada is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services

> in both English and French, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French;

[101] Paragraphs 5 and 6 of the Preamble are of interest because they would appear specifically to contradict any concept of a purposive interpretation of language of work provisions favouring one language community in terms of obtaining employment advantages, not based on the merit principle. The Applicant is seeking a remedy that would require the linguistic reclassification of positions of specialists in Toronto. A similar employment issue arose in *Tailleur*, although not perhaps recognized, but which I discuss. These two paragraphs of the Preamble would reject this outcome if obtained by a purposive interpretation principle tending to favour one language community creating an equality of rights and privileges as to use, besides being in violation of the merit principle.

[102] The 7th paragraph of the Preamble, by its allusion to developing the English and French linguistic minority communities can only refer to the provincial minority communities when placed in the subsequent wording that they are "an integral part of the two official language communities in Canada". If one community is part of a larger community, it must be a different and smaller community. The reference to the English and French linguistic minority communities therefore, can only refer to the provincial minority communities that are part of the greater pan-Canadian English and French official language communities.

[103] The last paragraph in the Preamble confirms Parliament's intention to refer to the objective of supporting and developing minority official language communities by the

Government of Canada's commitment to cooperating with provincial governments for that purpose.

[104] A similar distinction between purposes regarding those solely in respect of federal institutions and those to support provincial official language minority communities is found in the purpose provision, being section 2 of the OLA, as follows with my emphasis:

Purpose	**Objet**
2 The purpose of this Act is to	**2** La présente loi a pour objet:
(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;	**a)** d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, leur égalité de statut et l'égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l'administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en oeuvre des objectifs de ces institutions;
(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society;	**b)** d'appuyer le développement des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

[105] The purposes described at the last two preamble items and section 2(b) of the OLA are carried forward at Part VII of the Act under the heading "Advancement of English and French",

Sections 41 and 43. Neither refers to the purposes of federal institutions being relevant. Section 41 restates section 2(b) of the OLA which includes supporting the development of English and French linguistic minority communities. Section 43 refers to the specific mandate of the Minister of Canadian Heritage. This includes at section 43(d) the mandate to encourage and assist provincial governments to support the development of English and French linguistic minority communities etc., obviously in their respective provinces.

[106] Finally, the Treasury Board Secretariat has also indicated in the clearest of terms that the reference to English and French linguistic minority communities refers to the provincial minority in its 2012 Policy on Official Languages at paragraph 3.4 when speaking to the duties of the Minister of Canadian Heritage in the area of official languages described at section 43(1)(a) in being required to take measures to enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development, as follows:

> 3.4 The OLA also defines the responsibilities and duties of the Minister of Canadian Heritage in the area of official languages. This role relates to the obligation of institutions to adopt positive measures in order to support the development of English and French linguistic minority communities and advance the equality of status and use of the English and French languages within Canadian society.
>
> English and French linguistic minority communities
> English-speaking population in Quebec and French-speaking population outside Quebec.
>
> [Emphasis added.]

[107] Thus, it is obvious that the Applicant's argument for a purpose that favours one language community over the other in the interpretation of language of work provisions is in flagrant conflict with the stated purpose of institutional bilingualism. Parliament has already indicated

that as regards federal institutions, the purpose of the OLA is to ensure the equality of use and privileges of the two official languages. By applying statements favouring one language community over the other, the result usurps Parliament's statement of purpose of institutional bilingualism set out in the Preamble and purpose section of the OLA. A purposive interpretive approach, which is just another manner of stating Parliament's intention, might have some purchase, had Parliament not already set out explicitly what the purposes of the provisions are. However, the Applicant's submission, as endorsed in *Tailleur*, would override the purpose of enacting official language institutional bilingualism expressly decreed by Parliament, contrary to the fundamental objective of statutory interpretation.

(4) The OLA has re-balanced past disadvantages of the Francophone minority community in federal institutions

[108] One of the Applicant's submissions in support of an expansive interpretation of language of work rights in the OLA based on a "purposive interpretation" of its provisions, is found at paragraph 89 of its initial memorandum. The particular reference is with respect to the application of section 36(2) to support contextual bilingual staffing. But the same argument is advanced by the Applicant and Commissioner with respect to section 36(1)(a)(i). This submission is as follows with my emphasis:

> [TRANSLATION]
>
> "89. This Honourable Court also noted the principle set out in *Beaulac*, namely that it was not Parliament's intention to restrict the rights of bilingual Canadians, to deny them the right to choose their official language of work because they can communicate just as well in either language. A contrary interpretation would disadvantage official language minorities, who have the highest incidence of bilingualism in the country, when language rights legislation was precisely designed to assist them."

[109] Obviously, the minority with the highest rates of bilingualism refers to the Francophone minority in Canada. In essence, what the Applicant implicitly argues is that the re-designation of unilingual positions to bilingual positions favours the Canadian Francophone minority given its members greater facility to work in two languages. I am not aware of any issue of assimilation or the like caused by Francophone Canadians working in federal institutions in bilingual regions.

[110] There are at least three significant problems with such an argument, beyond the fact that it is in total conflict with Parliament's express purpose of official bilingualism to favour one language group over another. First, the Francophone official language community, by its greater proficiency in bilingualism as acknowledged by the Applicant, already holds a somewhat advantageous position by the effect of the Parts IV and V of the Act*:* Section 27 requiring the bilingual provision of services to Canadians; Section 36(1)(a)(ii) requiring the similar provision of bilingual services to co-workers in federal institutions; and particularly Section 36(1)(c)(i) and (ii) that requires supervisors and managers be bilingual. Significant job opportunities for bilingual Canadians in bilingual regions have been created, to the competitive disadvantage of their unilingual compatriots.

[111] Second, the merit principle is the source of advantages accruing to bilingual Canadians in federal institutions. It is not just a tendentious interpretation policy that would favour employment opportunities for one language community over another in bilingual regions. The only means for a Federal government of two official language communities to function with more than 80 % of the population being unilingual is by means of bilingual Canadians. Bilingual personnel are essential to the good and competent operation of the Federal public service. The

advantage of course arises to bilingual Canadians in that more than 80 % of the population cannot compete with them for jobs. Indeed, they cannot really contemplate a career in federal institutions in bilingual regions which require a facility in both official languages.

[112] Given that the services and language of work provisions of the OLA provide the Francophone community with a competitive employment advantage in bilingual regions based on merit due to its acknowledged proficiency in bilingualism, it is entirely inconsistent to throw merit out the window where language skills are not a staffing factor by claiming a different advantage on the basis of an alleged purposive interpretation of sections 35(1)(a)(i) or section 36(2).

[113] Third, the Applicant is only speaking for bilingual Canadians. I suppose the collective good of its bilingual members is to the benefit of all members of a community. Nevertheless, it appears highly discriminatory of unilingual Canadians, approximately 55 % of whom make up the population of the Province of Québec. It is just because language has always been a means to discriminate against different language communities that it would appear that the historical discrimination operating on distinctions between language communities, should now be applied on a language proficiency basis to override the merit principle in federal institutions.

(5) The methodology of applying a purposive interpretation

[114] I also have concerns about the methodology of the application of the purposive interpretation principle. It should not be resorted to as a means to avoid first undertaking a comprehensive and holistic interpretation of provisions such as sections 36(1)(a)(i) and 36(2). By

this I mean that the parties and the Commissioner in this matter, the Respondent somewhat less so, start with their purposive approach, without providing submissions that would assist the Court in first reading all the words of the provisions considered in their grammatical and ordinary sense, in their context of the provision itself, and harmoniously with the scheme of the Act. I respectfully further conclude that this was the method of interpretation adopted by the Court in *Tailleur*, which resulted in a failure to consider the interpretation of most of the key elements of section 36(2).

[115] In my view, a purposive interpretation, which moves the debate from its textual and contextual beginnings to those of policy in searching for the object of the Act and the intention of Parliament, should only be resorted to after considering what the words mean in their ordinary sense and ordinary context in relation to other provisions of the Act. In other words, the Court is required to undertake the exercise of completing the initial steps described in the modern principle of interpretation, before resorting to extrinsic evidence or turning to any purposive policy considerations, presumably because the provision remains ambiguous in its meaning or application.

(6) The bilingual interpretation of sections 36(1)(a)(i) and 36(2)

[116] The bilingual interpretation of sections 36(1)(a)(i) and 36(2) adds to the challenge of the Court's task, because of the different drafting methodologies used for the two linguistic versions. For the purposes of clarity's sake, I will outline what I understand is a three step approach that I am required to follow if the provisions are not the same, depending upon the nature of the differences.

[117] The first step is to determine if the provisions although different, are not ambiguous and can share some common meaning, in which case the common meaning is adopted. If the meanings however, are incompatible with the intention of the legislature, as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained: *R v Daoust*, 2004 SCC 6 (CanLII), [2004] 1 SCR 217 at paragraph 26 citing Professor Coté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at 324 [*Daoust*].

[118] If however, one provision is ambiguous and the other is clear, then the clearer meaning is said to be the common meaning, which is arrived at by the ordinary rules of interpretation.

[119] Conversely, if both versions are unambiguous, but not reconcilable by having different meanings (or structures), then the meaning arrived at by the ordinary rules should be retained: *Daoust* supra, *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at paragraph 39 [*Khosa*].

[120] The parties and the Commissioner applied the second methodology in their interpretation concluding that the English version was the clearer in expressing the key element in section 36(1)(a)(i), “to support them in the performance of their duties”. This appeared to be missing in the more abridged French version making it structurally incompatible with the English version.

[121] I ultimately rejected this conclusion in my interpretation of section 36(1)(a)(i), as I concluded that the differing approaches used in French and English legislative drafting provided the means to reconcile the two versions of section 36(1)(a)(i). By this I mean that the French

method of drafting resorts to a more deductive reasoning approach than that used by English drafters. This eliminates the need to express some components of an English co-equivalent, if it is deductively considered to be implied by the meaning of another term. Having reconciled the two provisions in terms of their structure and scheme by this method, I proceeded to interpret them, finding that they essentially both expressed the same meaning.

[122] As concerns section 36(2), the Court in *Tailleur* applied the second approach of common meaning with respect to the bilingual co-equivalents of "reasonably" and "possibles" in terms of measures that could be adopted. The Court did so on the basis that "measures …reasonably …taken" was the common meaning as it expressed a more limited construction of "mesures possibles" [possible measures].

[123] I agreed with the choice of the most appropriate term, but rejected the method followed to achieve the results. Structurally, the co-equivalents in both versions matched well, and both were clear in meaning, but they could not be reconciled on the basis of their meanings.

[124] I concluded that the concept of reasonably determined measures and that of possible measures, both intended to provide an appropriate official language work environment, could not be reconciled as they express two entirely different meanings. "Reasonably" describes the exercise of discretion in determining measures, whereas "possible" merely describes the extent of measures, with no exercise of discretion. It was contextually important that a discretionary term be that applied to determine the required measures, as it was compatible with a flexible

construction of section 36(2) and the adoption of the term “accommodate” in preference to “permettre” [permit], which is the essence of my interpretation of section 36(2).

[125] This was the methodology applied by the Supreme Court in *Khosa* at paragraph 39, where the Court concluded that the terms “may” and “is” in section 18.1 of the *Federal Courts Act* could not be reconciled, as follows:

> [39] The English version of s. 18.1(4) is permissive; the court is clearly given discretion. In the French version, the words “sont prises” translate literally as “are taken” which do not, on the face of it, confer a discretion. A shared meaning on this point is difficult to discern. Nevertheless, the linguistic difference must be reconciled as judges cannot be seen to be applying s. 18.1(4) differently across the country depending on which language version of s. 18.1(4) they happen to be reading.
>
> [Emphasis added.]

[126] That avenue not being available because the provisions were totally irreconcilable, the appropriate methodology required adherence to the approach adopted in *Khosa*. It required a holistic interpretation of both terms starting from their very different ordinary meanings, and thereafter contextually considering them in respect of the remaining elements of the provision, in the context of the Act, and finally its object and Parliament’s intention.

VIII. Services provided to federal institution personnel pursuant to paragraph 36(1)(a) of the OLA

A. *Introduction*

[127] The submissions of the parties raise at least three interpretive issues:

- First, what is the basis for the distinction between the personal and central services categories?

- Second, if a lesser trained employee simply by working with a more highly trained co-employee learns skills or gains knowledge that either assist, or are essential to enable the employee to perform his or her duties, is this a "service" within the meaning of the provision provided by the more highly trained employee [specialist] to the lesser trained employee [generalist]?

- Third, if learning on the job is tentatively the result of a service provided by the specialist, is it also a central service?

[128] Before undertaking any analysis of the language of work service provision, it is first necessary to synchronise the English version, being sub-paragraph 36(1)(a)(i) with the French paragraph 36(1)a). The French version combines the language of work service sub-paragraph with that of the work instruments sub-paragraph into one paragraph. Accordingly, the two versions are produced below with the irrelevant portions of the French version being identified by the strikethrough font as is the irrelevant sub-paragraph in the English version:

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 (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;~~	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;~~

[129] The lack of coordinated paragraphing of the provision between the English and French versions poses problems for the adoption of a common nomenclature to describe the different provisions. Accordingly, when generally referring to the provision, the Court adopts the English subparagraph, i.e. section 36(1)(a)(i) as the common element of both versions. I will use that descriptor, with my normal practice of identifying all provision only as "section", or "the provision" when generally referring to it. To some extent this also accords with the parties and Commissioner's conclusion that the English version is clearer and should be preferred because there are more references to its component parts than found in the French version.

[130] The co-drafters of the legislation have also adopted different styles of presenting Parliament's intention portrayed in section 36(1)(a)(i). This is obvious in comparing both versions. This presents some additional problems in describing the co-equivalents that are the subject of interpretation. Nonetheless, they are present, if only implied in some circumstances. I

would match the co-equivalents as follows using the English order of components, again applying strikethrough to assist in matching up the versions of the same component:

> "services that are provided to them as individuals" and "les services qui lui sont destinés, notamment à titre individuel"
>
> [individual services]
>
> "and services that are centrally provided" and "ou à titre de services [~~auxiliaires~~] centraux"
>
> "to support them in the performance of their duties" and "ou à titre de services auxiliaires [~~centraux~~]"
>
> [together, auxiliary services]

(1) Treasury Board Policies and Directives on Official Languages and Training and Professional Development

[131] Before embarking on the construction of section 36(1)(a)(i), the Court will first consider the Treasury Board policies and directives on official languages and training and professional development. The parties referred to the Treasury Board policies at different points, and it is worth considering their impact on the complaint as well.

[132] There are three relevant policies, two of which pertain to the language of work. The third provides the parameters for training and professional development in the greater public service, with intention that its precepts will be adopted and tailored by federal institutions. The first two work policies I describe as the "2004 Policy" and the "2012 Policy". The latter policy repealed and replaced the 2004 Policy. The third policy being the 2017 Learning Policy has already been already referred to.

(a) *The 2004 Policy on Language of Work*

[133] There are six relevant comments to make about the 2004 Policy, four of which pertain to the interpretation of section 36(1)(a)(i), the other two are relevant to the interpretation of section 36(2).

[134] First, the Policy establishes a clean break between the two categories of "individual" and "auxiliary" services and that of "training and professional development" services. Presumably, this occurred because training and professional development service were thought to not amenably fit in either of the two categories described in section 36(1)(a)(i). This would also explain to some extent why the Respondent questioned whether training and professional development activities were even a service within the meaning of the provision.

[135] Second, Treasury Board did not attempt to distinguish what services fell into the individual category as opposed to those which were auxiliary services in the long list of examples of services that were provided, simply describing them all as falling somewhere in both categories of services, as follows:

> Accounting, administrative, financial and budget, computer, evaluation and audit, legal, library, archival and information/communications, management advisory and consultation, materiel management, purchasing and procurement, asset management, security, staffing and classification, technical, translation, pay and benefits, health care, and vocational guidance services, and grievances.

[136] Third, it is apparent from the 2004 Policy that 16 years after the adoption of language of work provisions Treasury Board did not feel sufficiently comfortable in its interpretation of section 36(1)(a)(i) to provide but the vaguest guidance as to what constituted a service, even to

the point of assigning well-recognized services to the two categories that it had identified were covered by the provision.

[137] Fourth, what is clear however is that all the examples provided were easily identified and recognized as forms of administrative units of service providers, except training and professional development services. Two ramifications follow from this. First, added to the complexity of interpreting section 36(1)(a)(i) is whether it was intended by the French term “auxiliaires” referred to services described as administrative units, which would give it an entirely different meaning to its co-equivalent which provides a definition of service.

[138] Second, the Applicant and Commissioner appear intent on significantly redrawing the services map from what existed at the time the OLA language of work provisions were adopted. As a starting point in the construction of the provision, it is therefore difficult to conceive that Parliament intended the OLA to significantly enlarge the meaning of services for the purpose of identifying a greater number of bilingual positions in bilingual regions, not to mention the same result occurring in unilingual regions.

[139] The first of two comments that are relevant to the interpretation of section 36(2), which makes up the second half of my analysis below, is what I consider to be a significant omission to refer to what I will describe as the second objective in the English version of “work environments” that must “accommodate the use of either official language by its officers and employees”.

(b) *The 2012 Policy on Official Languages*

[140] The 2004 policy was replaced by the Policy on Official Languages, commencing in November 2012 [the 2012 Policy]. It was not in force at the time of the complaint, but has remained in force since its issuance.

[141] The 2012 Policy added somewhat to the 2004 Policy. It maintained the distinction between training and professional development services and the two categories of personal and central services. It replaced the list of services by providing skeleton definitions and examples of personal and central categories of services, as follows:

> These services are those that affect the employee on a personal level (their health and well-being, personal development, their career) or that are essential for the employee to perform their duties. Some examples:
>
> Personal services: pay and benefits services; career counselling services Central services: information systems services and legal services

[142] One significant change was to add the requirement that the central services be <u>essential</u> for the performance of the employee's duties. The Applicant relied upon the essential criterion to argue that the specialists were providing services that are essential to the generalists in order for them to be able to carry out their duties. The Respondent and Commissioner disagreed with this submission that Central services were required to be <u>essential</u> to the performance of the duties, with which I am similarly in agreement.

(c) *2017 Policy on Learning, Training, and Development*

[143] The relevant excerpts from the TBS's 2017 *Policy on Learning, Training, and Development* [the 2017 Learning Policy] , with the Court's emphasis, are as follows:

> 3. Context
>
> 3.2 Deputy heads have the authority, pursuant to section 12(1)(a) of the Financial Administration Act, to "determine the learning, training and development requirements of persons employed in the public service and fix the terms on which the learning, training and development may be carried out," and Treasury Board has the authority, pursuant to section 11.1(1)(f) to "establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads..."
>
> …
>
> Appendix A – Definitions
>
> professional development *(perfectionnement professionnel)*:
> an activity that assists employees further their careers and is aligned with departmental business priorities and management improvement objectives of the government. Includes courses, programs or learning events sponsored by a variety of service providers (e.g. in-house, the Canada School of Public Service, academic institutions and the private sector).
>
> training (*formation*):
> represents an organized, disciplined way to transfer the knowledge and know-how that is required for successful performance in a job, occupation or profession. It is ongoing, adaptive learning, not an isolated exercise.

[144] While the policy does not apply to separate agencies such as the OSFI, it is indicated at section 2.2 that they "may use it to develop their own learning, training and development policies".

[145] In general terms, the 2017 Learning Policy appears to settle the issue troubling the parties as to the appropriate service category for training and professional development. The TBS answers this query by first defining "professional development" in a fashion that would suggest that it should be considered a personal service, as "an activity that assists employees further their

careers". It is not on the job training, thereby placing it in the first category of section 36(1)(a)(i) "provided to them [employees] as individuals".

[146] Conversely, the TBS clearly aligns "training" with the second category of a service based on the English version of section 36(1)(a)(i), "to support them in the performance of their duties" [à titre de services auxiliaires]. It is defined in the policy as a learning experience being "required for the successful performance in a job". Additionally, what is important is that the definition of training should be carried out in an "organized, disciplined way to transfer the knowledge and know-how". Thus, it is not an *ad hoc* form of learning carried out during interactions between employees on the job, as is the principal submission of the Respondent and of the Commissioner.

[147] As shall be seen, the Commissioner's submissions move away from its original concept of the service being that pertaining to training or professional development described in the Final Investigation Report. Instead, he now proposes a much broader generic definition, which expands the definition of a service to that of any activity where a group of employees "supports another employee in the performance of their duties".

(2) The Submissions of the Parties on the Interpretation of the Services Provision

(a) *The Applicant's Submissions*

[148] For the most part the Applicant relies upon the Commissioner's conclusions in the Final Investigation Report, as follows with my emphasis:

[TRANSLATION]

> The information that supervisory staff in Montréal receive from employees in the Supervision Support Group is essential for the performance of their tasks. This enhances their ability to comply with OSFI's mandate, and these enhancements constitute professional development. Thus, the Supervision Support Group in Toronto provides professional development, practically every day, to supervisory staff in Montréal. Oral and electronic communications between the two offices are in English only, even though they actually constitute professional development for Montréal employees.

[149] The Commissioner in his submissions to the Court abandons both the requirement that the services being essential and that they fell under the category of professional development, as opposed to training.

(b) *The Commissioner's revised submissions*

[150] After the parties had filed their submissions, the Commissioner presented a different interpretation of section 36(1)(a)(i) from that in the Final Investigation Report. He relies upon a purposive interpretation requiring a liberal and teleological interpretation of language of work provisions that supports the maintenance and development of the official language communities. The Commissioner in reference to official language communities is referring to the Francophone official language community, although not stated expressly in those terms. I have given my reasons why I reject this submission.

[151] The Commissioner similarly argues that [TRANSLATION] "providing training in the employee's preferred official language is intimately related to implementing the purpose of Part V of the OLA, which is to create a work environment that is conducive to the effective use of both official languages within federal institutions".

[152] In order to dispose of this argument, I will provide my comments on this submission at this point in my reasons. In my view, the Commissioner overreaches in attempting to buttress his argument with irrelevant considerations. It is clear from reviewing the various paragraphs and sub-paragraphs that make up section 36 that the concept of creating a conducive work environment is specifically referred to by Parliament only in the sections 36(1)(c)(i) and 36(2) regarding the requirement that managers be bilingual and the requirement to provide appropriate official language work environments. Given the specific references to work environments in other provisions, if Parliament thought providing services in the language of the employees being served is conducive to the effective use of both official languages, it would have similarly stated so. In addition, as pointed out by requiring bilingual employees to use their second language as service providers, this effectively contradicts the fundamental right of employees to use their first language.

[153] The Commissioner advances a new broader definition of a "service auxiliaire", bringing it back to the English wording of to be [TRANSLATION] "a service that makes it possible to support or assist employees and that is therefore useful in the performance of their duties". Thus, if a group of employee's work is useful on a regular basis, but not essential, in carrying out another employee's work, it is a "service auxiliaire". His position is probably best summarized at paragraphs 62 to 64 of her memorandum as follows:

> [TRANSLATION]
>
> 62. The Commissioner proposes to define training as: "An organized activity aimed at imparting information and/or instructions to improve and/or maintain the recipient's performance or to help him or her attain a required level of knowledge or skill."

> 63. Thus, training, in its ordinary sense, means sharing knowledge, information, techniques or skills with employees so that they can use them on their own in performing their duties. In other words, training, as opposed to mere information sharing, is aimed primarily at allowing employees to acquire personal and professional know-how that they will then be able to apply in the various circumstances of their work.
>
> 64. The question of whether a specific activity is training for employees is a question of fact that must be analyzed by considering the specific circumstances of each case.

[154] Given the focus on training, I repeat my concern that the 2017 TBS Policy on Learning, Training, and Development was not included in the evidence presented to the Court. I am particularly concerned that I could have unknowingly declared the TBS 2017 Learning Policy to not properly reflect the contents of the Policy, without being aware of its existence.

[155] The Commissioner contends that [TRANSLATION] "the term 'central' refers to a service that is critical for the institution, in the sense that the institution made the decision, at a central or relatively high level in its administration, to provide this service to its employees". However, he indicates that the evidence to demonstrate that such a decision ~~is~~ has been taken can be based upon how the institution ~~is~~ has organized the structure of its workplaces in order to provide a service. Thus, there is no requirement for a decision actually to be made, or a stipulation by the institution that it is providing a service to its employees. It is sufficient that the facts demonstrate that a service, by which employees help other employees perform their duties, has been put in place by the institution to infer that the service reflects a central character required by section 36(1)(a)(i), because that is the way that the institution set up the employment structure.

(c) *The Respondent's Submissions*

[156] The OSFI contends that the specialists do not provide the generalists with a "service". It submits that the interactions between the generalist and the specialist do not represent a service within the meaning of the Act. In my view its strongest submission is expressed very succinctly at paragraphs 43 and 45 of its memorandum, as follows with the OSFI's emphasis on the term [TRANSLATION] "as a team" as follows:

> [TRANSLATION]
>
> 44. Discussions between the two groups are part of their respective work. Occasionally, the two groups have to combine their respective work. In effect, the generalists and specialists form two separate working groups that are called upon to work as a team as part of their respective duties and toward a common goal.
>
> 45. Under these circumstances, the specialists do not provide any "services" to the generalists. The former are not in the service of the latter.
>
> [Emphasis in original.]

[157] The Respondent further submits that the generalists and specialists, even as distinct groups, work closely together as a team (emphasized by the defendant) to achieve the core objectives of the institution's mandate. It argues that employees executing the core mandate of the institution receive services, they do not provide them. I am in agreement with the submission, that a team environment is incompatible with the concept of its members providing services to each other. Employees executing the core mandate are simply part of that team. I will return to the submissions in my analysis below, particularly as to what constitutes the definition of a team of employees and whether it inherently proscribes members from being service providers.

[158] The Respondent's second argument is that the specialists do not provide the generalists with services that are "centrally provided . . . to support them in the performance of their duties".

The phrase “services that are centrally provided . . . to support them in the performance of their duties” refers to internal support services or corporate services aimed at supporting, in an incidental or secondary way (hence the terms “service auxiliaire” or “to support them”), all (or nearly all) employees of the institution in the performance of their duties (hence the terms “centraux” or “centrally provided”).

[159] The Respondent further argues that the generalists could not constitute a “centrally provided” service since they only represent a single restricted category of employees of the OSFI and lack the degree of definitional organization normally applied to a group of service employees as established by the central direction of the institution.

[160] The BSIF contends that accepting the Applicant’s submission would lead to a totally absurd result because nearly any employee would be considered a service provider to other employees if the definition extended to employees working together on a common project for the employer. This would clearly result in either 1) imposing bilingualism on all employees of the federal institutions covered by the OLA regardless of the nature of their duties, or 2) forcing federal institutions to create separate Francophone and Anglophone teams.

[161] The Respondent appears to raise the issue of whether training and professional development should fall within Part V of the OLA, as it contains no language dealing specifically with these categories of services. In addition, even if the Court were to accept the definition of a service in its broadest form as argued by the Commissioner, the interactions of the

generalist and specialist still do not constitute a training exercise because this requires a certain degree of organization and formalism is generally understood as required.

[162] The Respondent advances the additional submission that such a broad interpretation of section 36(1)(a) [TRANSLATION] "is also contrary to the objective of the OLA of ensuring that French-speaking and English-speaking Canadians have equal opportunities to obtain employment in the federal public service and that the composition of the work-force of federal institutions tends to reflect the presence of both the official language communities of Canada", taking into account their location, among other things.

B. *The Interpretation of section 36(1)(a)(i)*

(1) Introduction

[163] It is not disputed that section 36(1)(a)(i) describes two categories of services. The first category, misleadingly but perhaps more conveniently described, in the Treasury Board policies as "personal services" is that set out in the first component above. I describe it as "individual services" to accurately portray is meaning using the term chosen by Parliament and to avoid the misleading aspect of the term "personal".

[164] The second category consists of the second and third components, which again is misleading by the Treasury Board nomenclature describing it as "central services". The more appropriate descriptor is "auxiliary services" being a translation of the term in the French version. "Auxiliary" better describes the distinction between the individual services category, as

is its function. Moreover, the concept of "centrally provided" services applies to both the first and second categories, even if implied in the meaning of the "individual services" category. This is the essence of my conclusion on the interpretation, admittedly highly abstruse, of the provision that follows.

[165] As a forewarning of sorts, the most difficult interpretive aspect of the provision relates to the French phrase "ou à titre de services auxiliaires". It is confusing because the term auxiliary, or its near synonyms "secondary" and "ancillary", represents a key definitional characteristic of the meaning of services. This in fact is one of the arguments of the Respondent. For reasons which I will attempt to convey, this meeting is a pleonasm, i.e. "a false lie". The point is that the term service itself already expresses the definitional characteristic of ancillary, thereby making its repetition a "faux ami" of sorts, as our Francophone colleagues would describe the term.

[166] Coming to this conclusion, leads the interpretive process back to the drafters' intention. It is to use the term "ou à titre de services auxiliaires" for the sole purpose of distinguishing the second category from the first category in French described as "tant les services qui lui sont destinés à titre individuel". This explains why I describe the second category as "ancillary services" because its only relevance is for the purpose of distinguishing it from the first category. This also explains why I have included the term "ou" [or] in the excerpted phrase, as the nexus between the two categories of services, i.e. there are two categories of services, nothing more.

[167] I point out here that the fundamental distinction between the process that I follow in interpreting both sections 36(1)(a)(i) and 36(2) and others that I have examined, is that I attempt

to reconcile all of the terms in both provisions. As far as I am able to tell, neither the Treasury Board, the Commissioner or the Court in *Tailleur* undertook this primary, and in my opinion of the overriding objective of statutory interpretation. It is to come to grips with the provision as a whole. Instead, the categories are mislabeled and reference is made to individual components of each language version. This has the effect of not accurately reflecting Parliament's intention and adding to the Court's challenge, as it follows these interpretive passages down to a dead-end, having to start all over again, and again. Moreover, this interpretive process requires an open mind to a "back-and-forth" revision of each term in the provision to determine whether it can be reconciled with the remainder of the provision in both languages.

(2) Define and follow the scheme of the provision

[168] Given the difficulties that section 36(1)(a)(i) presents in terms of its interpretation, logically the best approach is to follow the apparent scheme of the provision. The most prominent aspect of that scheme is the existence of two categories. Without being able to properly distinguish between those two categories, no contextual sense can be given to the different terms that make up the provision. Accordingly, the first task of the interpretation process is to differentiate between the two categories.

[169] I conclude that Parliament intended the individual category to apply to services available to all employees of the institution. They use the terms "as individuals/ à titre individual". Because the individual category comprises all employees, there is no need to place a limit on who should receive the service, nor is there any need to indicate that they are centrally provided because services to all employees must be centrally provided.

[170] With the individual category defined, the ancillary category is thereafter, defined in relation to the individual category, something that is ancillary in the workplace to the individuality of the employee, which is bestowed simply by being an employee. The ancillary category relates to services that enhance the performance of the employee's duties on behalf of institutions. This meaning is accomplished by the co-equivalents of services "to support them in the performance of their duties/à titre de services auxiliaires".

[171] Thereafter, the scheme of the provision focuses on the ancillary category with the purpose of providing some limit on what should be accepted as a performance-enhancement form of service. It does so first by the definition of a service and then second by the "centraux/centrally provided" co-equivalents. The interpretation of the provision is as simple as that: define what a service constitutes as a first limitation, distinguish and define the categories, then place a second limit on the second form of service intended to enhance the performance of employees using the "centraux/centrally" component of the provision.

[172] With respect to the meaning of centrally provided, while not clearly stated, it appears that it was Parliament's intention to endow the Treasury Board or senior managers of federal institutions with the responsibility of designating the vast assortment of service activities that might enhance employee performance. The 2017 Learning Policy is a good example of what I conclude was Parliament's intent to avoid precisely what I find the Applicant and Commissioner are attempting to do. By this I mean to avoid any overreaching and disruption of the operations of federal institutions by putting language rights ahead of everything else.

(3) Definitions of "services"

[173] It is not possible to define the two categories without first defining the meaning of "services".

[174] The term "service" comprises a wide range of meanings, even some which would imply a different understanding when used in the plural. The following comprises the English list of what the Court views as the relevant meanings for the word "service" taken from the Merriam-Webster (https://www.merriam-webster.com/dictionary/service), [Merriam-Webster Dictionary] with the Court's emphasis. The relevant sub-definitions from the same online dictionary are included in square brackets.

> 2a: the work performed by one that *serves* [a: to be of use; b: to be favorable, opportune, or convenient]; good service
>
> 2b: *HELP* [1a: to give assistance or support to: benefit: 3a: to be of use to], *USE*, *BENEFIT* [1a: something that produces good or helpful results or effects or that promotes well-being]
>
> 4: the act of serving: such as b: useful labor that does not produce a tangible commodity - usually used in plural; charge for professional services
>
> 6a: an administrative division (as of a government or business); the consular service
>
> 11: a branch of a hospital medical staff devoted to a particular specialty; obstetrical service

[175] The relevant definitions from the French version of the term "service" are taken from the Larousse Dictionnaire de Français (http://www.larousse.fr/dictionnaires/francais), [Larousse Dictionnaire de Français] with a related expression using the term, again with the Court's emphasis as follows:

- Activité professionnelle exercée dans une entreprise, une administration : Avoir quarante ans de service. ([TRANSLATION]

Professional activity carried out in a company, a government: To have forty years of service.)

- Organisme qui fait partie d'un ensemble administratif ou économique ; organe d'une entreprise chargé d'une fonction précise, ensemble de personnes assurant cette fonction : Les services commerciaux d'une entreprise. ([TRANSLATION] Unit that is part of an administrative or economic body; branch of a company with a specific purpose, set of people who deliver this purpose: The commercial services of a company.)

- Ce que l'on fait pour quelqu'un, avantage qu'on lui donne spontanément : Il m'est difficile de demander ce service à Paul. [Expression: Rendre service à quelqu'un, lui être utile, l'aider] ([TRANSLATION] Something done for someone, assistance given them spontaneously: It's difficult for me to ask this [favour] of Paul. [Expression: Do someone a [favour], be helpful to them, help them])

[176] Two comments can be made with respect to the definition of "service" and "services". The first is that the most generic definition of service (although not listed as its first meaning), and that which seems to apply from the Commissioner's perspective, is that of "help", and "to give assistance or support to". The French version, when used in the expression "Rendre service à quelqu'un" [Do someone a favour] has a similar broad generic definition.

[177] This is relevant to the Court's consideration of the wording of the ancillary category in English which largely parrots the definition of the term "service". It is similarly relevant to the Court's consideration of the term "support", in relation to the TBS policies, adopted by the Applicant's, and the Commissioner's submissions that services do not need to be essential.

[178] The second point is that the meaning of "service" could extend to an administrative division, or one devoted to a particular specialty. The services so far defined by the TBS

comprise separate and distinct administrative divisions devoted to a particular specialty that serve other employees in federal institutions. The French version of "service" has a similar definition of [TRANSLATION] "branch of a company with a specific purpose, set of people who deliver this purpose".

[179] Insofar as one might distinguish between definitions of support based upon individual as opposed to administrative relationships, the alternative definition as a specialized administrative component is relevant. The Court is of this opinion because it is assumed that the drafters would be considering what services meant in the federal institutions at the time of drafting section 36(1)(a)(i).

[180] The fact is that most service components are specialized administrative divisions. It would make sense that the languages of work provisions in the OLA were not intended to affect the structures of government, but rather to apply to those services already identified as such, while providing scope for growth or change as required. This would also explain why Treasury Board differentiated training and professional development services because they are not seen as administrative service units in federal institutions.

[181] What I draw from this discussion however is that the term "service" has to go back to its generic fundamental meaning to capture all matter of possible services that require the service to be provided in the official language of the person being served. In other words, the base definition of service remains "to give assistance or support to" other employees in the context of section 36(1)(a)(i). What needs to be conveyed as the extra element is the first limiting factor

namely that the service is to support employees "in the performance of their duties", followed by the second limiting factor that they must be centrally provided.

(4) Services provided to employees "as individuals"

[182] As mentioned, none of the parties or the intervener seriously considered the meaning of the individual category of services. Instead, they focused their attention on the ancillary category. The difficulty with ignoring the individual category of services is that it prevents a comprehensive view of the purpose of both services together, and how they are intended to be distinguished from or may complement each other, as the case may be.

[183] Construing the meaning of services provided to employees "as individuals" or "à titre individuel", where only a single word in a prepositional phrase is used, poses challenges for its interpretation. But brevity pervades all of section 36(1)(a)(i). This adds to the challenge of gauging its meaning. Importantly, it results in an interpretation process that depends upon a contextual analysis that construes the provision as a whole.

[184] The Court begins its analysis by cavilling to a limited degree the choice of the term "personal" to designate the individual category of services, as was adopted in Treasury Board policies. "Individual" and "individuel" are the terms used in section 36(1)(a)(i) to demarcate the individual category, but they have different meanings used as an adjective, i.e. "individual services" as opposed to "personal services". The Court agrees that the term "personal" is the practical label to apply to the individual category. Nevertheless in the Court's view, the term is somewhat misleading of Parliament's intention for the purposes of describing the individual

category, which thereafter resonates when interpreting the ancillary category. I will continue to apply the statutory label in this matter.

[185] All services are personal in the sense that they are always provided to persons. This certainly applies to services pertaining to language, which can only be provided to persons. Because the term "personal" applies to all services it adds somewhat to the confusion in distinguishing between the categories. It also does not accurately convey the same sense of "as individuals" applied to services.

[186] The English and French definitions of "individual" and "individuel", again taken from the Merriam-Webster Dictionary and the Larousse Dictionnaire de Français provide the following meanings for the respective words, with the Court's emphasis.

> *Merriam-Webster*
>
> 2a: of, relating to, or distinctively associated with an individual an individual effort
>
> b: being an individual or existing as an indivisible whole
>
> c: intended for one person an individual serving
>
> 3: existing as a distinct entity: separate
>
> 4: having marked individuality an individual style
>
> *Larousse*
>
> Qui est conçu pour une seule personne ou qui concerne une seule personne : Convocation individuelle. ([TRANSLATION]
> Which is designed for or concerns a single person: Individual meeting.)

[187] The distinction between individual and personal is perhaps best explained in a short article from the Internet (https://www.differencebetween.com/difference-between-person-and-vs-individual/), which captures the distinction, as follows, with the Court's emphasis:

> In a society full of persons, we have individuals that display different characteristics. A crowd is composed of individuals but each individual is also a person. The word individual is used in the sense of conveying unique properties or characteristics of a person. People who know a celebrity from close quarters often use the word individual to describe him as a person.

[188] Accordingly, the dictionary definitions would suggest that the meaning of the individual category would refer to services provided to employees that are intended to meet their individual needs reflecting their individuality. In other words, the services are intended to serve each person based on their primary characteristic of individuality, as opposed to any secondary or supplemental attribute that devolves from their individuality.

[189] If we are discussing the concept of benefits or assistance in accordance with the definition of a service, they must logically apply to all employees, i.e. all persons in the institution, with the view to addressing their primary individuality, and provided for each person's individualized needs. They are not essential or related to the performance of their duties, but are provided by the simple fact of being a member of the family of employees of the institution. They are provided for who you are, not what you do.

[190] As the TBS policies properly describe examples of services that fall in the individual category, they would include those that relate to administrative services providing for pay and benefits, health, security, well-being, personal development or the career development of the

employee that are open to all employees without a relationship to the specific performance of the position they hold or some secondary attribute that defines them, such as what they are trained to do for a position.

[191] Approaching this issue on a more practical and common sense basis, if Parliament decided to designate only two obviously large categories of rights of employees to receive services (i.e. assistance) in the language of their choice, it would surely start with any service in the institution that was available to all of the employees. This would be regardless of any personal attribute or contribution of the employee to the institution that might be reflected in an employee's specific position with the employer. If the service applies to all employees there is no basis to distinguish between providing the service to some employees and not others. In other words, logically the most obvious individual category of a service available in either official language would be a service that applies to everyone in the institution without regard to what they do to contribute to the institution, or more specifically to the position that they may be trained in. It is a form of benefit that arises from being an employee of a federal institution.

[192] Accordingly, the Court is satisfied at this point of its analysis that services provided to employees as individuals appear to be intended to apply to those services provided to all employees of the institution without regard to any attributes that may be attributed to them by their duties in a position. The conclusion is tentative, inasmuch as the definition of the scope of the individual category should be consistent and in harmony with that of the auxiliary category, as discussed below.

(5) Services to support employees in the performance of their duties "services auxiliaires"

(a) *The verbal phrase "provided to support employees in the performance of their duties" is redundant to the meaning of "services"*

[193] The Court has in mind the reconciliation of the bilingual versions of the auxiliary category. There is no concern over the concept of "centrally" at this point. It is expressly mentioned in both versions, with no suggestion that the terms should be interpreted differently in each language. It can be set aside for consideration at this time, at least until the end of the analysis that follows below.

[194] Rather at this juncture, the issue is the meaning to be attributed to the term "services auxiliaires" found in the French version, as it relates to its co-equivalent in English. How can the Court reconcile the single term "auxiliaire[s]" in relation to services, both so as to express the same concept of the phrase "provided . . . to support [employees] in the performance of their duties", as well as distinguishing between the two categories of services, as the English provision does?

[195] In attempting to reconcile the two versions, the Court pays tribute to what it has described as the Cartesian approach of the Francophone drafters. This approach often relies on a deductive and conceptual analysis to fill in apparently missing concepts found in the English version "support the performance of their duties", while tending to avoid the repetition of unnecessary concepts. This allows the précised language to emphasize its most significant elements. Contrary to the misconception that it takes more words in French to express the same meaning in English,

this is often a function of having to translate, as opposed to co-draft. Section 36(1)(a)(i) is an example of the brevity of a co-drafted version over that in English. The question is, has it achieved a similar meaning? In my view it has.

[196] The Applicant and the Commissioner ignored the term “services auxiliaires” except as a naming function for the auxiliary category without defining it. The interpretive approach was that the term “auxiliaires” lacks clarity in comparison with the English version that describes a service of one employee supporting the other in the performance of their duties. I am in agreement with this submission that the English version expresses the appropriate definition of the second category based on its clear wording. My point here however, is either to confirm that the English version is not reconcilable with its French partner, or to ensure that “auxiliaires” does not convey another meaning. This goes part and parcel with my quest to reconcile all of the contents of section 36(1)(a)(i), which has eluded a comprehensive interpretation to date.

[197] Somewhat conversely, the Respondent focused on the term “services auxiliaires” without any regard to the provision as a whole. The term was used by the Respondent to define the function of a service, being its secondary nature to support the primary task: the term “auxiliaire” seems to be expressed in the English version by the words “to support them in the performance of their duties”. I would agree up to a point with this submission. But, what has to be understood is the component relating to “the performance of their duties” still remains to be deduced from the context. This component of the auxiliary category is not conveyed in the term “auxiliaire”, only the support concept is expressed.

[198] The French adjective “auxiliaire” is defined in Larousse, Le Petit Robert and an internet dictionary entitled “Linternaute”, as follows with related words in square brackets:

> Larousse
>
> Auxiliaire, adjectif : Qui s’ajoute à quelque chose d’autre, momentanément ou accessoirement : Service auxiliaire. ([TRANSLATION] Auxiliary, adjective: Which is additional to something else, temporarily or incidentally: Auxiliary service.)
>
> Accessoire, adjectif : qui accompagne une chose principale, qui s’ajoute à titre secondaire : Ne pas s'arrêter aux détails accessoires. ([TRANSLATION] Incidental, adjective: Which accompanies a primary thing, which is added as secondary: Go beyond incidental details.)
>
> Le Petit Robert
>
> « auxiliaire » : « Qui agit, est utilisé en second lieu, à titre de secours », « Personne qui aide en apportant son concours » ([TRANSLATION] “Auxiliary”: “Which acts, is used secondly, as support”, “Person who helps by providing support”)
>
> Linternaute
>
> auxiliaire, adjectif : Qui aide, accessoirement ou temporairement. ([TRANSLATION] auxiliary, adjective: Which helps, incidentally or temporarily.)
>
> Accessoire : Qui est secondaire par rapport à un phénomène qu'il accompagne. ([TRANSLATION] Incidental: Which is secondary to a phenomenon that it accompanies.)
>
> www.linternaute.fr/dictionnaire/fr/definition/auxiliaire/

[199] The definitions of “auxiliary” of [TRANSLATION] “who helps by providing support” and “which helps, incidentally” are redundant to the meaning of “service”, “to give assistance or support to”. In effect, it is a pleonasm repeating the definition of a “service” in the expression “services auxiliaires”. This means that its reference by the Respondent really adds nothing to its

meaning. There is still the missing connexion to demonstrate that the service is intended to support the performance of duties of other employees.

(b) *"in the performance of duties" may be deduced contextually in the term "auxiliaire"*

[200] Given that the term "auxiliaire" appears redundant to that of "service", I conclude that its purpose is not to parrot half the meaning of the English version, without capturing the object of the service being to assist "in the performance of duties". Instead, I conclude that the term is used to distinguish the auxiliary category from the individual category.

[201] What is required is to define the auxiliary category so as to distinguish it from the individual category. This, the term "auxiliaire" does very well, especially when set up side-by-side, exactly as they are in section 36(1)(a)(i): "tant les services qui lui sont destinés, notamment à titre individuel ou à titre de services auxiliaires". This construction of the two categories being logically related by the auxiliary term having a meaning in opposition to the individual term for its meaning is confirmed by the parallelism of the structure of the language used in the French version. What is required now is some deductive analysis to bring the English and French versions into a similar parallel meaning.

[202] The first deductive step is to recognize that the individual category is defined as services that are provided without regard to the attributes of the employee's position, i.e. provided to all employees of the institution in their personal capacity. Given that Parliament has ordained only

two categories of services in section 36(1)(a)(i), it follows that the auxiliary category must be a single attribute of the employee's individuality, which is the first category.

[203] This brings forward the second deductive step. In a language of work context, this secondary or "auxiliary" attribute can only be in relation to the employees' position in the institution. This in turn can only relate to the duties that the employee's position entails. This follows because positions are defined by their duties.

[204] Finally, once the term "auxiliaire" has a legitimate role in distinguishing the auxiliary category from the individual category in terms of the duties of the position that the employee holds, it must follow that the service referred to in section 36(1)(a)(i) attaching to the employee's position can only be that to achieve the primary institutional purpose of why it pays the employee. The service must be to support employees in discharging their duties owed to their employers, which consists in performing their functions. No other explanation is plausible.

[205] In other words, the Court is satisfied on a *prima facie* basis, that by the process of deduction applied to the definitions and context of terms applied to the second of only two categories, the second category, that I describe as the auxiliary category, must refer to services provided to employees to assist or support them in the performance of their duties. This in turn confirms and is confirmed by the clear language of the English version. Services are not required to be "essential" in the support of the performance of duties

> (6) Services are not required to be "essential" in the support of the performance of duties

[206] There remains one further loose end that the Court must consider before moving on to construe the term “central”, namely whether the service must be “essential” to support employees in the performance of their duties. This requirement is found in the 2012 Treasury Board policy, which remains in place at this time. The Applicant relied upon the policy to describe essentialness as being a quality that defines the service, inasmuch as he contended that the specialist’s services were essential to allow him to perform his duties. Both the Commissioner, at least in his submissions to the Court which varies from the conclusion in the Final Investigation Report, and the Respondent reject the additional requirement of services being essential to the performance of duties. I agree with the respondent.

[207] Second, I say loose end for a number of reasons, because the term “essential” is not found in section 36(1)(a)(i). It is an additional concern for the Court if services are found to be essential because this would impact on the conclusion that the term “auxiliaires” has the same meaning as its English counterpart. Such a meaning could only arise from the term “support” in the English version. If so, this would add a component to the English version not found in the French version of section 36(1)(a)(i). Second, if essentialness is a limiting factor of a service, one would have to rethink the function of “centrally/centraux” as the limiting factor of the auxiliary category that I ascribe to it, given the broad definition of “services”.

[208] The dictionary definition of “support” evinces a range of meanings depending upon the circumstances. Overall, I find the term to be a synonym for assist or help in the context of section 36(1)(a)(i). Service limited to those that are essential would eliminate many recognized services. This conclusion may be drawn from the definition of “support” from the Merriam-Webster and

Oxford online dictionaries. The Oxford dictionary would appear to more clearly describe the two meanings in contention. Both are presented here, with the Court's emphasis:

> *Merriam-Webster:*
>
> 2 a (2): to uphold or defend as valid or right: ADVOCATE // supports fair play
>
> b (1) : ASSIST, HELP // bombers supported the ground troops
>
> (2): to act with (a star actor)
>
> 3 a: to pay the costs of: MAINTAIN // support a family
>
> b: to provide a basis for the existence or subsistence of…
>
> 4 a: to hold up or serve as a foundation or prop for
>
> b: to maintain (a price) at a desired level by purchases or loans; *also*: to maintain the price of by purchases or loans
>
> 5: to keep from fainting, yielding, or losing courage: COMFORT
>
> 6: to keep (something) going
>
> *Oxford:*
>
> [verb with object]:
>
> 2 Give assistance to, especially financially.
>
> Synonyms: help, aid, assist
>
> [as adjective]
>
> 2.5 supporting (of an actor or a role) of secondary importance to the leading roles in a film.

[209] The term has a wide range of meanings of support from merely "helping" or "assisting" to providing an essential foundation upon which the thing or person being served is based. But that latter definition does not apply to wide range of services applying to the performance of

duties many of which merely assist. The online dictionaries provide the following relevant definitions of the term "assist", again with the Court's emphasis:

> *Merriam-Webster:*
>
> to give usually supplementary support or aid to. She assisted the boy with his lessons.
>
> *Oxford:*
>
> Help (someone), typically by doing a share of the work; 'a senior academic would assist him in his work'

[210] Thus, the concept of assisting is that of helping persons doing something that they could do themselves, but with assistance they are able to perform more efficiently, profitably, effectively, etc. It does not convey any sense of being essential or necessary to the person being served. "Support" therefore, could narrow the meaning of services, if interpreted as something that is essential and necessary to allow someone to complete their task. So it really comes down to what meaning to attribute to the term support. Ironically, it is more apt in its application to a team environment, where as in the case of the specialist/generalist relationship that they are essential to each other. If anything, essentialness is a hallmark of a team relationship, not a service relationship.

[211] Because many services only assist others to do their job better, more efficiently or effectively, but not in the sense of being essential, I conclude that essentialness describes too high a threshold for the definition of a service in a work environment and is likely impractical to implement. For instance, training and professional development cannot be said to be essential for the performance of duties. From the 2004 list of services that could be said are essential to the performance of duties of, this would rule out library services for example. Indeed, I think there

are few situations where service providers, as opposed to team members such as the generalists and specialists working together, can truly be said to be essential or indispensable to the completion of their tasks. It does not strike me as a practical or workable addition to the definition of what constitutes a service.

[212] In my view, Parliament used the term "support" in the English version rather than assist, because it provides a broader range of the degree of help that services can provide to employees that consists of services that both assist and are essential, necessary indispensable to the performance of duties.

[213] A definition whereby support means both "assisting" and being an "essential support" in the performance of duties also accounts for the wide range of indirect services identified in the 2004 TBS policy, which otherwise would have no place in either category. An analogy distinguishing the terms might be a pylon that supports the structure of the bridge, so that the traffic lights can assist directing vehicles across it. Without the essential support concept in the auxiliary service category, there is no accounting for all of the essential indirect services that are required to keep the institution functioning, i.e. accounting and administrative procurement etc., and thereby support the employees in the performance of their duties. On the other hand, using the term "essential" as applied to support, would have the opposite similar effect on what Parliament intended.

[214] There is also the argument that if Parliament thought official language rights should apply only to essential or necessary services, it would have clearly stated so, given the wide

range of meanings that can apply to the term support. Contextually, in this regard the Court has in mind the managerial language of work provision of section 36(1)(c)(i). It requires bilingual supervisors, where "appropriate or necessary" [emphasis added] to create a work environment that is conducive to the effective use of both languages. As shall be seen when construing the meaning of section 36(2), I attribute the distinction between necessary and appropriate to whether the persons being supervised are bilingual or unilingual. The point is that "necessary" has a similar mandatory indispensable quality that is conveyed by the term "essential". Thus, when Parliament wished to indicate that language rights should be applied in a mandatory fashion to some form of conduct in the workplace, it clearly specified the requirement.

[215] Finally as indicated, the Court attributes Parliament's intention to limit the scope of employment related services by recourse to the co-equivalents "centrally/centraux". Accordingly, if "support" is interpreted to limit services to those that are essential to the performance of the job, this would unnecessarily fetter any discretion that the central management of the institution might possess in the application of the provision.

[216] Accordingly, I am satisfied that section 36(1)(a)(i) should not be construed such that services provided to employees of federal institutions are required to be "essential" to the performance of their duties. Given this interpretation of the term "support", there would be no distinction between the English and French versions in terms of section 36(1)(a)(i).

(7) Services do not include assistance provided by "team employees" to each other in the performance of their duties

[217] In the review of evidence and factual conclusions earlier in my reasons, I conclude that the generalist and specialist work as interdependent members of a team whose members share responsibilities and depend on each other to accomplish their tasks. While the specialist possesses superior knowledge on factors involving particular areas of risk, they also depend upon the generalists for relevant information, updating and feedback on their own work as the service needs to be applied to the client.

[218] To bring specificity to this point, the Court cites the following definition of the term "team" in the employment context defined in the online Business Dictionary (http://www.businessdictionary.com/definition/team.html) as follows:

> Team
>
> A group of people with a full set of complementary skills required to complete a task, job, or project. Team members (1) operate with a high degree of interdependence, (2) share authority and responsibility for self-management, (3) are accountable for the collective performance, and (4) work toward a common goal and shared rewards(s). A team becomes more than just a collection of people when a strong sense of mutual commitment creates synergy, thus generating performance greater than the sum of the performance of its individual members.
>
> [Emphasis in original.]

[219] The Court finds the foregoing definition entirely applicable to the work relationship between the generalists and specialists at the OSFI. What is important to note in this definition of the team concept is that when employees are working together they will be assisting and supporting each other regularly in carrying out their duties, because that is essential to the relationship. This is thus, another distinction between a service employee and a team employee.

[220] The team concept therefore comprises the same wording to define a service, the distinction therefore being in the nature of the overall relationship. Ultimately, it comes down to the differences in the nature of the relationships on all the points described above. But one thing is certain, the concept of providing a service and being a member of the team are mutually exclusive.

[221] It is fair to say that there is no example anywhere that the Court is aware of, or brought to its attention, of such a broad conception of a "service" although a widely used term both inside and outside of government institutions and around the world.

[222] The distinction exists between services brought in from the outside to assist a team and its tasks, and that of members helping and assisting each other within the confines of the team. When employees work together to complete a task or assignment, they coordinate and complement their efforts to achieve the goal set for them by their employer. It is not understood that one employee is providing a service to a work mate by rendering assistance to the co-worker. There is no primary versus auxiliary relationship in a team environment. Moreover, most work environments are hierarchal, ranked on the basis of skill and knowledge. Every time a new employee starts in a team environment, they begin the process of on-the-job training which is intended to pass the skills and knowledge from the more experienced, more skilled senior employee. Working is normally an ongoing learning process.

[223] Besides, the concept of having to examine every work relationship to determine whether or not a co-worker is providing a service or not, and the disruption that this would cause

throughout the workplaces of federal institutions, simply makes the definition espoused by the Commissioner too impractical and unworkable in terms of its implementation.

[224] There is also the issue of imposing on team members a requirement to work in the language of choice of another workmate of the team. The Commissioner's definition of services will apply throughout bilingual regions. The result will be that bilingual employees possessing greater skill, experience or knowledge will be identified as service providers and be required to use the language of choice of their bilingual co-workers who supposedly would be receiving services from them in the form of on-the-job training. This would seem to render the work environment less conducive to the use of both languages, where each bilingual worker is intended to be able to communicate in his or her first language, thereby undermining the intention of Parliament to maximize the use of both official languages in the workplace as the more senior employee will always be using the language of the less experienced and skilled employee. Assertion of such a right as well might be disruptive to relationships and the efficiency in the work team that would not be conducive to supporting its members in the performance of their duties.

[225] In the final analysis, the Respondent is correct in pointing out that services are secondary to the primary activity of the person to whom the services are being provided, although making the statement alone is not much assistance to the Court. Thus, piano teachers assist students, airplane bombers support army soldiers on the ground, technicians repair articles purchased by consumers or make them work. In terms of a team work environment, it is obvious that the service provider must be employed outside of the team work environment, and serves in a

supplementary ancillary manner to assist the team achieve its duties by providing services to its members.

[226] The tautological secondary/primary nature of the service provider assisting the person receiving the service's means that it is unidirectional. The Court is not aware of situations where service providers, as opposed to team members, would regularly be mutually, or bi-directionally or multi-directionally providing services to each other. The sole function of the service providers is to support other employees, not vice versa, because otherwise they then become team members directly sharing primary responsibility for achieving the employer's mandate.

[227] These conclusions apply equally to any learning of knowledge or skills that may occur while team members work together on the job. While obviously learning on the job is a form of training, it does not acquire that definition of a service via internal exchanges between members of the team.

[228] At this point, the distinction should be noted as to which category training [formation] and professional development [perfectionnement professionnel] services fall under. As indicated, training is specifically work-related and therefore would fall under the category of a performance enhancing service. On the other hand, professional development is said to assist employees in their careers, without a particular objective of enhancing the specific performance of an employee's duties. The idea is that career development is more long-term to aid the individual employees in their profession. The French term "perfectionnement professionnel" similarly

conveys the same meaning. It is a service therefore that relates to the individuality of the person and should be open in some form or other to all employees of an institution.

[229] Additionally, I agree with the Respondent that to constitute professional development or training to be a service, it must be performed externally to employees carrying out their regular work functions, as something exceptional to regular information exchanges which would require some degree of organization. An example would be a seminar organised with a structure specifically to train employees.

[230] The requirement that training be organized was recognized by the Commissioner in his submissions that referred to the French definition of "formation" as follows:

> [TRANSLATION]
>
> 62. The Commissioner proposes to define training as: "An organized activity aimed at imparting information and/or instructions to improve and/or maintain the recipient's performance or to help him or her attain a required level of knowledge or skill" [TERMIUM Plus, "training," online].

[231] The definition of "organized" in the Merriam-Webster dictionary is "having a formal organization to coordinate and carry out activities." This definition of training would meet the definition of a service organised under the auxiliary category of section 36(1)(a)(i) because the training is organized and falls outside of the employees' regular duties.

[232] I also refer here to my comments above pertaining to the 2017 TBS Learning Policy, and the definition that it prescribes for the meaning of "training/formation". As indicated, I find that the Commissioner has implicitly adopted this definition by his reliance on the Termium

definition. In doing so, the Commissioner has undermined his argument that co-workers in a team relationship by the daily transfer of information from the more knowledgeable or experienced workers to the less experienced workers as a form of on-the-job training, could meet the definition of training normally referred to as a service as described in the Termium plus definition. The team is formally organized to carry out its mandate, not to provide training services to each other. If training occurs, it is not the purpose of the organization, but merely an effect. To be an organized service, it must be organized for that purpose, not for some other purpose.

[233] Accordingly, I reject the submissions of the Applicant and the Commissioner that the specialists are providing a service to the generalists within the meaning of section 36(1)(a)(i). The relationship is not one of the specialists being service providers to the generalists, but rather as them both being members of a work team. They are mutually exclusive relationships.

[234] In addition, I also find that such on-the-job training would not be centrally provided as argued by the Commissioner. I complete my analysis of section 36(1)(a)(i) by my interpretation of "centrally provided" services and its identical co-equivalent "services centraux".

(8) Central Services

(a) *"centrally provided" and "centraux"*

[235] I find that the terms "centrally provided" and "centraux" are identical co-equivalents. For the purpose of this discussion, I will use the term "central services" to limit those services that

are regularly provided to support employees not working in a team relationship as broadly defined that assist them in the performance of their duties.

[236] My conclusion that the two terms are identical co-equivalents is based upon an implicit conclusion that "centraux" similarly refers to services being centrally provided by a decision of the senior management group of the institution, or some delegated management level exercising these powers. This is not in dispute. As well, there is no apparent dispute that the term "centrally provided services" is intended to place some degree of limitation on the category of performance enhancing services. That is the scheme of the provision whereby the definition of services is very broad in the traditional understanding of the term, but that means their scope must be circumscribed, which purpose Parliament has endowed the terms "centrally" or "centraux" to serve.

(b) *Respondent and Commissioner's submissions*

[237] Neither the Commissioner's Final Investigation Report, or the Applicant attempted to define precisely what centrally provided services comprise.

[238] The OSFI would require "central services" to be those provided to [TRANSLATION] "all (or nearly all) employees of the institution". This would eliminate services provided by the specialists, because [TRANSLATION] "they would constitute 'central' services even less, since they would benefit only a restricted category of OSFI employees, namely the generalists in charge of supervising financial institutions". Thus, the Respondent's submission on central services is somewhat similar to that implied for the first category as those being provided to all

employees, with the qualifier however, that the term “central” could also extend to the quasi-totality of the employees of the institution.

[239] For his part, the Commissioner disagrees that quantitative factors should apply and that the issue of services should be measured on a qualitative basis of the nature of the service itself. More importantly, the Commissioner submits that wherever the structure of the work relationship has been “organized” by the institution to allow one group of employees regularly to assist another group, this should be considered evidence of a service relationship that was centrally provided by management.

[240] In arriving at this conclusion, the Commissioner goes halfway in recognizing that “central” means that management must decide to create services by its description of the meaning of the term as follows: [TRANSLATION] “critical for the institution, in the sense that the institution made the decision, at a central or relatively high level in its administration, to provide this service to its employees”.

[241] The Commissioner denies any requirement that the decision be formally taken. Rather it is a constructive decision, one arising from the evidence that demonstrates that a decision has been implicitly taken to create a service by the fact that it exists. His submission on this point is as follows, with my emphasis:

> [TRANSLATION]
>
> Rather, this is about verifying, as mentioned, whether the institution has made the decision to organize its institutional structure in a way that makes a service available to its employees so that they can perform their tasks effectively. The fact that the central or main duties of a group or category of employees include

> supporting other employees in the performance of their duties, or, conversely, the fact that a group of employees must seek advice and support from another group of employees in the performance of their tasks, are significant indicators in this regard.

(c) *Analysis of centrally provided services*

[242] The Court's interpretation of section 36(1)(a)(i) provides two clear but broadly expressed categories of services. The parties and Commissioner agree that the term "centrally" is intended in some manner to limit the extent of services required to be offered in both official languages under section 36(1)(a)(i). On this basis, I do not see any quantitative limitation on what could constitute centrally provided services.

[243] Such quantitative requirements requiring large numbers of persons receiving services would appear to eliminate bilingual services in many areas where services are recognized to operate. Such would be services to train employees. By the requirement that the training be related to the employees' duties, the quantitative aspect of training is self-limiting. It would also eliminate specialized service providers who would not provide services to all of the employees or even large groups of them.

[244] In addition, attempting to fix any description of a threshold of the extent of a quasi-totality of a service that should be recognized under section 36(1)(a)(i) is also problematic. There would be no bright lines to assist, such as the matter becomes one of discretion requiring the establishment of factors and the means to reasonably determine where the line should be drawn in each institution.

[245] Similarly, the Court disagrees with the Commissioner that qualitative considerations should somehow define centrally provided services, any more than the term should be defined by a quantitative measure as argued by the Respondent. However, I also recognize that the submission is simply one that where someone is providing a service, its essence or qualitative nature should be recognized as such in priority to its quantitative nature.

[246] On the other hand, the Court disagrees with the Commissioner about the nature of the evidence required to demonstrate that management made a decision to create a central service. In my view Parliament intended that the decision be based upon evidence of a formal decision taken by management to create a service to assist employees in the performance of their duties.

[247] The Merriam Webster on line dictionary defines "formal" as "relating to or involving the outward form, structure, relationships, or arrangement of elements rather than content".

[248] In other words, in terms of evidence of a centrally provided service, what we are looking for is the norm of decision-making in federal institutions. It is one whereby the decision is based upon evidence of an appropriate decision-making process by central management with the view to recognizing and establishing a work component of service providers. The example of the 2017 Learning Policy fits perfectly with my view of what Parliament intended to mean by services that are "centrally provided by the institution".

[249] The fact that training may vary widely in terms of how it is provided, the number of employees involved in a training session, or the nature of the training event and trainers, is not

determinative of whether training is a centrally provided service. The issue rather, is whether the central administration has expressly adopted positive and discernible measures to recognize some form of training as a service. Training could be provided on an individualized or group basis, or in whatever circumstances senior management considers the most appropriate learning environment to enhance employee performance. It is up to management to determine training.

[250] For example, the 2017 Learning Policy describes the purpose and implementation of the provision of learning services in the Federal public service at paragraph 3.1 et seq., as follows:

> 3.1 Learning, training, leadership development and professional development are key to ensuring that the public service is equipped to meet the challenges of the 21st century. The acquisition of skills and knowledge and the development of managerial and leadership know−how is critical for the effective management of the public service—it is the foundation of a responsive, accountable and innovative government.
>
> 3.2 Deputy heads have the authority, pursuant to section 12(1)(a) of the *Financial Administration Act*, to "determine the learning, training and development requirements of persons employed in the public service and fix the terms on which the learning, training and development may be carried out," and Treasury Board has the authority, pursuant to section 11.1(1)(f) to "establish policies or issue directives respecting the exercise of the powers granted by this *Act* to deputy heads..."
>
> 3.3 This policy supports deputy heads in meeting their responsibilities by addressing specific training requirements for four groups of employees: new employees, managers at all levels and functional specialists in domains defined by the employer and all employees where the Treasury Board has determined training to be mandatory in the best interests of the public service. In addition, it introduces measures to strengthen organizational leadership and promote innovation. Implementation of this policy will help build a learning culture in the Public Service of Canada and stimulate, guide and promote its development as a learning organization.

[251] I come to the conclusion that Parliament intended that senior management should have responsibility for determining what constitutes services within the meaning of section 36(1)(a)(ii) for a number of reasons.

[252] First, the designation of what constitutes a service complement of employees should be a management decision. The managers of institutions have the ultimate responsibility of ensuring that the mandate and objectives of the agency are met. Official language rights in this area are intended to be a communications umbrella so to speak that should be dropped over those services once designated by management as being required to assist in achieving those ends. Management is in the best place to decide where this would be most appropriate.

[253] Second, the last thing that Parliament would want is a definition of services that opens up every office to some degree of speculation whether the relationship between employees is one of services by the fact that knowledge and skills are passed down from employees normally arranged in a hierarchical fashion to maximize the “deliverables” of team environments. As indicated, my respectful view is that the Commissioner’s interpretation of what constitutes a service would be highly disruptive in the first instance, and would continue to sow uncertainty in work environments as to the application of official language requirements.

[254] Third, there is a reality that services cannot be provided in many instances unless the person receiving the service can understand what is being provided to him or her. It is not as though management would allow a situation to prevail that undermines the operational efficiency of its work environments.

[255] Fourth, federal institutions must follow a norm of rational and transparent decision-making process. This process identifies the need for some form of intervention or amendment of procedures, usually representing choice of options, accompanied by an analysis of the appropriate choice and guidance on how to best implement the decision. That does not mean that the complaints cannot be filed about services, indeed they happen all the time. It also does not prevent the Commissioner from intervening, or acting on complaints in the various matters, including challenging the institution on the basis of poor decision-making in providing services in both official languages.

[256] The Court further supports its conclusion that centrally provided services, because expressly researched and implemented decisions of management would appear to represent the most appropriate, or even only means to provide new services beyond the minimum which Parliament appears to have intended by the terms "including services/tant . . . que". The Court concludes that Parliament intended to provide scope for the provision of new services beyond those that apply to all personnel or are related to the performance of duties. The management group of the institution is optimally in the most appropriate position to determine what and when such an innovative new service should be designated pursuant to section 36(1)(a)(i).

[257] In this matter, there is no evidence before the Court suggesting that any positive decision was made to have specialists train generalists as a service ordained by the OSFI's management group. Evidence of this nature if it existed would have been available from internal documentation, particularly in terms of job descriptions of the specialists and historical documentation describing how the working structure involving generalists and specialists came

to be established and implemented with the view to providing training to the generalists. No such evidence was presented to me. I also doubt that such evidence exists, as it seems obvious that the two groups of employees have been conceived to work in a broader team-environment that involves a hierarchy of participants, bearing no resemblance whatsoever to a service situation.

[258] If training occurs in an institution based upon the policies adopted pursuant to the above directions, it will be centrally provided for the purposes of section 36(1)(a)(i). The 2017 Learning Policy seems destined to be adopted to some degree by all federal institutions, so that such issues will hopefully not arise in the future.

C. *Conclusion on the Interpretation of Official Language Obligations Pertaining to Services in section 36(1)(a)(i)*

1. The definition of services provided to employees or officers is a beneficial and organized function of assistance or essential support provided by employees to other employees, not working together in a team environment. The specialists work in a team relationship with the generalists and do not provide them with services.

2. For the purposes of services provided as individuals or à titre individuel, these are services available to be provided to all employees at some time, in some form or capacity simply by the fact of their being employees of the institution, which by implication is centrally provided.

3. For the purposes of services “centrally provided/à titre . . . centraux”, they 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.

IX. The Interpretation and Application of Section 36(2)

A. *Introduction*

[259] This division relates primarily to the interpretation of section 36(2) of the OLA. It governs the residual language of work rights of employees in designated regions under Part V of the Act. Also under consideration is the secondary application of rights under section 36(2) to affect language rights of co-workers in non-designated regions where the Toronto specialists work. Finally, section 91 is relevant in respect of the interpretation of section 36(2). It would appear to limit the staffing consequences that the Applicant contends otherwise would result from the application of section 36(2) to require the specialist positions in Toronto to be designated and staffed bilingually.

(1) Section 36(2)

[260] Section 36(2) is reproduced here to assist in this introduction and the analysis that follows:

Additional duties in prescribed regions	**Autres obligations**
(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	**(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

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.	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.

[261] Section 36(2) requires federal institutions to establish and maintain work environments that fulfill two linguistic objectives. The first objective is that they be conducive to the effective use of both official languages. The second objective is that they accommodate the use of either official language by its officers and employees.

[262] The interpretation of section 36(2) in *Tailleur* is based in the first instance upon the first objective that prescribes the obligation of institutions to provide a work environment that is conducive to the effective use of both official languages. As a result, the Court in *Tailleur* concludes that the bilingual capacity of an employee cannot be resorted to by the institution to avoid fulfilling its language of work rights to employees. This in turn has the effect of a rule that no bilingual employee can be required to work in their second language of choice to accommodate a unilingual employee, unless justified by significant considerations to do so [the no accommodation rule].

[263] The Applicant relies upon the no accommodation rule, which has a secondary effect that entitles bilingual employees to work with other bilingual employees so as to permit them to make effective use of their first language. In the case of the specialists in Toronto with whom the generalists work regularly, the Applicant seeks to exercise his alleged right, and that on behalf of his co-worker generalist colleagues by requiring the OSFI to implement measures to enable the Francophone bilingual generalist to work with bilingual specialists in Toronto.

[264] The exercise of the Applicant's section 36(2) right will thereby require the re-designation and staffing of a number of bilingual specialist positions. I describe this staffing principle as a "collateral bilingual staffing" principle or requirement. The staffing is collateral in the sense that it is the exercise of the Applicant's right pursuant to section 36(2) that determines the linguistic qualifications attached to the position and its eventual staffing, as opposed to its functions.

[265] In contradistinction to *Tailleur*, I conclude by my interpretation of section 36(2), and in particular the second objective that work environments must accommodate the use of either official language. Accordingly, Parliament intended bilingual employees to accommodate unilingual employees to some degree. As a result, by my interpretation of section 36(2), the issue is resolved largely at the institutional level by determining whether "work environments" are compliant in being sufficiently conducive to the effective use of both languages, while also accommodating the use of either official language.

(2) Section 91

[266] Section 91 provides as follows:

Staffing generally	**Dotation en personnel**
91 Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.	**91** Les parties IV et V n'ont pour effet d'autoriser la prise en compte des exigences relatives aux langues officielles, lors d'une dotation en personnel, que si elle s'impose objectivement pour l'exercice des fonctions en cause.

[267] I conclude that section 91 of the OLA, as an application of the merit principle, prohibits the collateral bilingual staffing of positions based on Part V of the Act.

[268] In this respect, section 91 is in some degree irreconcilable with section 36(2), which is intended to express a *Charter* right. I therefore conclude that reconciliation of two fundamental principles of staffing and language rights must be mediated by each other. This further supports my interpretation that section 36(2) must provide for some degree of accommodation by bilingual employees of unilingual employees as it reflects a compromise result of the right to make effective use of one's first language, and that work environment will comprise both bilingual and unilingual employees working together.

B. *The Parties' Submissions*

(1) Applicant

[269] The Applicant relies almost entirely on the decision in *Tailleur* in support of his argument that the specialist positions in Toronto should be redesignated bilingual in order to allow them to

fully exercise their section 36(2) rights. Given that I analyze the *Tailleur* decision in great detail, little purpose is served by reviewing the Applicant's submissions here.

[270] The Applicant also advances what could be described as a generalized work environment argument based upon the organizational structure portions which are as follows:

> [TRANSLATION]
>
> [78] . . . The institutional environment of the OSFI clearly places it at odds with the principle of the substantive equality of the two official languages. This situation would require proactive measures on its part to counter the negative effects of its internal organization. The OSFI refuses to acknowledge that the problem even exists.
>
> 79. The evidence in this regard clearly demonstrates that the Toronto office is now the de facto co-headquarters of the OSFI. It is the largest office in terms of staff (345, as opposed to 320 in the Ottawa office, 20 in Montréal and 12 in Vancouver), the Superintendent has an office there, and several sensitive activities are found there, notably almost all of the Supervision Support Group, which includes the specialists who support the supervisors in their tasks. This group includes approximately 120 persons.
>
> 80. . . . The same is true for the 225 other positions from the Toronto office. The fact that so many activities have been located in a unilingual Anglophone region, especially central and sensitive activities such as supervision support and supervisory planning, means that all of the OSFI—including the employees working in bilingual areas—is constrained to constantly communicate in English and to read documents written in that language.

[271] The above evidence, which is not contradicted, may well have figured in the discussions between the OSFI and the Commissioner that led to 11 specialist positions in Toronto being designated bilingual. However, I do not attach much relevance to the organizational structure in this matter, inasmuch as I understand that section 36(2) focuses on the work environment of the

Applicant in Montréal. The specific issue is whether it conforms to the objectives of the provision, and if not, what measures need to be taken to ensure that it does.

[272] The evidence on the linguistic work environment and the nature of the communications between the Toronto specialists and the Montréal generalists are described at paragraph 83 of the Applicant's memorandum as follows:

> [TRANSLATION]
>
> 83. . . . As mentioned, the vast majority of OSFI employees located in Toronto are unilingual Anglophones; the communications between them and the Montréal employees were extremely frequent and of all types: advice, supervision, meetings, etc. These communications took place in English only, thereby depriving the bilingual employees in Montréal of their right to work in their language of choice. . . .

[273] In order to correct the situation in the Montréal office, the Applicant requests a remedy which would designate all positions of specialists who work regularly with the generalists to be designated bilingual as described at paragraph 97 of his memorandum:

> [TRANSLATION]
>
> 97. Mr. Dionne submits that it would have been reasonable to raise the linguistic designations of all the positions whose incumbents must interact on a regular basis with supervisory staff located in a designated bilingual region, for all sectors of the OSFI. As pointed out by Mr. Dionne in his evidence, the OSFI staffing practices have always been a determining factor in maintaining a fundamentally Anglophone culture and a key element of his inability to serve his employees in both official languages. Raising the linguistic designation of all the relevant positions would make it possible to remedy this fundamental problem.

[274] I draw three relevant conclusions from these submissions. First, the Applicant makes no distinction based on the fact that he works in a bilingual region while the specialists work in a unilingual region. It is difficult not to consider this bi-regional employee relationship as a relevant factual parameter of the case that must be considered.

[275] By ignoring the issue, the Applicant implicitly concludes that the collateral bilingual staffing rule applies to bilingual regions. If I were to accept its application at the bi-regional level, I would implicitly be recognizing this principle as a valid staffing proposition throughout all federal institutions. In the circumstances I am compelled first to consider whether section 36(2) applies in bilingual regions. Only after the collateral bilingual staffing rule is determined to apply in bilingual regions, would I be in a position to turn my mind to whether it should apply equally to positions in unilingual regions.

[276] Second, the *Tailleur* decision at paragraph 82 made the following statement of principle:

> [TRANSLATION]
>
> [82] "[. . .] a federal institution cannot circumvent its language of work duties under Part V of the OLA simply by resorting to bilingual employees. The language proficiency of individuals should not be a factor in determining language rights."

[277] This comment provides the jurisprudential foundation for the Applicant's argument. This explains why the *Tailleur* decision must become the focus of much of my analysis. This despite that the facts in that matter are entirely different than those presented here, having no direct impact on staffing, or the application of section 36(2) to unilingual regions.

[278] Third, this is ultimately a decision about staffing requirements. This brings into consideration section 91 of the OLA. It states that it has priority over Parts IV and V in terms of preventing language rights arising therefrom affecting the staffing of a position, unless language skills are an objectively required function in order to perform the tasks of the position. Once the Respondent raised the issue of section 91 being in opposition to section 36(2) as a factor that I must consider, there is no avoiding taking a closer look at what the provision entails.

(2) Respondent

[279] The Respondent's submissions with respect to the application of section 36(2) reflect that the BSIF has already designated 11 bilingual specialist positions in Toronto as part of its settlement with the Commissioner. Accordingly, the main objective of the OSFI is to ensure that no further positions need be designated bilingual. To that extent, I find that the Respondent has greatly understated the role of section 91 in limiting the application of collateral bilingual staffing.

[280] This is problematic for the Court. It means that the OSFI for some undisclosed reason has accepted that a number of its specialist positions should be designated bilingual in response to the Applicant's complaint. By its opposition to the Applicant's arguments that the specialists were providing services, section 36(1)(a)(i) was clearly not the basis for this outcome. In such circumstances, it might appear that the OSFI has accepted the collateral bilingual staffing principle as an established requirement flowing from section 36(2) and only seeks to limit its categorical application to all positions where the specialists work with the generalists in Montréal.

[281] The Respondent refers to section 91 of the OLA to support a fairly restrained submission, arguing that the Applicant has not met its evidentiary onus to demonstrate why the designation of 11 positions is insufficient. The Applicant's response to this submission is that the Court should settle the law on the institution's obligations pursuant to section 36, and thereafter remain seized of the matter to ensure that OSFI's obligations are fulfilled.

[282] The most significant consequence of the Respondent raising the application of section 91, even if only as a means to prevent further staffing consequences of specialists in Toronto, was that it forced the Court to consider why the provision should not apply to limit collateral bilingual staffing in all circumstances. Having come to the conclusion that this appeared to be the effect of the provision, I issued a direction to the parties requesting their submissions with respect to the relevance of section 91. I address the submissions in reply to the direction below.

[283] The Respondent also advanced a second alternative raising the spectre of an unacceptable outcome should the collateral bilingual staffing principle be applied throughout the OSFI. The Respondent argued that the outcome would be impracticable and contrary to the objectives of the OLA by the fact that it would require all the employees of the BSIF to be bilingual, regardless of the operational requirements of the institution.

[284] The Court agrees that the Applicant's argument, if applied to other employees in a bilingual region, would greatly expand the number of bilingually designated positions in bilingual regions. This would result from what I describe as the "concatenating" phenomenon of collateral bilingual staffing which would have a tendency to expand exponentially as more

positions were designated bilingual. It would also have somewhat that tendency in affecting other unilingual positions in unilingual regions who work regularly with bilingual employees in the bilingual regions. This assumes of course that section 36(2) has a collateral staffing effect in unilingual regions, which I determine not to be the case.

[285] When addressing outcomes, there was some discussion about the option of separating unilingual employees to work in "language silos" as a workplace arrangement to avoid collateral bilingual staffing based on section 36(2). In my view such a practice would be inconsistent both with the spirit of the OLA, and specifically section 36(2). Its purpose is to establish and maintain work environments that are conducive to the effective use of both official languages and accommodate the use of either official language by its employees.

[286] The Applicant provided a third set of submissions, although supported with little analysis. The submissions were said to be self-evident, in that the Applicant's argument ignores: (1) the existence of unilingual regions of Canada; (2) the need for the federal public service to have offices and employees in these regions; (3) the limited scope of the obligations of sections 35(1)(a) and 36(2) that only apply to bilingual regions of the OLA; and (4) only to the extent that the obligation is limited to ensuring that the workplace is conducive to the use of both official languages, and not that of ensuring that employees can interact exclusively in the language of their choice.

[287] I agree with the fourth submission that the focus of section 36(2) is on work environments and not employee interactions. This submission as expanded upon, forms the basis

of my conclusions. Obviously, this submission depends upon the interpretation and application of section 36(2), which comprises the totality of my analysis, apart from my analysis of section 91.

(3) The Commissioner's 2014 Final Report

[288] The Commissioner confined its submissions to the interpretation of paragraph 36(1)(a)(i), which I have reviewed above. Nonetheless, the Commissioner's 2014 Final Investigation Report endorsed the Applicant's position. In the section of the report entitled "Fondement juridique", it commented as follows:

> [TRANSLATION]
>
> Employees of these (bilingual) regions have the right to work in French or in English, subject to some obligations related to services provided to the public and to other employees.

[289] This is basically the Applicant's submission, although confirmed by the reasoning in *Tailleur*, which was handed down after this report. I note that the statement refers to "working" in the language. The Commissioner would have meant the employees' right to communicate in their own language, as they obviously cannot require co-workers to communicate with them in their own language, unless they are service providers.

[290] Also with respect to services provided between different linguistic regions, the Commissioner stated that when provided from anywhere in Canada to employees anywhere in the country, they were to be in the language of the person receiving the service. The Court agrees that this is a reasonable rule, and indeed a necessary one. Given that a service can only be useful

if understood by the person receiving it, the language of communication must be in that person's language.

C. *Section 91 and Collateral Bilingual Staffing*

(1) No evidence that collateral bilingual staffing practices have been adopted by federal institutions

[291] The Court's direction to the parties and the Commissioner included a request to be provided with any publicly available evidence in the form of policies and directives to indicate that federal institutions had adopted collateral bilingual staffing practices, such as to indicate that section 36(2) was being interpreted to affect staffing practices in that matter. I did not presume that it was within my authority in an adversarial process to require the parties to provide evidence, beyond what I might find of a public nature that could serve as judicial notice on this issue.

[292] The only relevant information on the designation of the bilingual positions that was provided by the parties appears to be that found in the *Directive sur les langues officielles pour la gestion des personnes* dated October 15, 2012, the relevant provisions which are as follows:

> [TRANSLATION]
>
> 6.2 Linguistic identification of positions
>
> Managers are responsible for the following:
>
> 6.2.1 (Linguistic identification) Determining the linguistic identification of a position and ensuring that it reflects the functions and duties related to that position. They do so by:
>
> 6.2.1.1 objectively determining if the position requires the use of one or both official languages; and

> 6.2.1.2 objectively establishing the required level of proficiency in the second official language if the position requires the use of both official languages.

[293] The directive is fairly ambiguous, although it would appear that paragraph 6.2.1 reflects section 91 in its reference to the initial requirement for an objective determination of functions and tasks related to the position for the purpose of identifying its linguistic designation. Although paragraph 6.2.1.1 does not indicate how the staffing officers should determine whether a position requires the use of one or two official languages, the term "objectively", would tend to suggest that it refers back to paragraph 6.2.1 in linking the linguistic identification with the functions and tasks of the position.

[294] As a consequence of the Respondent's submissions, even though not argued by the Respondent, it appears to me that section 91 is highly relevant to any consideration of section 36(2). In particular, the wording appears to prevent an exercise of collateral bilingual staffing, particularly as it has priority over "the application of official language requirements to a particular staffing action" arising from Part V of the Act, such as section 36(2).

[295] As the Court is the final arbiter of the interpretation of the OLA, I conclude that I have no option but to consider the relevance of section 91 with the interpretation of section 36(2) and the staffing remedies sought by the Applicant, even if the Respondent has not advanced as fulsome an argument as might have been expected on behalf of the OSFI.

(2) The Parties' submissions regarding section 91 that the scope of the complaint proscribes its consideration

[296] My Direction to the parties and the Commissioner requested their views as to the relevance and application of section 91 to the matter at hand.

[297] The Applicant and Respondent on the other hand, advance submissions that are similar in contesting the Court's jurisdiction to consider section 91. They claim that because there is no complaint pursuant to section 91 regarding the legitimacy of a staffing procedure, it is not a matter that the Commissioner has investigated and therefore cannot be within my jurisdiction to consider. This submission appears to confuse the relevance of section 91 as a contextual provision to interpret the scope of section 36(2), as opposed to having a complaint based on the provision as an issue foretold consideration.

[298] [306] The acting Commissioner does not suggest that the Court is without jurisdiction to consider section 91. This is not surprising in view of her earlier submissions that the Court should take jurisdiction over the issue of section 36(2) itself, although not raised by the Applicant and not a matter the Commissioner undertook to investigate arising out of the facts of his complaint. Her arguments are more substantive to the point that the provision has only limited application and is not relevant to the debate of the interpretation and exercise of section 36(2) rights.

[299] The Applicant's submission that I lack jurisdiction is based upon the conception that it is dependent on the provisions of the Act that define the federal institutions' linguistic obligations. This argument is found at paragraph 30 of the Applicant's supplementary memorandum as follows, with my emphasis:

> [TRANSLATION]
>
> 30. The principle stated in section 91, when it is applied, is necessarily dependent on the provisions of the Act that define the duties of federal institutions with respect to official languages. If it is determined by the Court hearing an action pursuant to Part X that work performed by a certain type of position must, pursuant to a provision of Parts IV or V, be offered in both official languages, certain consequences would necessarily result in terms of linguistic profiles. If the current profiles do not take into account the duties of the institution as they have been defined by the court, they will necessarily have to be changed. There is no need to bring an action directly evoking section 91 to arrive at this result.

[300] I disagree with this interpretation of section 91. Its wording does not suggest that it is dependent on provisions such as section 36(2), but rather that it has precedence over this and other provisions that would impose language requirements not needed for the performance of the functions of the position. The Applicant implicitly acknowledges why section 91 must be a consideration in this matter: i.e. that there is a direct link between the exercise of language rights and staffing outcomes. Parliament by section 91 similarly clearly also acknowledges the direct link between language rights and staffing obligations. It was with that very clear understanding of the link that Parliament indicated that the functional requirements of the position should have precedence over language rights in the area of consequential staffing in order to uphold the principle of merit.

[301] What is surprising therefore, is the failure of the Applicant, the Respondent, and the Commissioner to comprehend section 91 is a statement by Parliament that the principle of merit should have precedence over language rights in the area of staffing of positions. It cannot be otherwise, because the principle of staffing meritocracy is the overriding foundational principle underpinning the legitimacy of the Federal Government in the eyes of all reasonable Canadians.

[302] Accordingly, there are several difficulties with the submissions suggesting that I lack jurisdiction to consider section 91. First, section 91 is contextually relevant to the interpretation of section 36(2). Section 91 contradicts the categorical interpretation of section 36(2) in its requirement that the specialist positions be redesignated bilingual. This supports my interpretation of section 36(2) that Parliament intended the second objective to require the accommodation of unilingual employees by their bilingual colleagues. A principal enshrining consequential bilingual staffing contradicts Parliament's intention.

[303] Second, the Court is required to consider probable outcomes that result from its interpretation of the provision. Indeed, it is the starting point for any interpretation of a statutory provision. The Applicant is arguing for an interpretation of section 36(2) which he acknowledges seeks a remedy requiring the Court to require the Respondent to modify the linguistic qualifications of positions in Toronto as a result of the exercise of his rights under section 36(2). If the outcome of the interpretation of Part V of the Act is to determine linguistic staffing requirements, it is obvious that a provision which limits the application of these requirements pursuant to Part V is contextually relevant to its interpretation and the remedy the Applicant seeks from the Court.

[304] Third, the Respondent has advanced submissions arguing that the Court should apply section 91 to restrict the extent of the Applicant's remedies requiring additional specialist positions to be redesignated. This requires me to consider the application of the provision. Additionally, the Respondent points to a list of problematic outcomes, should section 36(2) be applied in its mostly categorical fashion as argued by the Applicant? The Respondent pleads that

the application of the Applicant's interpretation of section 36(2) would result in the elimination of opportunities for unilingual Canadians to find positions in both bilingual and unilingual regions.

[305] Given these arguments, the Court cannot understand why the Respondent did not advance section 91 as a contextually relevant provision to the interpretation of section 36(2) in the first place. The Court having raised the issue of the relevance of section 91 therefore is even more surprised that the Respondent has not argued that section 91 contradicts the requirement to bilingually staff all of the specialist positions in Toronto in the same manner that it strenuously argues that specialists are not providing services to the generalists pursuant to section 36(1)(a)(i). I see no substantive difference in the application of section 91 as argued by the Respondent that the provision is relevant because the Applicant has failed to provide evidence to support additional staffing, from such evidence being similarly required for the bilingual designation of all of the positions in Toronto. Moreover, once the Respondent raises the implication of section 91 for the Court's consideration, the provision becomes a live issue that I am required to follow to the end to determine its relevance to the issues at hand.

[306] Fourth, it is not clear how section 91 would ever come to be considered by the Court if not in the context of a case that seeks a remedy pursuant to section 36(2) that concludes in a declaration by the Court that OSFI is required to designate additional specialist positions in Toronto as essential-bilingual. Having made that ruling, a complaint filed by a prospective candidate for one of the Toronto positions would see it enter the Commissioner's labyrinthine complaint-handling and settlement procedures that could only terminate long after the positions

had been filled in Toronto. No doubt the argument would also be presented that the issue is *res judicata* by my ruling. Then the Commissioner might work out some arrangement with the OSFI that the Applicant obtain a unilingual specialist position making the complaint go away. To some extent, this was the intention of the Federal Court of Appeal in *Canada (Attorney General) v Viola*, [1991] 1 FC 373 [*Viola*] which decision will be discussed below.

[307] Finally, picking up on the Applicant's submissions, he argues that he is seeking an outcome based purely upon a legal interpretation of section 36(2) that bears no relation to the facts apart from his occupying a bilingual position and working regularly with a co-worker in a unilingual position (while ignoring that the co-worker is in a unilingual region).

[308] I agree that the entirety of the case on this issue rests on a legal interpretation of section 36(2). But this is all the more reason for the Court to consider section 36(2) by reading "the words of an Act . . . 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."

[309] It is an argument that the Respondent has pointed out will have wide ramifications on the staffing of positions throughout the OSFI and federal institutions generally. This is not a trifling matter. In my view, I am required to consider any other contextual provision in the OLA that affects a legal interpretation of the provision sought by the Applicant, all the more so when section 91 can be shown to be extremely relevant.

[310] I therefore reject any suggestion that the Court should not consider section 91 as contextually relevant to the interpretation of section 36(2), and accordingly I will proceed to do so.

(3) Section 91 is intended to ensure that linguistic requirements of Parts IV and V do not override the merit principle of staffing positions in the public service

[311] I conclude that section 91 is intended to ensure that the merit principle is not superseded by language requirements not required for the performance of the functions of a position. Neither of the parties, nor the Commissioner appeared to have recognized this significant policy consideration embodied in section 91 that would be a counterweight to any possible overreach to the application of section 36(2). My view that section 91 is intended to protect the primacy of the merit principle is supported by the grammatical and ordinary effect of its wording in its context, in addition to the jurisprudence that has considered the provision, as well as the extrinsic evidence concerning Parliament's intention in adopting the provision.

(a) *Extrinsic evidence regarding section 91*

[312] As indicated, the Commissioner appears to recognize that section 91 is contextually relevant. As a result, her arguments are substantive in nature, all of which however, I reject.

[313] The Commissioner first referenced the Parliamentary debates with the purpose of demonstrating that Parliament intended a relatively minor role for section 91. He argued that the provision was only intended to have symbolic value with the view to protecting public servants

from discrimination. This at least, is my conclusion in examining his submissions in reply to my direction at paragraph 4 as follows, with my emphasis:

> [TRANSLATION]
>
> 4. The Minister suggested several things by adding this section. First of all, he considered that it was a symbolic addition since the *Public Service Employment Act* already made provision for mechanisms intended to protect public servants from any discrimination. Next, he intended to entrust a specific role to the Commissioner of Official Languages to ensure that public servants were treated equitably. Finally, he wanted litigants to be able to have recourse to the Courts in the case of inequitable treatment. The Minister stated the following:
>
> > During the hearings, witnesses suggested measures to prevent language requirements in staffing from leading to abuses.
> >
> > Allow me to repeat, Mr. Chairman, that the *Public Service Employment Act* provides for recourses against all the requirements, particularly linguistic, that could be contrary to the merit principle.
> >
> > We recognize however that it is symbolically and fundamentally desirable to clarify this question. We also think that it is important to give a specific role to the Commissioner of Official Languages and the Courts so they can take into account the inequitable or inappropriate requirements that could be imposed on public servants or on persons applying for employment with the federal Public Service.

[314] The passage from the Parliamentary debates at the time of adoption of section 91 describes its intention to prevent any application of a provision such as section 36(2) to create a basis for staffing positions not based on merit. The first expression of Parliament's intention in rationalizing section 91 is to avoid abuses by recourse to language requirements that would be contrary to the merit principle, i.e. "qui pourraient être contraires au principe du mérite."

[315] The emphasis on the merit principle was reinforced by the sentences that followed wherein the Minister stated "qu'il est symboliquement et fondamentalement souhaitable de clarifier cette question". The fundamental symbolism referred to the clarification of "this question" which can only refer back to the initial issue of ensuring that linguistic requirements do not override meritorious staffing principles. The Minister's statement was clearly to the effect that the priority of the merit principle needed to be clarified, both symbolically and fundamentally, to avoid any misunderstanding regarding the imposition of language requirements that might be said to arise under Parts IV and V of the Act, where language plays no role in the functions required for the position.

[316] In examining the language of Parliament and section 91, assuming that it is intended to uphold the merit principle in staffing processes, the fact that the provision was expressly declared to have priority over the language obligations that Part IV and V might create, is highly significant. It is a statement that in matters of staffing of positions in federal institutions, the merit principle should have priority over any staffing obligation thought to be created by the requirements of Parts IV and V of the Act that would undermine the merit principle by not being related to the functions of the positions being staffed.

[317] In rejecting the submissions of the Commissioner, I do not disagree that discrimination was an element of the reasoning underlying section 91. Specifically, the population identified who would be the victims of such discrimination were unilingual Canadians who could not apply for a position that was designated bilingual.

[318] Besides the concerns that unnecessary language requirements would discriminate against unilingual candidates, the underlying concerns about overriding the merit principle by the prospect of a principle of collateral bilingual staffing arise from the fact that the population of applicants available to staff bilingual positions is considerably less than the population for unilingual positions.

[319] While not specifically applicable to the pool of candidates for any particular position, the overall statistics nevertheless describe the limited opportunities for unilingual Canadians to fill bilingual positions on a larger scale. These statistics indicate that in 2011 approximately 17.5 % of Canadians identified themselves as being bilingual, (Lepage & Corbeil, *The Evolution of English – French Bilingualism in Canada from 1961 to 2011*, Statistics Canada [Lepage & Corbeil]: https://publications.gc.ca/collections/collection_2013/statcan/75-006-x/75-006-3012001-4-eng.pdf).

[320] Moreover, approximately 55 % of Francophones identify themselves as unilingual. If its purpose is being described as to prevent discrimination, this must be on the basis that it limits employment opportunities of unilingual Canadians of both official language expressions, while diminishing the pool of candidates available to compete for a position when linguistic requirements play no functional role in performance of the duties of the position.

[321] The Commissioner also referred the Court to additional extrinsic evidence from the debates to the effect that section 91 (referred to as section 85 at the time) was not intended to

attenuate the obligations of federal institutions to meet their obligations under Parts IV and V of the Act, in the following passage, with my emphasis:

> [TRANSLATION]
>
> To return to the concerns expressed before your Committee, section 85 will not interfere with the imperative staffing of positions and <u>will certainly not reduce the obligations of federal institutions in terms of services to the public and language of work.</u> In fact, these obligations, including the one to actively offer services, will be defined by the Act and the Regulations for its application, and all federal institutions are required to comply with them.

[322] The Court agrees with the statement. However, it begs the question as to what the obligations are of federal institutions when the principles of merit are in contention. This appears to be the first case where section 91 has been considered in the interpretation of language of work provisions of Part V.

(b) *The Preamble to the OLA*

[323] The sixth paragraph of the Preamble, which was an amendment added in 1988 to the OLA, appears to be relevant to this discussion. The English version is as follows with my emphasis:

> AND WHEREAS the Government of Canada is committed to achieving, <u>with due regard to the principle of selection of personnel according to merit</u>, full participation of English-speaking Canadians and French-speaking Canadians in its institutions;

[324] In my view, this paragraph pertains directly to section 91. It explicitly indicates that Parliament was concerned about maintaining the principle of selection of personnel according to

merit. The provision was added during the debates by the Parliamentarians. To a certain extent therefore, it must be seen as something the original drafters of the legislation thought was so obvious that they did not think it was necessary to explicitly safeguard fundamental staffing principles of the Federal Government.

[325] It is therefore, an important contextual provision because in terms both of the extrinsic evidence relating to its introduction in Parliament and the accompanying Preamble, it opposes collateral bilingual staffing in the application of section 36(2).

(c) *Jurisprudence regarding the purpose of section 91*

(i) *Canada (Attorney General) v Viola*

[326] I am further convinced of my conclusion that section 91 is intended to reflect the merit principle in staffing, inasmuch as the Federal Court of Appeal has stated so in the *Viola* decision at paras 19 and 20, which are as follows, with my emphasis:

> 19 I cannot accept this argument. Essentially, these provisions are but a revised statement of the duty already imposed by section 40 of the 1969 Official Languages Act to maintain the principle of selection based on merit. By stating that language requirements must be imposed "objectively", section 91 expressly confirms what has always been implicit, namely that language requirements cannot be imposed frivolously or arbitrarily. The purpose of this section is to provide comfort and reassurance, rather than create new law, and it would be vain to seek in it for any new jurisdiction of any kind for the appeal board, especially as subsection 77(1) expressly authorizes a complaint under section 91 to be brought before the Commissioner, not the appeal board, and it appears from [page 389] section 35 and subsection 39(2) that the department concerned, not the Public Service Commission, is responsible for ensuring compliance with the 1988 Official Languages Act in the establishment of languages of work.

> 20 That is not all. The foregoing provisions indicate that Parliament has directed its attention to the matter of selection based on merit. If it had intended to take the opportunity of giving the appeal board a new jurisdiction, it would certainly have done so at the same time as it undertook to create the new judicial remedy contained in Part X. It should not be forgotten that while the 1988 Official Languages Act establishes the right of government officers to use either official language (section 34), it also establishes the public's right to be served in either language in accordance with the provisions of Part IV (section 21). It may be concluded that the legislature did not think it advisable to make the appeal board the proper decision-making authority to determine the respective rights of government officers and the public in the particularly sensitive area of language of work and language of service within the federal government structure. Parliament might well have preferred to make the Commissioner and the judges responsible for performing this delicate task. To raise any question as to that preference would be incautious.

[327] The Court in *Viola* indicated that the purpose of the provision was to restate the previous section 40 of the 1969 OLA, being that "to maintain the principle of selection based on merit". Although differently worded, this is how I would similarly characterize the purpose of section 91.

[328] I note that the Commissioner highlighted the excerpt from paragraph 19, that the purpose of this section is "to provide comfort and reassurance, rather than create new law as a statement" with the view to rejecting the argument that it provided the Public Service Employment Appeal Board, where a staffing appeal pursuant to section 91 had been brought, with a new jurisdiction to hear complaints related to the linguistic staffing issues, which previously did not exist. It was not new law therefore in relation to the previous statement of the primacy of merit in staffing found in section 40 of the 1969 OLA, which was new law at that time.

[329] The plain language of section 91 restates the priority of merit as the fundamental staffing principle applying to federal institutions, including where language requirements said to arise out of Parts IV or V of the Act are not objectively required to perform the functions of the position. The Parliamentary debates confirm my rejection of the submissions of the parties and the Commissioner that effectively would have me ignore considering whether section 91 is relevant in construing the ambit of section 36(2).

(ii) *Norton v Via Rail Canada*, 2009 FC 209 [*Via Rail*] and other service cases

[330] In his submissions, the Commissioner attempted to rely on other case law pertaining to staffing, but I find that none could be said to have violated the merit principle in the designation of bilingual positions. Indeed, they tend to reject any notion of collateral bilingual staffing. For example in, *Via Rail*, the issue related to the staffing of positions on trains travelling across Canada. The requirement for bilingual staffing arose out of the fact that Via Rail provides services to the travelling public and is required to do so in both official languages. Justice Luc Martineau described the application of section 91 of the decisions at para 79 as follows with my emphasis:

> [79] As I read section 91, a federal institution cannot, in the guise of purportedly giving effect to its obligations under Part IV or V of the OLA, set language requirements that are not objectively related to the provision of bilingual services in the particular setting where those functions are performed by the employee. For example, on VIA's trains, this might include imposing bilingual requirements on the positions of cook and chef which are not front-line positions (in other words service positions).

[331] The Court dismissed the application on the basis that there was sufficient evidence to support the bilingual staffing. Given that the matter involves a challenge to a decision exercised by management to staff a position, the onus is on the applicant to establish an absence of functional objectivity in the staffing of the position. As noted by the Commissioner when addressing the issue of the onus of proof, the judge who assesses the matter must find "that there was no evidentiary base to the designation, or that the designation was evidently unreasonable, or that there was an error of law somewhere": *Professional Institute of the Public Service v. Canada*, [1993] 2 FC 90 at page 106.. The onus is not an issue if the result is to require the positions in Toronto to be staffed bilingually on the collateral basis of the application of section 36(2). It is either a permissible application of section 36(2), or not depending upon the interpretation of the provision.

[332] In *Via Rail*, the Court found that there was no evidence of a compelling argument to support the applicant's position to overturn the staffing decision, referring specifically to the wording from section 91 at paragraph 90 as follows, with my emphasis:

> [90] The applicant has not brought <u>any evidence</u> or made any compelling argument that the designation of the first ASC position as bilingual in 1986 or the second one in 1998 was not objectively required to perform the functions for which the staffing actions were taken.

[333] The Applicant in this case is not arguing that the specialist positions should be staffed bilingually on the basis of evidence. This is a purely legal argument. I cite a portion of the submission from paragraph 30 of his supplementary memorandum to make this point, with my emphasis as follows:

> [TRANSLATION]

> If it is determined by the Court hearing an action pursuant to Part X that work performed by a certain type of position must, pursuant to a provision of Parts IV or V, be offered in both official languages, certain consequences would necessarily result in terms of linguistic profiles.

[334] Conversely, it is arguable that the decision in *Via Rail* stands for the proposition that collateral bilingual staffing is not a requirement simply by bilingual employees working regularly together, either in bilingual or unilingual regions throughout which Via Rail operates its trains. The Court cited the example of the bilingual designation of the positions of a chef or cook with whom conductors would work regularly as representing a likely violation of section 91.

[335] The Commissioner also relied on *Via Rail* to support his argument that the requirements of "active offer" should be considered a factor in the designation of the specialists' positions. Thus, he argued at paragraph 11 of his supplementary memorandum as follows, with my emphasis:

> [TRANSLATION]
>
> Thus, a federal institution may create bilingual positions beyond its minimal obligations pursuant to Part IV to the extent that this staffing may be objectively justified. The Court defined the objectivity criteria of section 91 as having a double dimension: an individual dimension and a more general dimension, that of promoting bilingualism throughout the country.

[336] Thus, a federal institution may create bilingual positions beyond its minimal obligations pursuant to Part IV to the extent that this staffing may be objectively justified. The Court defined the objectivity criteria of section 91 as having a double dimension: an individual dimension and a

more general dimension, that of promoting bilingualism throughout the country. I do not disagree with the foregoing statement in respect of work environments where services to the public are provided. But as indicated above, the positions of bilingual service providers are staffed on merit, due to the essential language qualification to be able to serve patrons in both official languages. Such staffing procedures in no way infringe section 91.

[337] The same point stated alternatively is that the issue at hand is that of collateral bilingual staffing based upon the requirements of section 36(2), not active offer which arises out of provisions of Part IV of the OLA. I have already indicated that there appears to be evidence of a requirement for bilingual staffing of specialist positions based upon service needs provided to Francophone financial institutions. I am also sympathetic to the Applicant's submission that a federal institution should endeavour to project a bilingual image across the country, which could constitute a form of the application of the "active offer" principle. That is not an issue that the Applicant has raised. His arguments are founded specifically on section 36(2), which contains no aspect of the provision of services that would require some form of active offer with defined financial institutions, as opposed to members of the public at large.

[338] The Commissioner also referred the Court to the decision *Schreiber c Canada*, 1999 CanLII 8898, [1999] ACF no 1576 [*Schreiber*] and similarly to *Via Rail* at para 106 with respect to security issues justifying bilingual staffing. In *Schreiber* all of the positions were designated bilingual in a work environment consisting of air traffic controllers.

[339] With respect, neither *Schreiber* nor *Via Rail* are relevant to the application of section 91. Both are service case cases, *Schreiber* being one of air controllers providing services to aircraft landing at airports. The facts in the *Schreiber* decision were also unique in that security and safety issues required an entirely bilingual staff to ensure that all employees could understand the conversations that were occurring around them in their unique work environment. This was pointed out at para 132, as follows, with my emphasis:

> [TRANSLATION]
>
> 132. Indeed, given the unique nature of air traffic control operations, only a fully bilingual work environment could be ". . . conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees", as required by paragraph 35(1)(a) of the Official Languages Act. Finally, a fully bilingual work environment was also consistent, on a long-term basis, with the Department's high safety requirements for the provision of air traffic control services.

(d) *Section 16(1) of the* Charter

[340] Finally, the Commissioner advanced the constitutional argument based on sections 20 and 16(1) of the *Charter* submitting only that it be given consideration when interpreting the languages of service and work, submitting at paragraph 18 of her supplementary memorandum as follows with my emphasis:

> Section 20 of the *Charter* concerning the language of service and subsection 16(1) of the Charter concerning the language of work form the constitutional foundation for Parts IV and V. These two parts have primacy over any other incompatible provision of any other act. The constitutional source of Parts IV and V and their primacy over any other act are important indicators of their special value within the OLA. Thus, these parts of the OLA must always be interpreted in a broad and liberal manner, so as to implement their purpose.

[341] The Court certainly agrees with that proposition inasmuch as the purpose of article 16(1) of the *Charter* is clear being that of ensuring that "the official languages of Canada have equality of status and equal rights and privileges as to their use in all [federal] institutions."

[342] But such rights are always subject to some degree of mitigation depending upon context. In my view, it is highly unlikely that any Court would endorse the application of language rights over a foundational principle of a meritocratic federal institutional regime. To do so would undermine, not only the legitimacy of Canada's federal human resources regime, but also the language rights legislation generally that the Commissioner is mandated to uphold.

[343] Had the Commissioner recognized that section 91 enshrined the merit principle in respect to staffing or language rights arise, I cannot imagine that he would have advanced this argument.

[344] In any event, constitutional issues are not raised in this matter. Besides, we only have one interpretation of section 36(2); that provided in the *Tailleur* decision. Section 91 was not a mitigating factor in that decision, because staffing was not recognized as being at issue. In fact, the applicant proposed an alternative reasonable measure in that matter which could have had staffing repercussions. It will be one of the items that I consider in my analysis of the *Tailleur* decision.

(4) Conclusion on section 91

[345] Parliament has drawn a bright line to distinguish the limits of language of work rights when it comes to the staffing of positions. In effect, it has stated loudly and clearly that merit must be the underlying foundation for every appointment in federal institutions.

[346] The appointment of employees and officers to provide services to the Canadian public or to their fellow colleagues very often requires that the occupant of such positions be bilingual. This is a purely meritocratic appointment. So too is the requirement that managers be bilingual, even more so because not only must they manage ordinary operations and administration, but they are also tasked with the unenviable duty of managing the delicate and often difficult environments of the employees made up of mixed languages and mixed language capabilities.

[347] There are no doubt other instances where having bilingual personnel occupy a post is entirely founded on merit. But it is apparent that the practice of collateral bilingual staffing, by its very definition, is not. That is the bright line that must not be crossed when it comes to staffing positions in federal institutions.

[348] Obviously, this means that many positions in bilingual regions will not be staffed bilingually. If the occupant is bilingual, it is because he or she was found to be the more meritorious applicant, or if of equal merit, the bilingual candidate be obviously preferred. The logical outcome of work environments consisting of bilingual and unilingual employees, is that they will not operate unless bilingual employees are prepared to work in the language of the unilingual employees.

[349] It would seem therefore that this reality is the starting point for any interpretation of section 36(2) and as shall be seen, is referred to below in the extrinsic evidence when Parliament addressed section 36(2).

[350] In any event, I come to this same conclusion via an independent interpretation of section 36(2) without the benefit of section 91. Accordingly, I now embark on an independent analysis of section 36(2), with only the briefest reference to section 91 as one of the contextual provisions which supports my conclusion that in adopting section 36(2), Parliament envisaged bilingual employees providing some degree of accommodation to their unilingual colleagues.

D. *Analysis of section 36(2)*

(1) Introduction

[351] The Applicant, although bilingual, argues that the appropriate interpretation of section 36(2) requires that the specialist co-workers in Toronto be bilingual in order to allow him to use the language of work of his choice. To resolve this issue, the Court must first determine whether the Applicant's argument applies to communications between co-workers in bilingual regions. Thereafter, it may consider whether the same argument applies in respect of communications between co-workers situated in bilingual and unilingual regions.

[352] As I examined the argument of the Applicant, I conclude that it came down to whether section 36(2) should be interpreted to require bilingual employees in bilingual regions to accommodate unilingual employees, to some extent, by communicating and working with them

in their only language of choice. This is an exercise of interpreting section 36(2) applied to bilingual regions.

[353] The Applicant submits that the starting point is that no accommodation is required, none which applies in this instance. This was similarly the argument of the Commissioner in *Tailleur*. As a result, he submits that section 36(2) imposes an obligation on the Respondent institution to reclassify the specialist positions in Toronto to bilingual-essential. Having bilingual specialists in Toronto would permit the bilingual generalists in Montréal to exercise their rights to communicate with them in French as their preferred language of work.

[354] In this regard, the Applicant and Commissioner urge the Court to adopt the reasoning in the *Tailleur* decision to interpret section 36(2). I respectfully decline to accept this submission for reasons that follow.

(2) *Tailleur* is a service-driven decision bearing no relevance to section 36(2)

[355] I describe *Tailleur* as a "service-driven" decision because the determination of the appropriate language of work reflects the operational requirements of providing services to the public. In my view, the Attorney General was correct when it argued that the decision did not require a statement of general principles regarding linguistic working relationships pursuant to section 36(2). Services to the public fully determined the language of work obligations of Mr. Tailleur.

[356] Mr. Tailleur provided services to an Anglophone Canadian [the client] who requested assistance concerning her income taxes. Mr. Tailleur is a bilingual Francophone working in an office comprised entirely of bilingual co-workers. He insisted on exercising his choice of language of work right by transcribing his notes of the service call into the automated record-keeping system in French. The record-keeping system could be accessed by other employees in the future who could continue to provide follow-up advice on the first call. His supervisor directed him to enter his notes in English. He did so, but thereafter filed a complaint that he was not allowed to exercise his use of official language choice in the workplace. No apparent staffing consequences could arise out of this complaint. However, the Applicant's alternative argument that file processing of English-speaking requests for assistance be limited to bilingual employees once the notes were recorded in French would have had staffing consequences, which was not considered.

[357] The Court stated that the issues for resolution pertained to the scope of section 36(2) and the Canada Revenue Agency's [CRA] language of work duties. This issue was thereafter reframed to consider whether the institution had taken all reasonable measures to enable the Applicant to use the language of work of his choice. The test stated in this manner reflected a debate by the parties as to the appropriate interpretation of the nature of measures required to achieve an appropriate linguistic work environment. This in turn, propagated a three-factor test consisting of: i) the significant, serious operational difficulties that the measures may create; ii) a demonstrable conflict with Part IV of the OLA and the federal institution's duties to the public; and iii) the fact that the implementation must not create a conflict with the institution's mandate.

[358] The decision was eventually decided on the basis that the notes were essential and necessary for the provision of the service. The impact of Mr. Tailleur's exercise of his choice of official language rights is summarized by the last sentence of paragraph 102 of the reasons as follows: "Therefore, the service received by the taxpayer would be longer and of lower quality."

[359] The Attorney General argued that the matter could be determined by applying section 31 and Part IV of the OLA. It reads as follows:

Relationship to Part V	**Incompatibilité**
31 In the event of any inconsistency between this Part and Part V, this Part prevails to the extent of the inconsistency.	**31** Les dispositions de la présente partie l'emportent sur les dispositions incompatibles de la partie V.

[360] The Court disagreed with this argument on the basis that Part IV takes precedence over Part V, but not absolutely and only to the extent the provisions of Part V are inconsistent with the provisions of Part IV. However, with respect, this does not appear to respond to the Respondent's submission.

[361] The Court found at paragraph 94 that "in order to ensure equal, immediate service for all taxpayers, it is objectively necessary that the notes be entered in taxpayers' files in the official language of their choice." These findings clearly demonstrate that the rights claimed by Mr. Tailleur pursuant to Part V are inconsistent and incompatible with the service requirements pursuant to Part IV of the Act. Accordingly, *Tailleur* was not a Part V case, but one that was decided on the basis of the priority of the service requirements over the right to use one's choice of language.

[362] Nor do I see a suggestion that the reasoning in *Tailleur* regarding section 36(2) was responsive to the submission of the Respondent that in determining the reasonableness of the measures required, consideration should be given to the bilingual nature of the position and/or employee whose duties and tasks require the use of French and English in providing services. This submission was an alternative secondary argument of the Attorney General once it was concluded that section 36(2) should be determined on the basis of applying the three-factor "reasonable measures" test created by the Court.

[363] By the same reasoning, the fact that the Court created a three-factor test to determine the reasonableness of measures required to be taken, one of which included the second factor of "a demonstrable conflict with Part IV of the OLA", cannot somehow change the essence of the decision as one solely determined by the service requirements under Part IV. In my respectful view, the Respondent was correct in its submission that the matter should have been resolved as a service-driven decision alone.

[364] The *ratio decidendi* in *Tailleur* is essentially the same service-driven *ratios* found in most of the official language institutional cases. This includes the decisions in *Via Rail* (conductors), *Schreiber* (air traffic controllers) and even the Supreme Court decision in *Beaulac*. In the latter matter the nature of the language right was described at paragraph 45 as follows: "… the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity."

[365] On this basis, I conclude that the categorical statement in *Tailleur* that the language proficiency of individuals should not be a factor in determining language rights is *obiter dictum*. This means that the principles of precedential comity have no application, in the sense that I am required to provide reasons for not accepting the principles expressed in the *Tailleur* decision regarding its interpretation and application of section 36(2).

[366] Nevertheless, the decision in *Tailleur* is helpful in that it provides a benchmark supported by a line of reasoning that the Court applied to section 36(2) that is useful to me, even though there is no resemblance in the fact situations of both matters.

(3) The terminological and internal contextual interpretation of section 36(2)

[367] In this portion of my reasons, I discuss the grammatical and ordinary sense of the terms in section 36(2) and their contextual meaning when considered together.

(a) *The scheme of section 36(2)*

[368] The scheme of section 36(2) in terms of its objectives and how to achieve them is clear. The overall purpose is to ensure that institutions establish and maintain appropriate official language work environments. Such environments are required to achieve two objectives: first, they must 1) be conducive to the effective use of both languages; and 2) they must "accommodate the use of either language", or in the French version "permettre à leur personnel d'utiliser l'une ou l'autre" [permit employees to use one or the other].

[369] In my view, responding to a complaint regarding the choice of language of work under section 36(2) starts with determining whether the institution has established the required appropriate official language work environment in terms of meeting its two objectives.

[370] In the first instance therefore, it is an interpretive task to determine what the words of section 36(2) mean by the modern principles of construction. Thereafter, the Court would normally consider the evidence placed before it to determine whether the institution has discharged its obligations to provide appropriate official language work environments pursuant to section 36(2). If not, it would be required to determine what reasonable measures are needed to ensure appropriate work environments are provided.

[371] Because the parties and the Commissioner have assumed that institutions have limited flexibility in requiring bilingual employees to use the language of unilingual co-workers, there has been no analysis provided to the Court in terms of what meaning should be attributed to "work environments" or to the two objectives, or to all of these terms considered contextually together, or considered contextually with other provisions in the Act. Because of reliance on Tailleur, I have not been provided with evidence to determine whether the work environments of the Applicant are appropriate based on the definitions of terms in section 36(2).

[372] In the circumstances, whether a work environment meets the requirements of the two objectives will depend upon the flexibility afforded to institutions to require bilingual employees to accommodate unilingual employees when working together. This issue is not concerned with the obligations of service providers or managers.

[373] *Tailleur* lays down a highly categorical rule permitting limited demonstrable circumstances of significant serious operational requirements that must be met before an institution could require a bilingual employee to work in their second language with a unilingual employee because of rights supposedly accorded pursuant to section 36(2).

[374] I respectfully disagree with this interpretation on the basis of my bilingual interpretation applied to all of the terms in section 36(2) in accordance with the modern interpretive principle. In my view, institutions may require bilingual employees to work with unilingual employees, being limited only to circumstances where work environments are not conducive to the effective use of both official languages while accommodating the use of either official language, as described in the English version of the provision.

[375] Because the parties have followed *Tailleur*, both in law and in the presentation of evidence, I am limited in this matter to explaining my reasoning as to why the starting position of appropriate official language work environments provides the institution with some degree of flexibility to require bilingual employees to accommodate unilingual employees when working together. That is all that I can do because the appropriate evidence was not placed before me to allow for a decision to be made on the basis of my interpretation of section 36(2).

[376] Therefore, it should be understood that the issue of concern throughout my analysis, outside of the limitations of service providers or managers to use their language of choice, is whether section 36(2) endows the institution with a degree of flexibility to require bilingual employees to accommodate unilingual employees with whom they work regularly. This is in

opposition to the conclusion in the *Tailleur* decision which would limit the institution's ability to require bilingual employees to accommodate unilingual employees on a demonstrable justification only where otherwise serious significant operational problems would arise (the other two factors in the "*Tailleur* test" not being relevant).

[377] Despite the arguments of the parties and the Commissioner, this is ultimately a matter of linguistic staffing requirements that section 36(2) is said to impose on institutions. The principle enunciated above in *Tailleur* leads to a conclusion requiring institutions to apply collateral bilingual staffing practices wherever bilingual employees work with other employees unless operationally justified.

[378] I say "wherever" because there cannot be a staffing rule which permits bilingual employees to exercise discretion in deciding the staffing requirements of persons they work with. If the principle of collateral bilingual staffing applies to co-workers of Mr. Dionne, it similarly applies to the co-workers of all bilingual employees in bilingual regions, unless justified by the institution on operational bases. Of course, if section 91 requires positions to be staffed unilingually where the functions require it, the operational requirements are met. My interpretation that follows excludes any effect of section 91.

[379] This issue decided, it would leave for resolution only whether the same principles and the requirement of collateral bilingual staffing should also apply to co-workers in unilingual regions.

[380] My analysis will commence with the interpretation of the meaning attributed to the words "work environments", followed by my interpretation of the two objectives of 1) appropriate work environments to permit the effective use of both languages; and to 2) accommodate the use of either. This will be followed by my analysis of reasonable measures, at which point I will be intersecting with the analysis of the Court in *Tailleur*, where again respectful differences of opinion of the terms arise. Thereafter, I will consider the provision in its entire context of the OLA, harmoniously with the scheme of the Act, its object and the intention of Parliament based on extrinsic evidence.

(b) *Work environments*

[381] The first task, at a textual level, is to determine the ordinary meaning and reconciliation of the English phrase "work environment" with the French phrase "milieu de travail". As indicated, I do so without the assistance of the submissions of the parties or the Commissioner.

[382] The terms "work environment" and "milieu de travail" in section 36(2) appear to be almost identical co-equivalents, as are the terms "conducive" in the English version and "propice" in French. Both terms are described in the dictionaries as meaning "favourable".

[383] I conclude that the definition of "environment" most befitting the purpose of section 36(2) is found in the Merriam-Webster online dictionary as follows: "the circumstances, objects, or conditions by which one is surrounded". I also note its secondary definition being "the aggregate of social and cultural conditions that influence the life of an individual or community" (https://www.merriam-webster.com/dictionary/environment).

[384] The French term “milieu” also exists in English. It is defined in the Merriam-Webster online dictionary as “the physical or social setting in which something occurs or develops”. The term environment is a synonym.

[385] The etymology of the English term “milieu” is said to originate from the same term in French. I again cite the Merriam-Webster online dictionary because it raises some contextual similarities to the term “accommodate”, with my emphasis as follows only to show that it has a sense of meeting in the middle:

> Milieu Entered English in the 1800s. The etymology of milieu comes down to “mi” and “lieu”. English speakers learned the word (and borrowed both its spelling and meaning) from French. The modern French term comes from two much older French forms, mi, meaning “middle,” and lieu, meaning “place.” Milieu | Definition of Milieu by Merriam-Webster, https://www.merriam-webster.com/dictionary/milieu

[386] The Larousse online dictionary provides the following definitions for the French term “milieu” with examples of use:

> [TRANSLATION]
>
> Framework, environment in which someone lives, considered as conditioning their behaviour: To know how to adapt to an environment.
>
> Group of persons among whom someone habitually lives, their entourage, the society from which they come: He was born in a very modest environment.
>
> Group of persons connected by their common interests, their identical activity types: Business communities. (https://www.larousse.fr/dictionnaires/francais/milieu/51429?q=milieu#51311)

[387] As stated, I find that the French and English terms are identical, or close co-equivalents.

[388] Applying these definitions contextually to the remainder of section 36(2), the focus of attention should be on the use of language and communications within the various "work environments" or "milieu de travail", particularly in relation to employees' duties in their work environments.

[389] Just as the duties and obligations under the OLA are imposed on the institution at an institutional level, the Court must similarly focus its attention to determine whether at the institutional level there has been compliance with section 36(2).

[390] The obligation on institutions is to establish and maintain appropriate official language work environments in which employees communicate. To a certain extent therefore, this obligation does not require institutions to cater to the choice of language of use of employees such as Mr. Tailleur or Mr. Dionne, in all cases.

[391] It would appear that reference to work environments provides considerable flexibility to the institution. As long as appropriate work environments are maintained that are conducive to the effective use of the language of employees and "accommodate the use of either", some members of that work environment may be required to use their bilingual skills with coworkers, if necessary to meet the objectives of the institution.

[392] Moreover, the term environment could be said to be purposively amorphous, in that it allows for a range of factors that could contribute to a favourable or unfavourable environment. Parliament's use of the term would appear to demonstrate an intention to express a certain degree of flexibility in not tying the hands of the institution by allowing for a range of solutions to linguistic problems that might arise in any workplace.

[393] I also conclude that Parliament was reticent to permit individuals to use language complaints to interfere unduly with the operations of an institution's work, unless at a collective level the work environments were not linguistically appropriate. This approach is similar to that referred to in the *Viola* decision where it described Parliament's intention to take workplace complaints out of the hands of complainants to prevent them from undertaking the fairly aggressive measure of filing a staffing complaint to be resolved in a somewhat adversarial context. Instead, Parliament preferred to direct the complaint to the Office of the Commissioner to be guided by its ombudsman function to find solutions.

[394] Accordingly as a starting point, I find that the terminology in section 36(2), whereby the overall measure of compliance focuses on the higher and more collective level of work environments, contradicts any intention by Parliament to establish a categorical rule for the exercise of individual language rights complainants. The scheme of the provision allows for the investigation of more generic solutions in addition to seeking a range of ways to satisfactorily respond to the complainant. The complaint in this case raises the issue of the language environment of the complainant, which takes in all aspects of communications with the complainant to determine whether the environment is conducive to the complainant's use of his

or her choice of language, while accommodating the use of both official languages. Such complaints raise complex issues that may require complex responses at the level of work environments.

[395] For example, an assessment of the linguistic appropriateness of a workplace would initially focus on the generalists' language work environment in Montréal. This would entail communications with co-workers, superiors, support staff and any other employees that communicate regularly with the complainant.

[396] The work environment would also extend to other "work communication environments" outside of the complainant's ordinary physical work environment. So long as such communications meaningfully and regularly contribute to the functions of the employees' work environment and relate to their duties and to meeting the objectives of the OSFI, such communications would be considered part of the complainant's linguistic work environments. Based on a communication definition of work environment, the Applicant's work environment extended to encompass his regular communications with the specialists in Toronto, even though in a different physical work environment.

(c) *The primary objective of appropriate official language work environments: being conducive to the effective use of both official languages*

[397] I describe ensuring the work environments that are "conducive to the effective use of both official languages" as the primary objective of section 36(2). This objective best captures

the meaning of what is entailed in achieving the substantive equality of status and equal rights and privileges as to their use in a work environment in a federal institution.

[398] The adjectives “effective” in English, and “effectif” in French, appear to be identical co-equivalents. The most relevant definitions in both cases describe their meaning as “producing the decided, decisive or desired effect”, or an effect that actually occurs. The relevant definitions in the Merriam-Webster online dictionary with sample expressions are as follows:

> 1 a : producing a decided, decisive, or desired effect // an effective policy
>
> 3 : ACTUAL // the need to increase effective demand for goods

[399] The Merriam-Webster dictionary also includes a legal definition of “effective”, as follows:

> 1 : producing a desired effect
> // an effective revocation of the contract
>
> 2 : capable of bringing about an effect
> // effective assistance of counsel

[400] In addition, the online dictionary provides a list of synonyms along with a short passage distinguishing words similar to “effective”, and an overall conclusion. The relevant portions of these additional comments are as follows:

> Synonyms: effectual, efficacious, efficient, fruitful, operative, potent, productive
>
> EFFECTIVE, EFFECTUAL, EFFICIENT, EFFICACIOUS means producing or capable of producing a result.
>
> EFFECTIVE stresses the actual production of or the power to produce an effect. // an effective rebuttal

> EFFECTUAL suggests the accomplishment of a desired result especially as viewed after the fact. // the measures to stop the pilfering proved effectual
>
> …

[401] Effective typically describes things – such as policies, treatments, arguments, and techniques – that do what they are intended to do. People can also be described as effective when they accomplish what they set out to accomplish, but the word is far more often applied to things.

[402] The Larousse online dictionary describes the term "effectif", and in addition provides a list of synonyms, as follows:

> [TRANSLATION]
>
> Of which the reality is indisputable, which produces a real, tangible effect: Effective participation.
>
> That is a reality: The armistice will be effective at 11 o'clock.
>
> SYNONYMS: authentic, concrete, objective, positive, tangible

[403] Because the discussion concerns using languages of work, I would think that the core meaning of an effective or substantive use of a language is one that contributes meaningfully to the fulfillment of the duties of the position. Employees should be able to conclude that the use of their language had a real and tangible effect and contributed to the "actual production of, or the power to produce an effect", being the achievement of the assigned tasks and responsibilities of the employee.

[404] This definition extends to communications with superiors, co-workers and support workers that relate to the core duties. Ultimately, an environment that is conducive to the effective use of one's language is one where the choice of language is used regularly and fluidly around the office such that there is a suggestion that the employees can generally express themselves regularly in the language of their choice at an acceptable comfort level in the accomplishment of tasks.

[405] It is a matter of degree. But overall, in weighing degrees, section 36(2) requires that the balance should fall more on the right of employees to use their language of choice, with accommodation being of secondary effect. This allows managers to work with individual situations as may be appropriate to maximize the opportunities for the employees to use their language of choice.

[406] The point being that assessments of appropriate official language work environments require a broadly focused contextual exercise that requires the balancing of the requirements to accommodate with the goal of allowing employees to feel at ease in the use of their language of choice in the accomplishment of their tasks and interchanges with fellow staff members. This is very much in line with the extrinsic evidence that explained Parliament's intention in enacting section 36(2).

(d) *The secondary objective of work environments: accommodating or permitting the use of either official language*

[407] My overall disagreement with the interpretive process followed by the Court in *Tailleur*, is its failure to engage with the second objective of section 36(2.

[408] At paragraph 44 of the decision, the reasoning in *Tailleur* describes the obligation imposed by section 36(2) on institutions as follows:

> [TRANSLATION]
>
> [44] Subsection 36(2) therefore creates a positive obligation for federal institutions to take measures allowing a work environment conducive to the effective use of both official languages to be established and maintained.

[409] The Court then describes the issue for determination as follows:

> [TRANSLATION]
>
> In the circumstances, did the CRA take all reasonable measures to enable Mr. Tailleur to use the language of work of his choice?

[410] Finally, in accordance with the methodology it adopted by making the focus of the institution's obligation based on the definition and extent of measures to be taken to comply with the requirements of section 36(2), the Court defined this obligation at paragraph 73 as follows with my emphasis:

> [TRANSLATION]
>
> [73] Also, in order to comply with the requirements of subsection 36(2), it is sufficient for a federal institution to demonstrate that it considered all reasonable measures to enable its employees to work in the official language of their choice.

[411] The requirement to take all reasonable measures to allow an employee to use the official language of his or her choice pertains entirely to the first objective. With respect, an interpretive methodology that ignores a second objective that is clearly described as one of two objectives required for the attainment of an appropriate official language work environment is flawed.

[412] For that reason alone, I cannot rely upon the *Tailleur* decision as a guide to properly consider Parliament's intention in enacting section 36(2), when it fails to engage a significant component of the provision.

(i) "accommodate/permettre"

[413] The Court in *Tailleur* did not attempt to interpret and reconcile the term "accommodate" in the English version with its French co-equivalent "permettre" found in the second objective of an appropriate official language work environment that accommodates the use of either official language. The Court also did not attempt to interpret and reconcile the words "both" and "either" found in the English version with their similar French co-equivalents found in the first and second objectives respectively.

[414] The first step in my analysis is to determine the grammatical and ordinary meaning of these terms in their bilingual expression which follows.

[415] The English expression of the second objective requires that the work environment "accommodate the use of either official language". Its French language co-equivalent describes the same objective as that of a milieu « qui permet à leur personnel d'utiliser l'une ou l'autre ».

[416] The relevant definitions of the terms “accommodate” and “permit” (which I add as a point of comparison with the French term “permettre”), again taken from the online Merriam-Webster dictionary with my emphasis, are as follows:

> ACCOMMODATE (transitive verb)
>
> (https://www.merriam-webster.com/dictionary/accommodate#synonyms)
>
> 1: to provide with something desired, needed, or suited: I needed money, and they accommodated me with a loan.
>
> 4: to give consideration to: to allow for: trying to accommodate the special interests of various groups
>
> 5: to make fit, suitable, or congruous
>
> Synonyms: ADAPT, ADJUST, ACCOMMODATE, CONFORM, RECONCILE mean to bring one thing into correspondence with another. ADAPT implies a modification according to changing circumstances. adapted themselves to the warmer climate ADJUST suggests bringing into a close and exact correspondence or harmony such as exists between parts of a mechanism, adjusted the budget to allow for inflation ACCOMMODATE may suggest yielding or compromising to effect a correspondence, he accommodated his political beliefs in order to win CONFORM applies to bringing into accordance with a pattern, example, or principle. refused to conform to society’s values RECONCILE implies the demonstration of the underlying compatibility of things that seem to be incompatible. tried to reconcile what he said with what I knew
>
> PERMIT (https://www.merriam-webster.com/dictionary/permit#synonyms)
>
> Definition of permit (transitive verb)
>
> 1 : to consent to expressly or formally permit access to records
> 2 : to give leave : AUTHORIZE
> 3 : to make possible the design permits easy access
>
> Synonyms: Verb allow, green-light, have, suffer
> Examples of *permit* in a Sentence
> The judge permitted the release of the prisoner.
> Smoking is not permitted in the building.

[417] The relevant definitions of “permettre” and “accommoder” (which I similarly add as a point of comparison with the English term “accommodate”), again from the *Larousse online dictionary*, are as follows with my emphasis:

> PERMETTRE/ALLOW
>
> (https://www.larousse.fr/dictionnaires/francais/permettre/59689?q=permettre#59327)
>
> [TRANSLATION] To give someone the power, the right to do something, to act in such and such a way: The law does not allow (you) construction in this location.
>
> To give the possibility, the opportunity, the means to do something: The bus allows us to arrive in ten minutes.
>
> To make it so that something is possible, may exist: His attitude allows us all suspicions.
>
> Synonyms: authorize, consent, tolerate
>
> ACCOMMODER/ACCOMMODATE
>
> (https://www.larousse.fr/dictionnaires/francais/accommoder/465?q=accommoder#458)
>
> [TRANSLATION] Literary Adapt something, fit it to a situation: Accommodate one’s speech to the circumstances.
>
> Synonyms: arrange, adjust, organize, install

[418] The most relevant shared aspect of the meaning “accommodate”, and which is noted as the common element of all the closely related terms is “to bring one thing into correspondence with another” [emphasis added]. The appropriate definition of correspondence in the Merriam-Webster Dictionary is “the agreement of things with one another”.

[419] It is my view that the definition of “accommodate” that best expresses the agreement of things with one another in section 36(2) is that of “compromising to affect a correspondence”. In

this case the compromise contemplated is that it is required by bilingual employees making the correspondence with the unilingual co-worker so as to permit the accomplishment of the institution's mandate.

[420] Of the definitions of the French co-equivalent of "permettre", none has the sense of correspondence, with the idea of achieving the agreement of things with one another. The term has more the meaning of an exercise or grant of authority to allow something to occur, along the lines of a rule or some exercise of power by some authority. The term "permettre" in section 36(2) has the sense of allowing or authorizing the use of either official language. The term does not connote compromise between two opposing elements resulting in the correspondence or agreement of one or both with one another.

[421] In my view therefore, the term "accommodate" cannot be reconciled with the term "permettre". Because there is no common meaning to be obtained, there is similarly no possibility of having one version interpreted with the assistance of the other. As mentioned, in such circumstances, "the linguistic issue must be placed in the framework of the modern rules of statutory interpretation that give effect not only to the text, but to context and purpose" (*Khosa* at paras 39-40).

[422] The Court is required to choose one term over the other, which in its view should be that of "accommodate" for the reasons that follow.

[423] First and foremost “accommodate” is the term generally applied to reconciling situations of bilingual employees working with unilingual employees. It is in effect, the term of art and describes the central subject of controversy in this matter. It is well known that Francophones consider the past requirement to accommodate unilingual Anglophones to be a significant contributing factor to their assimilation.

[424] For example, accommodation is a subject referred to in *Beaulac* in provincial minority language circumstances where assimilation remains a significant factor. The Applicant also makes the right of bilingual employees not to accommodate unilingual employees, the centre point of his submission at paragraph 89 of his initial memorandum. It remains somewhat an issue, but it was not an argument that I have heard advanced in regard to federal institutions, because of the staffing and economic advantage bilingualism has provided in federal institutions, which is an important factor in protecting a language.

[425] Second, there is some degree of redundancy with the adoption of “permettre” in the second objective. Its present participle form “permettant” is also used to describe “toutes autres mesures possibles permettant de créer et de maintenir en leur sein un milieu de travail”. The use of both terms “permettant” and “permettre” tends to make the first and second objectives redundant. Permitting work environments that extend to those that are conducive to the use of both official languages in the first category, seems redundant to permitting the use of either official language in the second objective.

[426] Moreover, in the context of the languages of work provisions, the requirement to accommodate the use of a language points to the concept of requiring the accommodation of a different language from that which is simply permitted to be used [qui permette à leur personnel d'utiliser] in the first objective.

[427] I also prefer "accommodate" as the relevant interpretive term because it portends the reality of a sophisticated and complicated relationship concerning the use of two languages in the workplace. It is implicitly acknowledged as the central issue in this case, being infused with historical implications regarding its acceptance in discussions concerning bilingualism. With these antecedents, Parliament intended the English expression "and accommodate the use of either" to be a significant consideration as one of the two prescribed objectives in section 36(2) required for the attainment of appropriate official language work environments. This is all the more so when the contextual analysis points clearly to the term being preferred over its co-equivalent "permettre" in the French version of the provision.

(ii) "either/l'une ou l'autre" and "both/deux"

[428] The term "accommodate" is also supported contextually by the term "either" in the use of the official languages. Reaching this conclusion requires a comparison of the term "either" with that of "both" found in the first objective.

[429] At first blush, the task appears to be complicated by the fact that it involves the comparison of four bilingual terms in two bilingual versions of the second objective. This process is actually simpler than it appears, because I conclude that the co-equivalent English and

French terms used in the two objectives are identical, or very similar to each other. By this I mean that I find in the first objective the bilingual co-equivalents of “both/deux” have the same meaning in relation to the similar phrases of “effective use” and “usage effectif”. Similarly, I conclude in the second objective that the co-equivalents “either/l’une ou l’autre” are identical in relation to the terms “accommodate” and “permettre”.

[430] This simplifies the task of the Court to determine whether the term “both” used in the English version of the first objective, can serve as a contextual aid to interpreting the term “either” employed in the second objective and thereby serve as a further contextual distinction supporting the term “accommodate” in preference to that of “permettre” in the second objective.

[431] I find this to be the case. With respect to the effective use of both official languages, this means that work environments must be conducive to the use of both English and French at the same time. However, when one speaks to the requirement to permit accommodation of either, or one or the other in the French version, there is a sense that accommodation of the two different languages will not necessarily be occurring or necessary at the same time, as well as occurring in different circumstances.

[432] If the reference is to bilingual employees accommodating unilingual employees as I believe to be the intention of Parliament, one form of accommodation will be by Francophone bilinguals accommodating their Anglophone co-workers. The other, or either, form of accommodation will involve Anglophone bilinguals accommodating Francophone co-workers. It will be either, or, one or the other situations, neither occurring simultaneously.

[433] In contradistinction to this interpretation, merely permitting one or the other language conveys the identical meaning of permitting the use of both of the official languages in the first category, without a distinctive or separate verb term for when employees accommodate the language of each, or one another.

[434] Permission does not convey the sense of the separate and distinct actions of accommodation depending upon language of the unilingual employee being accommodated in either the English language or the French language, such that either, or one or the other, will occur in different circumstances occurring in the first objective.

[435] I am satisfied therefore that the requirement described in the English phrase that work environments accommodate the use of either official language is the clearer and less redundant version as opposed to the French version which appears to repeat the same meaning as the first objective, and provides minimum additional meaning to the term “l’une ou l’autre” [one or the other].

[436] This is in addition to my conclusion that the term “accommodate” describes a flexible approach depending upon circumstances which is interpretively contextually supported by the term “work environment” which similarly portends a flexible and contextual factual application of language rights.

[437] The third internal contextual interpretive element is that of “toutes […] mesures possible” [such … reasonable measures], which I discuss below. I find the English version similarly

supports the connotation of the flexible application of section 36(2) to work environments that accommodate complex language relations, as opposed to permitting only non-accommodative linguistic relationships between employees of different linguistic abilities.

[438] Before turning to this third significant interpretive element of section 36(2), I will consider the Applicant's reliance on the Supreme Court decision in *Beaulac* as authority to dismiss any requirement to accommodate unilingual employees.

(iii) Criticism of linguistic accommodation in *Beaulac* is specific to its particular facts

[439] In approaching the issue of accommodation by bilingual employees of unilingual employees in the language of work circumstances, the Court in *Tailleur* relied upon two other paragraphs in *Beaulac*, being paragraphs 24 and 45, referred to at paragraphs 53 and 82 respectively.

[440] Reference to these paragraphs poses substantive issues for the Court's consideration. By this I mean that the paragraphs do not contain statements that would support a purposive interpretation of language rights. It was on that basis that I offered my previous comments on *Beaulac*.

[441] I understand that it is argued that the passages in *Beaulac* provide substantive support for the conclusion in *Tailleur* that bilingual employees should not be required to accommodate

unilingual co-workers, i.e. that "[T]he language proficiency of individuals should not be a factor in determining language rights."

1. Paragraph 24 in *Beaulac*

[442] Paragraph 53 in *Tailleur* closes out its analysis of the principles of interpretation with reference to paragraph 24 of *Beaulac* concerning what substantive equality of languages entails. The passage from *Tailleur* is as follows, with the emphasis on the term substantive being that in *Tailleur*, the remainder being my emphasis:

> [53] In *Beaulac* at para 24, the Supreme Court of Canada stated that section 2 of the *OLA* affirms that the *OLA* protects and contemplates a substantive equality of languages in Canada.
>
> > [24] This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create 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. This being said, I note that this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights.

[443] I respectfully do not see the passage at paragraph 24 above in *Beaulac* as stating an interpretive principle denying accommodation, except in the particular circumstances of that case.

[444] To start with, *Beaulac* was another service-driven decision having nothing to do with language of work issues. As already noted, the Court described the issue at paragraph 45 as one

"to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity." I have indicated that any accommodation of services not in the language of the client, as well as of communications by managers not in the language of the subordinate is not acceptable apart from exceptional circumstances. Those rules are statutorily enshrined, and there is really no debate on the issue.

[445] Second, the comment is particular to the situation that when required by a language right to provide services in the language of choice of the person being served "the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation". As said, it is well-established that the language right to receive services in the language of the client from the institution is a categorical right. In other words, it is not a statement that would support the declaration in *Tailleur* that "language proficiency of individuals should not be a factor in determining language rights." In fairness, the reasons in *Tailleur* did not provide any comment with respect to this passage, although it has been adopted by the Applicant to support an argument that bilingual employees should not be required to accommodate the linguistic deficiencies of unilingual employees.

[446] Third, the remarks of the Supreme Court referred specifically to the fact that the appellant was required to request the right to a trial in the language of his choice. The accused requested to be heard by a judge and jury of his own language, which in a preliminary motion before another judge, was refused. The reference to section 2 in the OLA was for the purpose of drawing an analogy to what "substantive" equality means. The point was that it was the onus of the institution to provide the means to exercise the right to choose one's language when receiving

the service. It is not for the accused to go cap in hand seeking some form of accommodation from the institution to use his language of choice.

[447] As for the cryptic closing comment that "this case is not concerned with the possibility that constitutionally based language rights may conflict with some specific statutory rights", it most likely would be a reference to the fact that by the statutory scheme in the Criminal Code, RSC 1985, c C-46 [Criminal Code], the appellant was required to request a trial in his own language, making it a form of exceptional procedure or a request for accommodation from the institution. Instead, the institution should be taking steps to make an active offer of the right to be tried by a judge or jury conversant in the language of the accused.

2. Paragraph 82 in *Tailleur*

[448] The second reference regarding accommodation in *Tailleur* at paragraph 82 refers to paragraph 45 in the *Beaulac* decision. It is referred to for the purpose of supporting the principle that a federal institution cannot circumvent its language of work duties by resorting to bilingual employees. This in turn, is argued by the Applicant to underpin a conclusion that bilingual employees are not required to accommodate their unilingual colleagues pursuant to section 36(2). The relevant excerpt from paragraph 82 citing paragraph 45 in *Beaulac* is as follows, with my emphasis:

> [82] … Second, a federal institution cannot circumvent its language of work duties under Part V of the *OLA* simply by resorting to bilingual employees. The language proficiency of individuals should not be a factor in determining language rights. Moreover, the Court notes in this regard the Supreme Court's comments in *Beaulac* at para 45:
>
> > 45. In the present instance, much discussion was centered on the ability of the accused to express

> himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist.

[449] Again the highlighted comment in the *Beaulac* decision is highly contextual and does not pertain in any way to language of work circumstances. The facts relate to the right of an accused to be tried by a judge and jury in the Superior Court of British Columbia who can understand French when this right was a stipulation in the Criminal Code.

[450] The motions judge in *Beaulac* did not understand that being perfectly bilingual did not mean that the Francophone accused should not be entitled to use his language of choice because that was the language he sought to be served in by the public judicial system in British Columbia. Otherwise, if Francophones with such high bilingualism proficiency accommodated the service by receiving it in English, there would be no necessity for the service itself.

[451] This is the point the Court is making in *Beaulac*. It was highlighting the irony that the Superior Court would deny a language right because the accused was a bilingual Francophone in the province of British Columbia. This was the very purpose why Parliament created the right in the first place. As the Court pointed out, it was intended to allow Mr. Beaulac and others in similar circumstances to assert their linguistic and cultural identity by requiring the recognition

of their right to participate in the trial process as a member of the Francophone minority community. The right to the service was a further facet of policies adopted by Parliament that were intended to assist minority communities resist assimilation.

[452] Those are not the facts in this case which concerns issues pertaining to the equality of status and privileges of official languages of work in federal institutions in bilingual regions.

(e) *The federal institution's duty to implement appropriate official language work environments by the terms of the English version "such measures as can be reasonably taken" reflects the exercise of discretion to attain a threshold*

(i) A legal standard based on a threshold

[453] The discussion under this heading examines the language in section 36(2) that requires institutions in bilingual regions to ensure that "such measures are taken … as can reasonably be taken to establish and maintain work environments …" [toutes autres mesures possibles permettant de créer et de maintenir en leur sein un milieu de travail].

[454] It is at this point in my analysis that it becomes apparent that I and the Court in *Tailleur* have entirely different approaches to the interpretation and application of section 36(2). The *Tailleur* decision states at paragraph 72 that "the Court is of the opinion that it is important to emphasize the 'reasonable' component because that is the essence and foundation of the duty under subsection 36(2) [emphasis added]." When alluding in *Tailleur* to the "reasonable" component, the Court is referring to the same analysis of "reasonable measures" that I am

undertaking here, with respect to "reasonable measures" described in the above passage from section 36(2).

[455] The Court in *Tailleur* describes in what manner the "reasonable component" is the central focus of its reasoning at paragraph 73, as follows:

> [73] Also, in order to comply with the requirements of subsection 36(2), it is sufficient for a federal institution to demonstrate that it considered all reasonable measures to enable its employees to work in the official language of their choice.
>
> [Emphasis added.]

[456] In accordance with the theme of "reasonable measures" being the essence and foundation of the duty under subsection 36(2), the Court develops a test consisting of a list of three factors stated at paragraph 75 "that may be considered in determining whether a measure taken by a federal institution … is reasonable." This appears to be a different statement of the test described above that the federal institution must demonstrate that it considered all reasonable measures to enable employees to work in the language of their choice.

[457] In any event, what the test comes down to in practice, at least as applied in the *Tailleur* decision, is a list of three factors, any one of which, if met by the institution, would entitle the institution to require employees to use their second official language in carrying out their duties on its behalf.

[458] The principal difference between our two approaches is the initial assumption pertaining to the requirement for institutions to demonstrate compliance with section 36(2). The Court in

Tailleur interprets section 36(2) as deeming the institution to be *prima facie* non-compliant in maintaining an appropriate work environment whenever an employee is required to work in his or her second official language. The Court arrived at this conclusion based only on the consideration of the first objective that speaks to the effective use of both official languages. Having concluded that a *prima facie* case of non-compliance arises where an employee is unable to use his or her first official language, recourse is then directed to the three factor analysis to determine whether there exists a reasonable explanation (how I would frame the test as applied) by the institution as to why employees should be required to work in their second official language.

[459] In my respectful view, this is not the scheme described in section 36(2). Moreover, the analysis in *Tailleur* does not engage section 91. This provision stands in the way of collateral bilingual staffing. Stated transparently collateral bilingual staffing is the effective outcome of a no-accommodation rule, as its application starts from the position that bilingual employees have the right to work with other bilingual employees. In opposition to this result, and in application of the merit principle, section 91 ensures that unilingual employees will continue to make up a component of work environments in bilingual regions where merited. This in turn will require as a starting point some form of accommodation by bilingual employees in order for such work environments to operate.

[460] Section 36(2) resembles most statutory provisions in that it sets out duties or requirements by describing a legal standard that the institution must meet to comply with ~~what~~ Parliament's dictates. In respect of section 36(2), the legal standard requires the federal

institution to demonstrate that its work environments fulfill the two stated objectives of being conducive to the effective use of both official languages, and accommodating the use of either. The application of this provision first requires a determination of what is a "work environment" and what is Parliament's intent in providing the two objectives, in particular the second one of accommodating the use of either official language. Attaining a statutory threshold of compliance in terms of work environments describes my analytical methodology followed above.

[461] Jumping to the conclusion of my interpretive analysis, I ultimately find that Parliament intended by the second objective to provide work environments in bilingual regions to be comprised of bilingual and unilingual employees. This conclusion is arrived at by the fact that the second objective allows for accommodation of unilingual employees by their bilingual colleagues and other interpretive indicators that support this.

[462] This conclusion further means that there is no three factor test applied to reasonable measures. Rather, "reasonable measures" have to be analyzed in the context of those required to bring up deficient work environments to be compliant with providing work environments that meet the two objectives described in section 36(2). This will therefore be a contextual analysis relating to the specific work environment under consideration as to what reasonable remedial measures are necessary to make that specific work environment compliant with section 36(2).

[463] In other words, there are two distinct visions of Parliament's purpose in enacting section 36(2) regarding its intention in respect of the term "reasonable measures". The *Tailleur* decision starts from the proposition that whenever an employee is required to work in their second official

language, it must be explained as a reasonable measure to comply with section 36(2), i.e. the employee not accommodating causes significantly serious operational difficulties to ensue. I respectfully reject this approach as representing Parliament's intention. By my analysis "reasonable measures" is the endpoint as Parliament's instrument to ensure that non-compliant work environments, revealed by a well-founded complaint, or preferably by self-reporting audits of work environments conducted by institutions, are rendered compliant.

(ii) The contextual significance of "toutes autres mesures possible" [such measures as can reasonably be taken]

[464] In this portion of my terminological interpretive analysis of section 36(2), the main purpose is to demonstrate, first that the English version of "such measures as can be reasonably taken" is based upon the discretionary essence of the term "reasonably", as the preferred version to be adopted in place of its irreconcilable co-equivalent phrase "toutes autres mesures possibles" [all other possible measures].

[465] This interpretation of the discretionary essence of "reasonableness" is an important contextual factor, along with the interpretation of the co-equivalents "environments/milieu de travail" and "conducive/propice" to support the conclusion that the English term "accommodate" is the preferred term and that it comprises the notion of work environments that anticipate the accommodation of unilingual employees.

(iii) "reasonably be taken"/"mesures possibles"

[466] The Court in *Tailleur* limited its interpretation of section 36(2) to construing whether measures required to be taken by the institution to establish appropriate work environments should be those as expressed in English as "such measures as can reasonably be taken" or in French "toutes autres mesures possibles" [all other possible measures].

[467] The parties and the Court in *Tailleur* agreed that the need to take measures should be those "reasonably" required as opposed to possible measures. This resulted in a debate mostly focusing on reconciling the co-equivalents of "such measures" in English, with that in French, being "toutes autres mesures".

[468] The Court reconciled these co-equivalents by determining what it considered was the common meaning to both versions of section 36(2). Its reasoning is as follows with emphasis in original:

> [TRANSLATION]
>
> [64] In this case, the common meaning of both linguistic versions of subsection 36(2) of the OLA is the one that refers to taking any other measures that it is reasonable to take, since all the measures that are reasonable to take are possible measures, but all the possible measures are not necessarily measures that it is reasonable to take.

[469] I agree that the correct interpretation of measures to be taken is those "reasonably" required. However, I respectfully disagree with the reasoning used to arrive at this conclusion. It is of contextual importance because the appropriate definitional attribution of "reasonably" describes the objective exercise of discretion. Its function is to resolve situations of choice. It is

an assessment term that requires the exercise of judgment and discretion, in this case in its application to words, such as “environment” and “accommodate” (rather than permit).

[470] I disagree with the method of interpretation applied by the Court in *Tailleur* because the term “reasonably” does not share a common reconcilable meaning with the French term “possibles”. I arrive at this conclusion based on the ordinary and grammatical meanings of these words in their ordinary and legal sense. In addition, I find that the contextual interpretation of the provision as a whole supports the conclusion that Parliament intended for “such measures” only to be taken in order to reasonably establish appropriate official language work environments.

[471] The ordinary meaning of reasonable suggests a number of synonyms attached to it as is indicated from the online legal-free dictionary as follows [Latin terms removed] with my emphasis:

> Reasonable: Suitable; just; proper; ordinary; fair; usual.
>
> The term reasonable is a generic and relative one and applies to that which is appropriate for a particular situation.
>
> amenable to reason, broad-minded, capable of reason, clearheaded, cognitive, credible, discerning, fit, intelligent, judicious, justifiable, logical, lucid, perceiving, percipient, persuable, plausible, probable, proper, ratiocinative, rational, realistic, right, sagacious, sapient, sensible, sound, tenable, understandable, unjaundiced, valid, warrantable, well-advised, well-founded, wise
>
> https://legal-dictionary.thefreedictionary.com/reasonable

[472] Reasonableness is a well-defined legal construct. I say construct because it is intended to ensure an objective, relatively well-informed and contextual perspective, often associated with the fictitious reasonable person. It is a foundational concept used in conjunction with fairness,

i.e. a fair and reasonable decision, legal system, etc. It is universally recognized as the most appropriate legal construct to assist decision-makers in rendering superior decisions on complicated matters involving a multiplicity of factors, from an objective perspective. The Court's role is to adopt the procedures intrinsic to a decision based on reasonableness as a guide to a fair and reasonable decision.

[473] "Possible" and "possibilities" on the other hand, are not really legal constructs. Standing alone they are mere descriptors of an undetermined range of whatever the adjective or noun is being applied to. The Court in *Tailleur* came to the same conclusion at paragraph 71 stating the following:

> [TRANSLATION]
>
> . . . the duty in subsection 36(2) cannot reasonably mean that a federal institution must look at everything that could be imagined in terms of measures.

[474] As the Court indicated in *Tailleur*, possibilities raise complications because they encompass a whole range of outcomes. The words associated with the root term "possible" are normally shunned as any form of legal standard just because they involve ranges that are difficult to define in terms of a beginning and an end point as opposed to an either/or threshold standard of balance of probabilities. The terms or standards of possible and possibilities are so problematic that it is actually surprising to see them used in modern-day legislation, or as a standard recognized by courts, unless no other option exists, i.e. to quantify future personal injury damages based on estimates of possible future medical interventions, or where it is not possible to comparatively measure the utility of an invention (a scintilla of utility) because of the infinite nature of inventiveness.

[475] Because the terms “reasonable” and “possible” are not reconcilable, there is no common foundation such that a common meaning can be ascribed to them. In my view, the lack of commonality of these two co-equivalents resembles a similar conclusion in *Khosa* at para 39. As I would slightly rephrase the point, the Supreme Court distinguished the English version of section 18.1 (4) as being permissive by providing the Court with a discretion, as opposed to the French version of the phrase “sont prise”, which does not on its face confer a discretion. The Court stated “a shared meaning on this point is difficult to discern.”

[476] “Reasonableness” describes a discretion applied to measures, while “possible measures” describes an infinite range of measures. I concluded that the same reasoning applied in terms of attempting to reconcile the terms “accommodate” and “permettre”. As I understand the rule in *Khosa* at paragraph 40, if neither term is ambiguous, and they do not share a common meaning, the court is required to place the linguistic issue “in the framework of the modern rules of statutory interpretation that give effect not only to the text, but to context and purpose.”

[477] Accordingly, I respectfully disagree with the conclusion that “measures reasonably be taken” and “possible measures” are reconcilable terms sharing a common meaning, but differing only in the lesser extent of measures that can be reasonably taken, as opposed to the wide range of measures that are possible. The terms are irreconcilable on the basis of their very different substantive meanings and the procedures each provides to determine measures to provide appropriate work environments. The term “reasonably” is the more appropriate term intended for the object of discretionary determinations of measures that are appropriate to creating work environments, as opposed to the term “possible”. The word bears no discretionary component

and describes an innumerable number of measures, which can only be triaged to a useful number of measures on the basis of some form of reasonability standard.

(iv) "such measures"/"toutes autres mesures"

[478] The second bilingual interpretive issue concerning reasonable measures is which co-equivalent is appropriate to describe the extent of reasonable measures required to be taken to provide for an appropriate linguistic work environment. The English version describes the measures required using the term "such measures", while the co-equivalent from the French version is "toutes autres" [all other] measures.

[479] The Court in *Tailleur* adopted the French version "toutes autres" entailing a composite standard made up of English and French terms described as "toutes autres mesures qu'il est raisonnable de prendre".

[480] With respect, I find that there is no common meaning in the expressions "such" and "toutes autres" measures. My difficulty with the expression "toutes autres mesures" is that this interpretation would require the institution to take more than such measures as legally required to provide an appropriate official language work environment by the terms of section 36(2).

[481] Assuming therefore, that there is the normal requirement as a probability or likelihood standard that the institution must meet in terms of providing an appropriate official language environment, only "such" measures would be required that will result in the institution attaining that threshold.

[482] The standard of “toutes autres mesures” imposes a range of all possible reasonable measures thereby elevating the legal threshold of measures required to establish an appropriate official language work environment beyond such measures as are only needed for the institution to comply with the duty imposed on it by section 36(2). The result is really unquantifiable and amorphous in terms of other measures, which is why the law tends only to work with thresholds.

[483] In my respectful opinion therefore, based on a textual comparison of the terms “reasonably” and “possibles” and a contextual interpretation of the terms “such” and “toutes autres”, the English version should be adopted such that institutions are only required to take such measures as reasonably can be taken to establish and maintain appropriate linguistic work environments. Again, this version provides more flexibility for the institution to adopt measures to provide suitable work environments which would permit some degree of accommodation by bilingual employees to provide an assortment of working relations with unilingual employees, while still being conducive to the effective use of both languages.

(v) The significantly serious [importantes et sérieuses] operational difficulties factor

[484] While the three-factor test enunciated in *Tailleur* is not relevant in my respectful view, I nevertheless also disagree substantively with its overly stringent requirements. By this factor, institutions would only be able to rationalize requiring bilingual employees to work in their second language of choice, if they could demonstrate that not doing so would cause “significantly serious operational difficulties”. My view is that this sets too high a standard that

is not consonant with the concept of what inherently constitutes a reasonable measure, i.e. it is disproportionately stringent in relation to a reasonable measure.

[485] The stringent nature of the factor is said to be supported by a "liberal and purposive interpretation consistent with the preservation and development of official languages in Canada." In any event, I have already indicated my view that no purposive interpretation should apply to institutional bilingualism provisions, other than to achieve the purposes that Parliament expressly described in the Preamble and Purpose of Act at section 2 of the OLA.

[486] The factor also operates at an institutional level that allows for an extensive range of alternatives to permit the use of the first language before being significantly serious to operations. I find that the factor of "significantly serious" operational difficulties imposes a stringent accommodation requirement on institutions to allow employees not to accommodate the use of their second language. In my view, this will excessively empower employees to refuse to work in their second language creating all manner of difficulties for institutions. Again, in my respectful view this is not what Parliament intended in enacting section 36(2) in any manner by focusing the provision on work environments, not necessarily on specific individual operational situations.

(vi) Reasonable measures does not imply an employee's right to dictate the language requirements of a co-worker

[487] There is a further aspect of the *Tailleur* decision with which I am in respectful disagreement. In fairness, it is more a concern about a decision not taken, which leaves an issue

outstanding. It pertains to the nascent right of bilingual employees to dictate how, or whether, unilingual employees should carry out their work or be employed. The issue bears some similarity to that mooted in this matter where in *Tailleur* it was suggested that an exception to the collateral bilingual staffing principle could be made by allowing a bilingual employee to decide when it is necessary that a co-worker's position should be re-designated, depending upon the language of the unilingual employee.

[488] This somewhat analogous issue arose in *Tailleur*, inasmuch as it was proposed that language rights might be used to change the operations of the CRA, and to divert the provision of services from unilingual employees to bilingual ones. This was argued by Mr. Tailleur as an alternative "reasonable measure".

[489] Mr. Tailleur submitted that the CRA did not consider all possible reasonable alternatives in order to discharge its duties to allow him to work in the language of his choice. The Court described the Applicant's argument at paragraph 98 of the reasons as follows, with my emphasis:

> [98] Mr. Tailleur suggests that it would be possible to implement a system in which a taxpayer's file would indicate that it has become "bilingual" when that is the case and that calls could be redirected to a bilingual employee when necessary and where a unilingual Anglophone agent would not understand the notes to the file written in French. Mr. Tailleur submits that transferring calls to another bilingual agent capable of understanding the notes to the file, whether they are in English or French, would not create unequal service for Anglophone taxpayers and that it would not be complicated to implement such a mechanism for transferring calls.

[490] The Court in *Tailleur* spent several paragraphs rejecting the proposition relating to its adverse impact on the provision of services, concluding at paragraph 108 as follows:

> [108] … a measure will not be reasonable if its implementation would be in conflict with a federal institution's duties under Part IV of the *OLA*. This factor is determinative in this case. The CRA's duties to provide equal service (meaning substantive equality) to Canadian taxpayers …

[491] This statement confirms my view that the *Tailleur* matter is an entirely service-driven decision. However, my principal concern is that the alternative reasonable measure should have been rejected out of hand because of the contention that one employee's disinclination to work in the language of the client, based on his language rights, could be rectified by measures that would impinge on the rights of unilingual employees to work on the service file.

[492] The implications of transferring Anglophone service calls to bilingual service providers would reduce the requirement for unilingual employees from working on these files. The result, if implemented across the CRA, would reduce the need for unilingual employees, whose work by Mr. Tailleur's suggestion, would necessarily be assumed by bilingual employees.

[493] In my view, such a suggestion would create significantly serious operational difficulties, both by the serious interference that such a practice would have on how CRA carries out its operations, and secondly by the alternative measure which would reduce the work of unilingual employees. By not rejecting it on this basis, I am concerned that the Court implicitly concluded that this alternative would <u>not</u> pose a significantly serious operational difficulty for the CRA. I also note that had the Court rejected the alternative suggestion on the basis of operational difficulties, it would then have been a language of work matter and some indication would have been provided as to how the factor should be applied.

[494] I have similar concerns in this matter by the suggestion that all co-workers would not be required to be bilingual, if the bilingual employee did not require it, i.e. there would be no need to re-designate the positions of unilingual Francophones working regularly with Mr. Dionne.

[495] It would be my understanding that if collateral bilingual staffing was endorsed and became a staffing practice, that it would be applied in every circumstance. This would mean that bilingual positions would normally be designated relative to each other to ensure that bilingual employees were not required to work with unilingual employees.

[496] It would be contrary to the merit principle, equality of language treatment and general staffing principles that employees would be able to determine who their co-workers should be in terms of their linguistic qualifications. Staffing and CRA operational practices pertaining to language rights must be applied in an equal manner across the country, or not at all. Equality is not a one-way street.

[497] Similarly but for different reasons, I am also of the view that employees occupying bilingual service providing positions have limited options to refuse to work in the language of the file of a client at any time. In other words, I respectfully do not believe that it was necessary for the CRA to demonstrate operational difficulties in the circumstances of Mr. Tailleur.

[498] The appointment of bilingual employees to provide bilingual services is based on merit related to their facility to work in both official languages. It is not gained on any language right

they possess, but rather due to their linguistic skills to the exclusion of the overwhelming percentage of unilingual Canadians.

[499] In the circumstances of service providers, it should be their clear expectation that the same merit principle that provided them with a decided advantage in obtaining their positions in the first place, will require them to use either official language as directed by management in the service realm that it considers impacts on the quality of the service. There should be no issue of bilingual service providers refusing to work with unilingual co-workers when they are servicing the same client, any more than there is a right for them to refuse to provide services to the client in the client's language of choice.

[500] The language rights of service providers are not similar to those of bilingual co-workers working together as in this matter, where the situation is considerably more complex. Bilingual service providers are required to use the language of choice of the client because that is what they were hired to do. That is also the reason that Mr. Dionne wanted to have the specialists declared as service providers so that he could work entirely in French. In contradistinction to this preferred outcome, pursuant to section 36(2) his right is limited to communicating with the Toronto specialists in French. Bilingual specialists in Toronto are still entitled to communicate with him in English, if that is their choice.

[501] When operational service requirements arise, service providers are required both to receive and communicate in the language of choice of the client, as did Mr. Tailleur. Any aspect in the workplace that is relevant to providing the service must similarly be in the language of the

client, unless management concludes that exceptions may be allowed without undermining the service. This is the institution's decision, not that of the employee.

[502] Thus, if bilingual service providers end up with a large majority of clients being served in a language not of their choice, this is what the job requires. It is not as though the bilingual service provider can demand that the institution stop assigning clients of the other official language, or require that it take steps, as Mr. Tailleur demanded, to alter work arrangements thereby eliminating unilingual employees who could also work on the file. Such demands cannot be used to increase the need for bilingual employees, or reduce the work of others, when merit does not so require it.

[503] As I would interpret section 36(2), management will have to be concerned about the appropriateness of work environments in terms of the effective use of languages of choice. However, if service language rights are in conflict with language of work rights in terms of work environments, that is also a factor that must be taken into consideration in assessing the degree of language use by a bilingual service employee, because that is what he or she took on when signing up for the job.

[504] I note on this point that the Court in *Tailleur* indicated at para 100 that "the CRA has already adopted a number of measures that it was reasonable to take to respect the rights of its call centre agents to work in the language of their choice." In my view, if the CRA agreed to these arrangements, it was an accommodation measure, no doubt one wisely taken, but one which raises questions as to why these positions are staffed bilingually if the occupants are only

serving clients in the employee's language of choice, and further if so, whether this infringes the merit principle of the appointments in the first place.

[505] Nonetheless, such arrangements are not a right of the service providing employee. They are decisions by management deemed appropriate with the view to assisting the institution in achieving its goals in the most effective and efficient manner that can reasonably accommodate employees' requests. Treating your employees like your best clients is a management practice of excellence, which usually provides results of excellence.

[506] Accordingly, it is my view that the alternative measure of Mr. Tailleur should have been rejected out of hand as exceeding the terms of engagement of bilingual service-providing employees, as well as constituting a discriminatory interference with the rights of unilingual employees to work on service calls in the language of the client.

(4) Contextual interpretation of section 36(2)

[507] In this portion of my reasons, I conclude my terminological analysis of the overall bilingual wording of section 36(2). I first consider the internal contextual impact of the terms and phrases analyzed above, to determine their composite effect on the interpretation of the provision as a whole. Thereafter, I consider other provisions in the OLA, but external to section 36(2), which may aid in the interpretation of the provision.

(a) *Internal contextual interpretation of section 36(2)*

[508] It will be seen below that the spokespersons describing section 36(2) when the provision was adopted by Parliament in 1988 indicated that great care was taken in the choice of words making up the provision. Having scrutinized the grammatical and ordinary meaning of the significant terms in the provision, I now stand back with the purpose of trying to determine whether there is an overall internal contextual theme or tone in the significant terms of the provision that supports an interpretation of the term "accommodate" as indicative of the requirement of bilingual employees to work and communicate with unilingual employees. If so, the question becomes how to reconcile this requirement with that of maximizing each employee's right to work in his or her choice of language.

[509] In this respect, I find that the carefully chosen words are intended generally to convey an internal consistency of flexibility in the interpretive approach that should be applied to section 36(2). This theme is found in both versions, but particularly in the English version that more ostensibly stands in opposition to a categorical approach to an interpretation of the right of employees to communicate in the work language of their choice.

[510] There is consistency in the expressions of flexibility for example, in the use of the terms such as "work environments" and "milieu de travail" in French. These are key terms because they describe the overall objective of the provision that works at an institutional level to provide appropriate work environments, and therefore are the focus of the provision. The terms "work environments" and "milieu de travail" both serve the purpose of individualizing and particularizing specific communication components in institutions where the linguistic obligations of section 36(2) apply. They also both provide connotations of flexibility in the

application of obligations. The terms generally speak to the implementation of practical solutions that are linguistically comfortable to the employees within the differing work environments of institutions, somewhat removed from the particular circumstances of any employee. In my view this is the intended meaning ascribed to the provision by Parliament.

[511] Even in regard to the primary objective relating to the "effective use of both official languages", its categorical nature is greatly tempered by the requirement that the work environment be only "conducive" in English, or by its identical co-equivalent "propice" in French. Both terms have a similar meaning, i.e. that the institution provide "favourable" linguistic environments, a multifaceted term of many different colours and degrees that shout out flexibility.

[512] The most categorical term found in both versions is with respect to measures (an equally wide and flexible term) that in the French version of section 36(2) would have imposed all possible measures to be taken by the institution to ensure appropriate work environments. No term could have been more categorical and impractical by implying that institutions would have to consider the universe of possibilities to enhance linguistic work environments. There was no disagreement in *Tailleur* that "reasonably" was the more appropriate term.

[513] The term "reasonably" connotes discretion with respect to what constitutes the required reasonable measure needed to be taken by the institution to provide an appropriate official language work environment that provides a range of factors to be considered. These include the impact of the measure on the ability of the institution to achieve its mandate, measured against

the extent of use of one's language in recognition that some accommodation will be required, but nevertheless allowing for an effective use of one's choice of language. Reasonableness connotes a fair and reasonable decision.

[514] If I dwell on this point, it is because the direct undisputed connexion between the terms "work environments" and "reasonably" I find overwhelmingly infects the totality of section 36(2) with the requirement that the interpretations of the provisions regarding use of language be reasonable, meaning not categorical, if somehow that was ever in doubt. In essence, this connexion stands for the proposition that appropriate work environments must be reasonable in the widest contextual manner where language impacts on federal institutions and its employees.

[515] This brings the Court face-to-face with the approach Parliament appeared to project on the requirements of federal institutions to reconcile the most intractable and controversial issue in official language legislation by far. I refer here to the regulation of language in the work environments comprising two languages of varying linguistic proficiency of its employees that affects the linguistic staffing of positions and employment opportunities for Canadians in competition for these positions.

[516] This brings me back to the overriding question that I am trying to determine, namely the purpose of the English term "accommodate" that was not considered in *Tailleur*. At this juncture of the analysis, I am satisfied that the term "accommodate" is highly significant in providing clarification of the intention of Parliament as to how to implement the provision.

[517] The essence of accommodation is “bringing one thing into correspondence with another”. Its definition of some degree of compromise appears to be the only means available to reconcile the two irreconcilable circumstances of a bilingual work environment. On one side, there is the argument for an employee complement to consist entirely of bilingual employees so as to maximize the right to use one’s choice of language, but to the detriment of the inclusion of unilingual employees. On the other side is the equally irreconcilable principle of merit that precludes a complement entirely of bilingual employees when language plays no role in the performance of the functions of many of the positions. Accommodation appears to be the saving grace that permits the use of “both” and “either” official language, without unduly limiting the general, as opposed to the unconditional, right to work in the employee’s language of choice.

[518] Compromise, workarounds and mutually acceptable but not entirely satisfactory solutions to anyone, but nevertheless responsive to the essential interests of all concerned, are the hallmarks of reasonability. This is all the more so when applied to an easily fractious environment, raising hard issues, but which require contextual and temporal solutions, not hard, fixed, theoretical answers. Reasonable accommodative solutions are essential to the good governance of a country’s institutions.

(b) *External contextual interpretation provisions of the OLA: sections 91 and 36(1)(c)(i)*

[519] In this portion of my reasons, I consider the contextual effect of other provisions of the OLA on the interpretation of section 36(2). In doing so, I continue to focus on the principal issue of my concern, regarding section 36(2), namely whether the provision recognizes a right of

bilingual employees in bilingual regions to use their language of choice so as not to be required to accommodate unilingual co-workers. As argued by the Applicant, such a principle would support the collateral bilingual staffing requirement of his unilingual specialist co-workers in recognition of that right.

(i) Section 91

[520] I have already indicated my view that section 91 reflects the application of the merit principle applied to the staffing of positions that precludes, or at least tempers the claims of language rights that would result by the practice of the collateral bilingual staffing of positions. At a minimum therefore, section 91 is a contextual provision that must be considered when interpreting section 36(2). I discuss reconciliation of the two provisions as an aspect of seeking an interpretation that balances the objectives of an employee's choice of language of work with the need to accommodate unilingual co-workers.

[521] Apart from the contextual effect of section 91, the course that I am following on my interpretive analysis of section 36(2) leads to a similar conclusion which would considerably abate any claim that bilingual employees in bilingual regions are not required to accommodate unilingual co-workers.

(ii) Section 36(1)(c)(i)

[522] Section 36(1)(c)(i) is a further contextual provision that merits consideration. It is the little recognized, but highly significant provision that imposes the requirement that managers be

able to communicate in both official languages with the subordinates they supervise. I say not recognized, because rarely has so much fundamental change in Canada's economic and cultural fabric been wrought by so few words in a single provision of a single Act of Parliament. A provision however, that reflects the merit principle by finally recognizing the essential requirement of bilingual personnel to enable federal institutions to fulfill their national mandates.

[523] More to the point in this matter, I conclude that section 36(1)(c)(i) represents a further contextual indicator of Parliament's intention that managers would be supervising work environments consisting of bilingual and unilingual co-workers working together.

[524] Both versions of section 36(1)(c)(i) are reproduced below with my emphasis:

36 (1) Every federal institution has the duty … to	**36 (1)** Il incombe aux institutions fédérales, … :
(c) ensure that,	c) de veiller à ce que, <u>là où il est indiqué de le faire</u> pour que <u>le milieu de travail soit propice à l'usage effectif des deux langues officielles</u>, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues.
(i) where it is <u>appropriate or necessary</u> in order to create <u>a work environment that is conducive to the effective use of both official languages</u>, supervisors are able to	

> communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility, and

[525] The provision was implicitly referred to in the *Tailleur* decision at paragraph 65. I say implicitly because reference was made to section 36, without specifying the subparagraph in mind. Nonetheless, by referencing the phrase "where it is appropriate or necessary" and "là où il est indiqué de le faire" in French, it is clear that section 36(1)(c)(i) was the focus of the Court's comments.

[526] The relevant excerpt from *Tailleur* at para 65 is as follows, with my insertion in square brackets of what the Court was referring to by "the common meaning":

> [65] Next, bilingual interpretation requires determining whether the common meaning [the interpretation in *Tailleur* of the requirement imposed on institutions to take any other reasonable measure] is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent (*Daoust* at para 30). It is also relevant that the common meaning identified be consistent with the internal logic of section 36 of the *OLA*, which uses the expression "là où il est indiqué de le faire" in French and "where it is appropriate or necessary" in English. In this regard, the Commissioner introduced in evidence the legislative history of Part V of the *OLA*, which confirms the common meaning identified by the preceding bilingual interpretation and the fact that the measures considered by federal institutions must be reasonable in their concrete and effective implementation. …
>
> [Emphasis in original.]

[527] In the manner described, the reference in *Tailleur* that section 36(1)(c)(i) contextually supports the interpretation of section 36(2) is not obvious. Perhaps, it is the mandatory imposition on managers to accommodate the linguistic choices of their staff that represents a legislated reasonable measure as a requirement demonstrating a meaning of what constitutes a reasonable and effective use of one's choice of language.

[528] In addition, speaking to the legislative history that was referenced in the same paragraph, I also respectfully interpret it in a different fashion than that of the Court in *Tailleur*, as shall be seen below.

[529] The first issue that arises before considering the implications of section 36(1)(c)(i) is how to reconcile the co-equivalents in the provision that both the Court in *Tailleur* and I rely upon in , being those of "where it is appropriate or necessary" in English and "là où il est indiqué de le faire" in French.

[530] I find that they have a common meaning, but that the English version "where it is appropriate or necessary" is a clearer and more particularized statement of the French equivalent "là où il est indiqué de le faire" [where it is indicated to do so].

[531] Additionally, the French version can be reconciled with the English version based on the different drafting approaches, whereby the French methodology is more deductive than is English drafting. By deduction, communication in the language of choice of subordinates "là où il est indiqué de le faire" [where it is indicated to do so] can reasonably mean "where it is

appropriate or necessary" to do so for managers supervising a complement of employees of different languages and language abilities. This becomes clear by its contextual relationship to section 36(2).

[532] Section 36(1)(c)(i) demonstrates that Parliament contemplated a linguistic composition of bilingual and unilingual employees in work environments who could make an effective use of both official languages in their communications with their supervisor. To this extent, I am in agreement with *Tailleur*. The supervisor would be required to respond in kind depending upon whether the language of choice of the subordinate was "appropriate or necessary".

[533] But, this can only refer in the first instance to the communications with bilingual subordinates, where the supervisor should use the appropriate language preferred by them. In contradistinction to this scenario, it would be necessary for the supervisor to communicate with their unilingual subordinates in their one and only official language. Thus, the distinction in the obligation of managers to communicate with subordinates demonstrates that Parliament contemplated that work environments in bilingual regions would comprise both bilingual and unilingual employees working together.

[534] The second contextual support that I draw from section 36(1)(c)(i) is more subtle. The provision refers only to the first objective in section 36(2) of supporting a work environment that is "conducive to the effective use of both official languages". There is no reference to the second objective of work environments that must "accommodate the use of either official language". Because discretion and flexibility are inherent in the process of seeking an accommodation, this

would be an impermissible factor and contradict the mandatory nature of the manager's obligation to supervise subordinate employees in the language of their choice.

[535] In other words, section 36(1)(c)(i) fits more appropriately with the existence of a bifurcated accommodative requirement by managers depending upon the entire range of the linguistic abilities and choice of language of subordinates they supervise. In doing so, it bolsters an interpretation that Parliament intended managers to be supervising the full range of preferred communication choices of their subordinates.

[536] This requirement endorses my interpretation of a work environment intended by Parliament that is conducive to the effective use of both languages, but also one that accommodates the use of either to the extent that reasonably is attainable. Managers are at the top of the linguistic triangle of a work place consisting of employees with differing language skills. They have the extra-added function of ensuring that both objectives are attained as best they can in a given linguistic work environment comprising unilingual and bilingual employees.

(5) Jurisprudence regarding unilingual employees in the workplace

[537] At paragraph 46, the Court in *Tailleur* referred to the decision of *Schreiber* at paragraph 129, as follows with the emphasis in *Tailleur*, apart from the first highlighted passage of this Court referring to the first objective of work environments:

> [TRANSLATION]
>
> [46] In *Schreiber* at para 129, this Court summarized the purpose of the relevant provisions in Parts IV and V of the *OLA* that are at issue in this case:

> 129 As indicated previously, sections 21 and 34 of the Official Languages Act recognize, respectively, the right of a member of the public to communicate with and receive available services from federal institutions and the right of an employee to use either official language at work, as English and French are the languages of work in all federal institutions. The corresponding statutory duties in section 22 and sections 35 and 36 respectively require a federal institution to ensure that a member of the public can communicate with and receive available services from it in either official language within the National Capital Region and other prescribed areas and that it provide work environments conducive to the effective use of both official languages. Those duties, imposed on federal institutions by the Official Languages Act, conform to the principle of substantive equality which requires positive government action to implement the recognized language rights. In other words, the purpose of the legislative duties imposed on federal institutions in sections 22, 35 and 36 is to implement and to give substantive effect and meaning to the rights recognized in sections 21 and 34. Furthermore, 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.

[538] As indicated, *Schreiber* is another service-driven decision (mettre en œuvre les droits reconnus par les articles 21 et 34). In my view, the Court could have relied upon the service provisions because different airlines would require assistance in different languages such that the merit principle would support the requirement that all the service providers were required to be bilingual, somewhat like conductors on trains travelling across Canada in *Via Rail*. In other words, the institution first determines whether in the providing of services, all the positions

require bilingual skills in order to be able to carry out the work. This issue is reviewed against the requirements of the position in carrying out the functions assigned the position by the employer. These requirements have nothing to do with work environments. They are statutorily defined and must be applied in that fashion.

[539] The Court nevertheless justified the need for a work environment staffed entirely by bilingual air controllers on the basis of safety concerns. On this basis, what was described as the "unique" work environment predicated the effective use of both languages. This is simply an example of the merit principle requiring bilingual employees to perform the functions of the position. Bilingualism was essential so that all members in the work environment could use the language of choice and understand that of others in order to meet the safety concerns required of their functions to guide the takeoff and landing of airplanes. There was no place for unilingual employees in such an environment.

[540] I acknowledge the *obiter dictum* statement of the Court referred to by the Applicant in the passage cited above about the language of work provisions being illusory without a work environment that respects the use of both languages and favours the development of such environments. But as indicated, it is not clear that the Court had come to grips with the merit-based requirement for the appointment of bilingual employees. In any event, quite clearly the Court was not stating that the right to use one's choice of language required an environment consisting entirely of bilingual employees in respect of section 36(2).

[541] This is clear from the Court's comments at paragraph 132 of *Schreiber*, where it recognizes that the unique environment entailed an all-bilingual complement of employees, as follows with my emphasis:

> [TRANSLATION]
>
> 132 . . . Furthermore, the Canadian Air Traffic Control Association consistently opposed the implementation of bilingual air traffic control services at the Ottawa Control Tower unless it could be "safely implemented with a full staff of competent and fully qualified bilingual controllers". Even Mr. Schreiber, during his cross-examination, admitted that it was "better" for all of the air traffic controllers to be bilingual. The Department therefore sought to create a fully bilingual work environment in order to facilitate the section 21 right of a member of the public to communicate with and to receive services in either official language, and to comply with the section 34 right of its employees to use either official language. Indeed, given the unique nature of air traffic control operations, only a fully bilingual work environment could be ". . . conducive to the effective use of both official languages and accommodate the use of either official language by officers and employees", as required by paragraph 35(1)(a) of the Official Languages Act. Finally, a fully bilingual work environment was also consistent, on a long term basis, with the Department's high safety requirements for the provision of air traffic control services.

[542] In effect, *Schreiber* is a precedent for the conclusion that section 36(2) was not to be applied to achieve an entirely bilingual work environment. Entirely bilingual environments would only occur when necessary based on merit, such as in situations involving the security of persons using the service.

(6) Extrinsic evidence as an aid to interpretation of section 36(2)

[543] The Court in *Tailleur* referred to extrinsic evidence from the Parliamentary debates that provided insight into its intention in enacting section 36(2). However, I do not interpret them in the same fashion as the Court did in *Tailleur*.

[544] The first reference was to that of the Honourable Ramon Hnatyshyn. He was replying to what he described as "some misunderstanding, that again, there is an institutional responsibility to allow people to work in the language of their choice". His comments are contained in the Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72, 33rd Parl, 2nd Sess, No 1 (March 17 and 22, 1988) at p 1: 34, with my emphasis:

> I think the language-of-work question here has been the subject of some misunderstanding that, again, there is an institutional responsibility to allow people to work in the language of their choice; the language in the workplace. But that is I think offset by the reality of the provision of services to the public, the area in which people are going to be employed, and the reality of the workplace.

[545] The Minister indicated that the language of work issues were controversial concerning the "institutional responsibility to allow people to work in the language of their choice", i.e. the application of section 36(2). However, the Minister indicated that this was "offset" by other factors. I would understand this to mean that the controversial right to use the language of choice would be tempered by other factors. The Minister cited examples of this occurring in the provision of services, unilingual regions, and most significantly for these discussions, by "the reality of the workplace".

[546] This last reference I would think refers to the fact that workplaces consisted and will continue to consist of bilingual and unilingual employees working together. This could only be a

"reality" if bilingual employees would be required to use the language of the unilingual employees, as otherwise the workplace could not function, i.e untoward operational difficulties.

[547] The Court in *Tailleur* referred to a second passage again quoting the Honourable Ramon Hnatyshyn, but this time from the Proceedings of the Senate Special Committee on Bill C-72, 33rd Parl, 2nd Sess, No 1 (July 19 and 20, 1988) at p 1:44. The relevant portion of this passage is as follows, as emphasized in *Tailleur*:

> These broad constitutional rights include, in my view, equality in respect of the use of these languages in the work environments of federal institutions. Because the entitlements flowing from Section 16 are not qualified by tests such as "significant demand" or "nature of the office", it was necessary for the Government to develop a legislative scheme respecting the principle of equality for the two languages in federal institutions, in a manner reflective of the reality of the country and which could be amended without great administrative difficulty.

[548] Based on these two passages, the Court in *Tailleur* concluded that Parliament's intent regarding the correct interpretation of section 36(2) was that "federal institutions must take any other measures that it is reasonable to take." Again with respect, I do not see how this conclusion flows from the two quoted passages.

[549] By the Minister referring to the fact that it was necessary for the government to develop a legislative scheme for the equality of the two languages "in a manner reflective of the reality of the country", which I think is a similar reference to the "reality of the workplace" described above, the Minister was acknowledging in effect that bilingual and unilingual Canadians would continue to work together in federal institutions, as was the reality of the public service 1988. If

this is the case, Parliament was obviously relying on bilingual employees to provide for the reality of that workplace operating appropriately.

[550] A third, and considerably more significant passage referred to by the Applicant, the Commissioner and the Court in *Tailleur* is similarly taken from the Senate session just referred to, with the comments occurring at p 1:51. They were made by Mr. Martin Low who spoke on behalf of the Department of Justice of Canada specifically addressing Parliament's intent in enacting section 36(2).

[551] The Court in *Tailleur* relied upon statements made by Mr. Low to support the high threshold of significant serious operational difficulties to the institution as justification for the requirement that bilingual employees be required to use their second language of choice. Again I would respectfully disagree with this interpretation.

[552] The relevant excerpt is taken from Bill C-72, 33rd Parl, 2nd Sess, No 1, (July 19 and 2019 88) at p 1:51 below with the passages as emphasized in the *Tailleur* decision, except in the one instance where I have indicated my emphasis:

> 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.

[553] The passages highlighted in the *Tailleur* decision and by the Applicant and Commissioner refer to instances of an individual taking rigorous and inflexible position as to his/her entitlement and similarly imposing upon institutions rigorous and inflexible demands such that the administration of the institution is adversely impacted.

[554] It would appear that the Court in *Tailleur* relied on the French translation of Mr. Low' s comments. Some of the terms suggest a higher standard of operational difficulties in providing "workable", "pragmatic" and "comfortable" linguistic environments. This would include the translation of "workable", by "applicable"; "adversely impacted" by "subirait un effet nocif"; and, in particular translating "tie up work" by "paralyser le fonctionnement". Even so, in my respectful opinion, the French version of Mr. Low's statement does not suggest that the use of

one's first language may be curtailed only if it causes "significant, serious operational difficulties."

[555] Mr. Low's remarks clearly focused on situations in work environments. He pointed out that it was not possible to describe a precise rule applicable to every work environment of every federal institution. With this in mind, he also described what would constitute an appropriate work environment pursuant to section 36(2).

[556] In the first paragraph, reference is made to the employee's right to use his or her language and is only relevant to show that they were circumscribed by section 36(2). Mr. Low stated that "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". This meant that the employee's rights were those defined by section 36(2), which is similar section 35(1)(a).

[557] Mr. Low states that those rights were intended to "establish the highest common standard within a particular institution to maximize the employee's ability to use the language of his or her choice." He does not state what the content is of those standards in this paragraph. It may be the highest common standard, but it is also the only common standard, or what I would simply describe as the threshold, that is imposed on an institution to maximize an employee's ability to use the language of his or her choice.

[558] In the next paragraph, Mr. Low refers to section 35(1)(a) in the precise terms of work environments with the two objectives, including that of accommodation, in identical wording to that found in section 36(2). The fact that the English version of the second objective was specifically referred to by Mr. Low would, I respectfully suggest, mean that this wording merited some consideration in the *Tailleur* decision if it is relying upon his comments as extrinsic evidence.

[559] It is agreed by all concerned that the third entirely highlighted paragraph is highly significant. Mr. Low addresses what I would understand to be the overall objective of section 36(2). It is "in a pragmatic way, to make the work environment one in which employees of both language groups are comfortable". The concept is to make the right "workable" and the work environments "pragmatic" and "comfortable" in allowing for the use of the employees' language of choice. Again, I stress that the emphasis of the objective is with respect to the "work environment".

[560] Thus, at this point it is clear that Parliament's intention is to "maximize the opportunities for individuals to work in the language of their choice" in workable, pragmatic and linguistically comfortable work environments. In my view, this is a statement that bilingual employees should expect that they will be required to work in the language of unilingual employees, without which the institutions cannot reasonably function. Similarly, the institution is required to provide a work environment that maximizes opportunities for use of the employee's choice of language to occur, within the reality of the linguistic work environments of federal institutions, in a practical way that is intended to make the use of the language of choice comfortable in that setting.

[561] I conclude that the extrinsic evidence relating to the intention of Parliament referred to above generally supports my interpretation of section 36(2). My analysis of the provision in terms of its grammatical and ordinary sense, in its context in the Act as a whole, and in its object and purposes confirms the conclusion that it should be interpreted so as to allow for some degree of accommodation by bilingual employees of unilingual employees. Seen in this context, inflexible demands are ones that do not make the right "workable" and do not align with pragmatic comfortable linguistic work environments already in place.

E. *Conclusion on the interpretation of section 36(2)*

[562] For the foregoing reasons, I conclude that section 36(2) should be construed with the expectation that bilingual employees will be required to work with unilingual employees in their language to some degree. Section 91 confirms that where the language requirements of Part IV and V are not a functional requirement for positions, they will be designated unilingual and staffed accordingly. Fundamentally the merit principle prevails in matters of staffing.

[563] As Mr. Low indicated, because work environments vary in institutions and among institutions, there are no precise rules describing how section 36(2) should be applied. Unfortunately in this matter, the parties started from the premise that a limitation on an employee's language of choice was an exception, as opposed to a reality in a work environment composed of unilingual and bilingual employees. As a result, they never came to grips with the veritable scheme of the provision which focuses on pragmatic workable environments requiring some degree of accommodation of unilingual employees in the workplace. In the circumstances, I have no alternative but to dismiss the Applicant's claim based on section 36(2).

F. *Applying section 36(2)*

[564] I have concluded that collateral bilingual staffing is not acceptable in accordance with section 91. There nevertheless is the requirement that the Applicant's work environment meets the objectives of section 36(2). This requires that the work environment be conducive to the effective use of both official languages and accommodate the use of either.

[565] Obviously, the hard task is how to meet the requirements of sections 36(2) and 91. Unique environments like that in *Schreiber*, where the operational requirements required the entire complement to be staffed bilingually, will be rare.

(1) Primacy to the effective use of both official languages

[566] I have already indicated that of the two objectives required of work environments in section 36(2), the first one, that they be conducive to the effective use of both official languages, should have primacy over the second objective that the work environment should accommodate the use of either when the choice is available.

[567] It is a generally accepted premise that in bilingual regions the majority of employees should be bilingual. This should largely occur as a result of the essential need for bilingual employees to provide flexibility in the provision of services to the public and to fellow employees, for communications with employees in unilingual regions, and to enable unilingual personnel in bilingual regions to work in bilingual regions. In addition, all of the management personnel are bilingual.

[568] Moreover, the right of the employee to communicate in his or her preferred language is a *Charter* protected right. It is also supported by the practical essential need for a highly bilingual core at the heart of federal institutions for operational efficiency in all regions across the country. With more than 80 % of Canada's population being unilingual, with the majority of both official language groups being unilingual, only bilingual employees can provide the communication bridges allowing Canadians to live and work in the same society, such that Canada can describe itself as one country.

[569] Accordingly, workplaces should be weighted in favour of a bilingual complement of employees, which will vary with circumstances. This also reflects the fact that if unilingual employees are included in the work environment, the bilingual core is essential in order for the complement of employees to be able to function in two languages.

[570] Thus bilingualism is an essential requirement for the majority of the employees in federal institutions in bilingual regions to ensure a "comfortable" linguistic work environment that achieves the objectives of section 36(2). Additionally, objective functional competence of applicants for a position being equal, the bilingual employee should be retained.

(2) Management's role

[571] Achieving such a comfortable bilingual workplace places considerable responsibility on the management team. To some extent a continual audit by them is required to ensure that the work environment is balanced such that bilingual employees can make an effective use of their choice of language and limit the need to accommodate the other language.

[572] This will depend upon many factors, including responding to the linguistic workplace arrangements that employees desire; but without any mandatory effect. It is the overall appropriate linguistic work environment that needs to be achieved pursuant to section 36(2) with the result that bilingual employees will be required to exercise their essential language skills to some extent working with unilingual co-workers for operational needs.

[573] Certainly, situations like that described by Mr. Dionne, who apparently raised the linguistic issue with his superiors on a number of occasions, should be avoided. Employees should indeed be encouraged to raise these issues with their managers, and to offer suggestions to remedy linguistic issues in the workplace.

[574] Managers should base their responses on operational needs, while seeking different scenarios of accommodation, perhaps by co-workers sharing duties with others as is feasible and reasonable or unilingual employees working together to limit the need for extra communications in their language.

[575] Heading off problems before they arise should not, however, be seen principally as a means of avoiding a complaint to the Commissioner. Management must deal substantively with these issues, as opposed to simply avoiding them.

(3) Recognizing the additional workload of bilingualism

[576] Complaints raised concerning the inability to use one’s language of choice in federal institutions can often relate to the unappreciated extra effort and mental energy that working in

two languages entails, particularly in carrying out bilingual functions in writing. Unfortunately, unilingual employees do not always seem to recognize the significant extra burden taken on by bilingual employees in working with them.

[577] Unless growing up in a totally bilingual environment, the effect of working in a second language can become enervating. Stress can add to this burden. I do not know the nature of the Applicant's tasks, but my sense is that the generalist and specialist teams are dealing with highly complex matters relating to the supervision of financial institutions. It is noted that Mr. Dionne's problems appeared to manifest themselves when financial institutions were facing their most perilous risks in nearly a century. I would think that the greater the complexity and challenge of the job, the harder it may be to work in the second language.

[578] By having to work in both languages, the comparable complexity of the nature of the work and the extra amount required on the part of the employees such as bilingual generalists could be significant. This is particularly the case if there is a heavy ongoing requirement to communicate regularly in a second language in a federal institution such as the OSFI, which appears out of necessity to have an overriding English language work environment to supervise and serve its clientele.

[579] When working in one's second language there is also the disadvantage of not performing at one's optimal best. These circumstances can raise issues of unfairness, which if accompanied by the unequal use of languages, eventually can weigh on the relations between bilingual and

unilingual employees, particularly in stressful circumstances, or those entailing extensive written communications.

[580] The reality in many so-called bilingual environments is that the language of work is English even with bilingual co-workers, simply because generally bilingual Francophones have a greater facility in English than Anglophones have in French. The bilingual Francophone is constantly accommodating Anglophones, which is a factor that management has to take into consideration in maintaining appropriate official language work environments.

[581] These circumstances become all the more disagreeable if unilingual co-workers and management do not appreciate the extra effort required by bilingual employees to work in their second language, for a multitude of reasons.

[582] This should to some extent be recognized in the workplace, by noting the extra burden of working in two languages. I believe that this would go a long way to establishing a harmonious workplace comprising of bilingual and unilingual employees; and hopefully put an end to the unjustified criticism of the $800 bilingual bonus.

[583] It is these concrete disparities in functional circumstances that can be accompanied by a sense of unfairness in the unequal use of language of employees working together that makes it imperative that federal institutions strive to allow employees to use their language of choice.

(4) Means to lighten the work efforts of the bilingual employee

[584] It is also well to consider Mr. Low's advice "to think in a way that maximizes opportunities for individuals to work in the language of their choice", without adversely impacting on the operations of the institution.

[585] In this regard, federal institutions should be investigating and seeking the means to embrace the new technologies that hold the potential to greatly facilitate the bilingual employee's tasks. The potential of many technological advances raises justifiable concerns about the elimination of work by humans that may accompany them. Nevertheless, in terms of assisting bilingual employees like Mr. Tailleur and Mr. Dionne, they hold out a potential to greatly reduce the burden of their English written communications.

[586] As technology stands today, an employee can type, or better still, voice dictate with a fairly high degree of accuracy into Google Translate, and depending upon sentence structure and length, obtain an immediate translation of a sufficiently acceptable draft quality: see generally *The Great A.I. Awakening: How Google used artificial intelligence to transform Google Translate* https://www.nytimes.com/2016/12/14/magazine/the-great-ai-awakening.html.

[587] Any required edits are obvious to bilingual persons with competent reading skills, particularly if in regard to a subject with which employees regularly work and in which they exchange communications. In a world moving to email and related written communications for so many reasons, federal institutions should be investigating how to apply these technologies to

assist bilingual employees and rebalance the practical tendency to overuse English in bilingual work environments.

[588] This recommendation is advanced with the caveat that such technologies should not apply to staffing considerations. Native linguistic skills should always be the primary consideration for staffing bilingual positions in all regions. Technology cannot serve the same end of creating respectful, tolerant and accommodating workplaces that require linguistic diversity in the workplace to create proper attitudes necessary for successful bilingual federal institutions.

X. Language Rights in Unilingual Regions

[589] Thus far, the commentary with respect to section 36(2) has only been addressed in respect of communications between employees in bilingual regions. However, the bilingual Applicant in a bilingual region is demanding that the collateral bilingual staffing rule be applied to redesignate the positions of his unilingual specialist co-workers in Toronto, in a unilingual region.

[590] The fact that the communication between employees occurs back and forth between bilingual and unilingual regions raises a further issue whether rights of employees under section 36(2) take precedence over language rights of employees in unilingual regions.

[591] The submissions of the parties on the issue were very limited. None were provided by the Applicant. He simply assumed that the OSFI has offices in both designated and non-designated

regions and cannot escape its obligation to provide appropriate official language work environments in bilingual regions just because the communications originate from employees in unilingual regions.

[592] Although I agree official language work environments should be defined by the communication paths between employees wherever situated, this does not resolve the fact that the Applicant's exercise of rights impacts on the rights of employees in unilingual regions, in their case to use the language of their choice, and moreover to continue to be employed in the specialist positions contrary to the Applicant's demands. The issue is how to resolve a conflict regarding official language rights of employees in differently designated regions.

[593] The Respondent, in one of its alternative arguments, included a short paragraph remarking that the OLA distinguishes between bilingual and unilingual regions, and that only in bilingual regions was there an obligation to provide an environment that was conducive to the use of both official languages.

[594] The Commissioner took no position on the issue. However, its final investigation report noted that the 2004 TBS policy stipulated that bilingual employees in bilingual regions were required to use the language of the unilingual employees in unilingual regions, being the only language they can work in. This policy direction was struck from the 2012 policy issued by TBS, with the issue remaining unaddressed. My assumption is that because the Commissioner was advancing the position that bilingual employees have the right to work in their first language, it

was determined that no position should be taken on the issue until clarification was provided by the courts.

[595] In my view, the TBS should have left the situation as is, until resolved by some definitive decision indicating otherwise. The concept of extending the collateral bilingual staffing rule to apply in unilingual regions creates significant staffing changes, when there was no reason to believe that Parliament intended bilingual employees to be able to insist that bilingual employees work only with other bilingual employees even in unilingual regions on its face appears to undermine the concept of having designated and non-designated regions.

[596] The only relevant provision that speaks to language rights in unilingual regions is section 35(1)(b) of the OLA, which reads as follows:

(b) in all parts or regions of Canada not prescribed for the purpose of paragraph (a), the treatment of both official languages in the work environments of the institution in parts or regions of Canada where one official language predominates is reasonably comparable to the treatment of both official languages in the work environments of the institution in parts or regions of Canada where the other official language predominates.	b) ailleurs au Canada, la situation des deux langues officielles en milieu de travail soit comparable entre les régions ou secteurs où l'une ou l'autre prédomine.

[597] In the non-designated regions the concept of equality of status, use and privileges of the two languages is replaced by that of the dominant language. This would appear to be a highly relevant indicator of how this issue should be resolved.

[598] As seen, the only statutory direction on work environments is that occurring within the workplaces of an institution. If an institution maintains offices in both dominant unilingual regions, then their work environments should be comparable. Given that the issue of work environments in non-designated regions was not addressed by the parties, nor was the Court provided with the relevant evidence, nor meaningful submissions on the issue, this important question is left to the Court to deal with as best it can.

[599] The presumption of an employee's language abilities, if situated in a unilingual region by the function of its non-designation, is that the employee is presumed to be unilingual. By this fact, and that the employee's language is the dominant one in that region, common sense suggests that communications with that employee should be analogized to the provision of services whereby the employee in the unilingual region is considered to be the client for the purposes of the provision of services. As for the provision of services, the communication serves no purpose if not in the language of the unilingual participant.

[600] As a second consideration, it is important to bear in mind that the relevant language of work provisions are applied to achieve appropriate linguistic work environments. The concept therefore, is to understand that information is being communicated from a bilingual work environment to a unilingual work environment (the right only extends to outward

communications), is not just from one person to another. It is expected that information received by an employee will be shared within the confines of his or her work environment, in this case the unilingual work environment in Toronto.

[601] If a bilingual employee in a bilingual region attempts to exercise his or her choice of language, the bilingual employee in the unilingual region will have to assume the interpretation and translation functions such that the information may be shared in the work environment of the unilingual region.

[602] Thus, we have a communication from a bilingual region with a capacity to communicate in either language that needs to be interpreted or translated to be useful to a group of employees in their unilingual work environment even if the co-worker receiving the communication is bilingual. In such circumstances, the question that arises is: where is it preferable that this function should be performed?

[603] It would seem obvious that in terms of minimizing delay and costs that the communication originate in the language of the unilingual region by the exercise of the employees' bilingual skills. It is presumed that Parliament conceived bilingual and unilingual regions based upon the capacity of employees in bilingual regions communicating in the language of the unilingual region.

[604] The concept of bilingual and unilingual regions is that the bilingual region is responsible for bilingual work communications, such that the unilingual regions can work in their dominant

language. The scheme of the legislation is not intended to let bilingual employees delegate their bilingual functions so that unilingual regions are required to possess a bilingual capacity in order to work with employees in bilingual regions.

[605] Third, the insistence of the Applicant's right to work in his preferred language of French pursuant to section 36(2) would require, as the remedy he seeks, the designation of bilingual specialist positions in Toronto. Section 91 stands in the way of this exercise of the Applicant's right because the appointment of bilingual specialists is not required for the performance of the specialist's functions in Toronto, but arises out of the exercise of a right under Part V.

[606] Inasmuch as the Respondent, even if it wanted to, would not be able to staff bilingual specialist positions in Toronto in order to allow the Applicant to exercise his right to work in his language of choice, it is not possible for him to exercise his alleged right pursuant to section 36(2). This is in recognition of the primacy that Parliament specifically gave section 91 over the application of rights pursuant to section 36(2) for the exact purpose of preventing employees, such as the Applicant, from exercising a language right that would result in unmeritorious staffing consequences, both in the bilingual and unilingual regions.

[607] Accordingly, communications emanating from bilingual regions must be in the choice of language of the employees receiving them in unilingual regions.

[608] This conclusion would be a further ground to deny the Applicant's claim requiring positions in Toronto to be redesignated bilingual essential based on section 36(2).

XI. Work instruments and Regularly and widely used computer systems

A. *Work instruments*

[609] The Commissioner recommended that OSFI ensure that all work instruments regularly and widely used by employees in bilingual regions are available in both official languages. It is the application of paragraph 36(l)(a) which sets out the duty of federal institutions to make available in both official languages, to their staff in bilingual regions, any regularly and widely used work instruments.

[610] The terms “widely used” in the English version and “d’usage généralisé” in the French version show Parliament’s intention to only impose the paragraph 36(1)(a) duty on a certain category of work instruments used by the majority of employees of a federal institution. I am of the opinion that Parliament therefore did not want to impose, in paragraph 36(1)(a), the duty to translate all work instruments used, although frequently by only a fraction of employees in an institution.

[611] The Applicant complained about the sharing of certain documents prepared by specialists in the Toronto office with employees at the Montréal office, specifically, analysis documents prepared quarterly for senior management. The respondent argues that these documents provide support for OSFI’s quarterly senior management meeting and are solely for that purpose. Therefore, they do not constitute regularly and widely used work instruments. I agree.

[612] The Applicant also complained about the fact that a speech delivered by the auxiliary superintendent before the Conference Board appeared in English only on the OSFI Intranet site. This speech was delivered in English only and had been placed on the Intranet site solely for information purposes. The respondent claims that it was therefore clearly not a "regularly and widely used" work instrument, as the Applicant claims. In any event, all documents on the Intranet portal are now always available in both official languages.

[613] In his last report, the Commissioner noted that all OSFI policy documents are bilingual. A working group comprised of key representatives from each OSFI sector was established in May 2014 to ensure that any other regularly and widely used work instrument be available in both official languages. The Commissioner indicated that implementation of Recommendation 7 of his report was almost complete.

[614] I conclude that any failure on the part of OSFI to provide documents or work instruments under paragraph 36(1)(a) has an insufficient *de minimis* character to require any sort of remedy, particularly insofar as the respondent took steps within a reasonable time frame to correct any shortcomings that may have constituted a violation of the OLA.

[615] Thus, the conclusion sought by the Applicant to [TRANSLATION] "declare that, under paragraph 36(1)(a) of the OLA, any document disseminated by OSFI's senior management to supervisors and managers of supervision, particularly the analysis documents prepared quarterly for senior management, must be available in both official languages" is unfounded in law. The

same applies to the other conclusion claiming that OSFI repeatedly violated this duty. This last conclusion lacks merit given the evidence in the record.

B. *Regularly and widely used computer systems*

[616] The Commissioner recommended that OSFI ensure that all computer systems regularly used by employees in bilingual regions are available in both official languages. It is the application of paragraph 36(l)(b) which sets out the duty of federal institutions to ensure that regularly and widely used computer systems can be used in either official language.

[617] The only two computer systems not available in both official languages at OSFI are SPA and SRA, namely, systems that are only used by employees assigned to the supervision of financial institutions. The respondent claims that, for the same reasons, these systems cannot be considered "widely" used, i.e. used by the vast majority of employees. Moreover, OSFI notes that the Treasury Board of Canada Policy on Language of Work (in effect at the time of the Applicant's complaint) stipulates that, in general, the requirement "does not include specialized software."

[618] That said, the evidence showed that OSFI was working on updating its supervision technology, which includes acquiring a new bilingual system to replace the current systems.

[619] Furthermore, the conclusions sought by the Applicant in this regard, including, in particular, that of ordering the deployment of the SPA and SRA systems within twelve months, are entirely new and were not included in the Applicant's notice of application. Therefore, OSFI

did not have the opportunity to produce any evidence regarding the time frame required to replace these systems.

[620] In his last report, the Commissioner noted that all computer systems that fall directly under the authority of OSFI, except one, are now available in English and French. The only exception is a highly specialized software used in managing the information technology services. In fiscal year 2015–2016, a study was conducted to find suitable replacements. In light of the foregoing, the OCOL concluded that Recommendation 6 was partially implemented, expressing his satisfaction at the commitment OSFI made to undertake studies and to implement a new system.

[621] Consequently, the Applicant's conclusion regarding the computer systems currently widely used is not supported by the evidence, nor by legislation.

XII. Conclusion

[622] For the reasons provided, the application is dismissed. There is therefore no requirement to consider the issues concerning the remedy sought by the Applicant. This is not a case where it is appropriate to award costs, and none are ordered.

JUDGMENT in T-759-15

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no costs are awarded.

"Peter Annis"
Judge

ANNEX A

Official Language Act, RSC, 1985, c 31 (4th Supp), section 2

Purpose	**Objet**
2 The purpose of this Act is to	**2** La présente loi a pour objet:
(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;	**a)** d'assurer le respect du français et de l'anglais à titre de langues officielles du Canada, leur égalité de statut et l'égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l'administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en oeuvre des objectifs de ces institutions;
(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society;	**b)** d'appuyer le développement des minorités francophones et anglophones et, d'une façon générale, de favoriser, au sein de la société canadienne, la progression vers l'égalité de statut et d'usage du français et de l'anglais;

Official, Language Act, RSC, 1985, c 31 (4th Supp), section 31

Relationship to Part V	**Incompatibilité**
31 In the event of any inconsistency between this Part and Part V, this Part prevails to the extent of the inconsistency.	**31** Les dispositions de la présente partie l'emportent sur les dispositions incompatibles de la partie V.

Official Language Act, section 35(1)(b)

(b) in all parts or regions of Canada not prescribed for the purpose of paragraph (a), the treatment of both official languages in the work environments of the institution in parts or regions of Canada where one official language predominates is reasonably comparable to the treatment of both official languages in the work environments of the institution in parts or regions of Canada where the other official language predominates.	**b)** ailleurs au Canada, la situation des deux langues officielles en milieu de travail soit comparable entre les régions ou secteurs où l'une ou l'autre prédomine.

Official Language Act, RSC, 1985, c 31 (4th Supp), sections 36(1)(a)(i) and 36(2)

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;

…

[…]

(c) ensure that,

c) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues.

(i) where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility, and

…

[…]

Additional duties in prescribed regions

Autres obligations

(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 [1st category] conducive to the effective use of both official languages and [2nd category] accommodate the use of either official language by its officers and employees.

(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 [1ere catégorie] en leur sein un milieu de travail propice à l'usage effectif des deux langues officielles et [2e catégorie] qui permette à leur personnel d'utiliser l'une ou l'autre.

Official Language Act, RSC, 1985, c 31 (4th Supp), section 91:

Staffing generally

91 Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.

Dotation en personnel

91 Les parties IV et V n'ont pour effet d'autoriser la prise en compte des exigences relatives aux langues officielles, lors d'une dotation en personnel, que si elle s'impose objectivement pour l'exercice des fonctions en cause.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ronald F. Caza Érik Labelle Eastaugh Gabriel Poliquin	FOR THE APPLICANT
Nadine Dupuis Helen Kneale	FOR THE RESPONDENT
Isabelle Bousquet Elie Ducharme	FOR THE INTERVENOR

SOLICITORS OF RECORD:

Caza Saikaley SRL Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT
Office of the Commissioner of Official Languages Gatineau, Quebec	FOR THE INTERVENOR