Federal Court  Cour fédérale

Date: 20151030

Docket: T-1444-13

Citation: 2015 FC 1230

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 30, 2015

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

LUC TAILLEUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES

Intervener

JUDGMENT AND REASONS

I. Overview

[1] This case deals with the tension that exists between two aspects of the *Official Languages Act*, RSC, c 31 (4th Supp.) [OLA]: the language rights of members of the public to be served by federal institutions in the official language of their choice and the language rights granted to officers and employees of federal institutions to work in either of the two official languages of Canada.

[2] The applicant Luc Tailleur, a Francophone, works in the federal public service. He is a taxpayer services agent at a Canada Revenue Agency [CRA] call centre in Montréal. Mr. Tailleur's position and the Montréal region where he works are both designated bilingual. In the course of his employment, Mr. Tailleur receives telephone calls from taxpayers and answers their questions about taxes and programs managed by the CRA. In August 2010, Mr. Tailleur served an Anglophone taxpayer in the language of her choice, i.e. English. After finishing his call with the taxpayer, Mr. Tailleur had to write a note in one of the CRA's computer systems to ensure that the necessary follow-up would be done in the taxpayer's file. Mr. Tailleur wrote this note in the language of work of his choice, i.e. French. Citing the policies in place at the CRA, Mr. Tailleur's supervisors directed him to rewrite his note in the language of the taxpayer, which Mr. Tailleur did.

[3] However, Mr. Tailleur filed a complaint with the Commissioner of Official Languages [the Commissioner] claiming that the CRA's procedure deprived him of his right under the OLA to work in the language of his choice. In June 2013, the Commissioner informed Mr. Tailleur of his decision to stop his investigation into Mr. Tailleur's complaint (and hence to dismiss it). After noting the CRA's unsuccessful efforts to reconcile its duties to serve the public and Mr. Tailleur's language rights, the Commissioner concluded that the procedure put in place by the CRA was reasonable because making notes to the file in the taxpayer's preferred language is necessary to avoid errors or undue delays in responding.

[4] On August 27, 2013, disagreeing with the Commissioner's conclusions, Mr. Tailleur filed this application under subsection 77(1) of the OLA. In his application, Mr. Tailleur submits that the CRA infringed his right to work in French. He seeks an order from this Court declaring that the CRA breached his right to work in the language of his choice and directing the CRA to revise its policy so as to respect its employees' rights regarding language of work. The CRA contends that, through the Attorney General of Canada, it explored all reasonable measures to try to accommodate Mr. Tailleur but that its duty to serve Canadian taxpayers in the language of their choice does not allow it to change its policies in the circumstances.

[5] The Commissioner intervened in this proceeding to argue the interpretation that should be given, in his view, to the sections of the OLA at issue in this case.

[6] Mr. Tailleur's application raises two issues:

A. What is the scope of subsection 36(2) of the OLA and of the CRA's language of work duties?

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

[7] For the following reasons, the Court finds that Mr. Tailleur's application should be dismissed. The Court is of the opinion that the CRA took all reasonable measures to enable Mr. Tailleur and its other employees to use the language of work of their choice, but that the requirement to write the "notepad" in the taxpayer's language of choice is essential and necessary to ensure that the CRA provides equal service to Anglophone taxpayers; therefore, it must take precedence. With respect to the alternative solution proposed by Mr. Tailleur to establish a mechanism to transfer calls, the Court is of the view that this avenue is beyond the scope of reasonable measures that the CRA can consider in the circumstances.

II. Background

[8] Before addressing the issues, it is important to situate the context of Mr. Tailleur's application, namely the facts surrounding his complaint, the Commissioner's decision, the type of services provided by the CRA and the statutory framework of the OLA.

A. ***Facts involving Mr. Tailleur***

[9] Mr. Tailleur works in the CRA'S Taxpayer Service and Debt Management Branch. As a taxpayer services agent in the Montréal region, Mr. Tailleur receives telephone calls from taxpayers and answers their questions about taxes and programs managed by the CRA. As a bilingual employee, Mr. Tailleur deals with calls from Anglophone and Francophone taxpayers.

[10] The volume of calls received by the CRA is considerable, and Mr. Tailleur (like the other CRA agents assigned to taking calls) continually moves from one call to another during his work day. On each call, Mr. Tailleur receives questions, information and data from taxpayers. In his day-to-day activities, Mr. Tailleur must, among other things, enter in one of the CRA's computer systems the information obtained from taxpayers in his telephone discussions with them, as well as the issues or actions that may result from these calls.

[11] On August 5, 2010, after dealing with a call from an Anglophone taxpayer and in an effort to resolve her case, Mr. Tailleur wrote a note in the "notepad" part of the CRA's T1 and Benefit Case Management System [T1BEN]. The T1BEN system is one of the computer software systems put in place by the CRA to assist in processing requests from taxpayers. Specifically, the T1BEN system is used to forward taxpayers' files for [TRANSLATION] "action", to follow up and to create records to enter all the actions taken in a given file.

[12] Because the intended recipient of his note was another Francophone employee who also had a bilingual position at the CRA, Mr. Tailleur wrote his note in the language of work of his

choice, i.e. French. However, after some exchanges with his supervisors, Mr. Tailleur was forced to rewrite his note in the taxpayer's language, i.e. English, as required by the administrative procedure in place at the CRA. Mr. Tailleur argues that this note was not directed to the taxpayer but that its purpose was to ask his Francophone colleague to send an internal request for a payment to be issued. It was therefore unnecessary, according to Mr. Tailleur, to write it in English. Mr. Tailleur adds that this was the first time in almost 20 years in his position at the CRA that he received a request to rewrite a note in the T1BEN system. He indicates that before, he had always written these notes in the language of his choice, i.e. French.

[13] In his written submissions filed with the Court, Mr. Tailleur said that, in his opinion, it was not necessary that all notes and forms be written in the taxpayer's language for an effective, timely follow-up of the taxpayer's file. Specifically, Mr. Tailleur stated that his note of August 2010 was never intended for the taxpayer. At the hearing before this Court, counsel for Mr. Tailleur recognized however that it was necessary that notes to the file such as the one that is the subject of this dispute be written and kept in the taxpayer's language in order to adequately deal with the taxpayer's file. On the other hand, Mr. Tailleur submits that the CRA could easily implement a system by which calls received by unilingual Anglophone agents who are unable to deal with a taxpayer's request because of notes to the file in French, could be transferred to bilingual agents.

[14] Although he complied with his supervisors' request and ultimately wrote his note in English in this case, Mr. Tailleur filed a complaint with the Commissioner. In it, he claimed that

the CRA procedure deprived him of his right to work in the language of his choice, as the OLA contemplates.

B. *Commissioner's decision*

[15] On June 28, 2013, the Commissioner sent Mr. Tailleur an email advising him of the results of the investigation into his complaint.

[16] In his correspondence, the Commissioner indicated that his investigation had taken into account the CRA's duties under Parts IV ("Communications with and services to the public") and V ("Language of Work") of the OLA and that he had considered the CRA's mandate. The CRA describes this mandate as "to administer tax, benefits and related programs and to ensure compliance on behalf of governments across Canada". The Commissioner noted in his investigation report that [translation] "the CRA receives and processes millions of income tax returns per year as well as benefit payments" and that [translation] "consequently, there is a very high volume of interactions between CRA agents and taxpayers".

[17] The Commissioner stated, in particular, that, given the type of services that the CRA provides to taxpayers, the provisions of the OLA on communications with and services to the public prevail over any inconsistent language of work provisions of the OLA and Mr. Tailleur's right to work in the language of his choice.

[18] The Commissioner's investigation noted, *inter alia*, that the CRA was basing its position on section 27 of the OLA, which provides that the duty in respect of communications and

services in both official languages applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services. In addition, the Commissioner's investigation noted that the CRA also cited section 31 of the OLA, which states that Part IV prevails over any inconsistency in Part V on language of work and therefore gives precedence to the rights of members of the public to communicate and receive their services in their preferred official language. Lastly, the Commissioner observed that the CRA had unsuccessfully tried to reconcile the public's right with its agents' rights:

> [TRANSLATION]
>
> The CRA also stated that it had tried to find ways to uphold employees' rights while complying with its duties to serve the public. However, it was unable to reconcile the two parts of the [OLA] given its official language duties and institutional objectives.

[19] In his decision, the Commissioner indicated that he had met with CRA representatives to obtain explanations on the procedures in effect and to determine whether the front-line CRA agents can find the information necessary to respond to taxpayers' requests without having to consult the notes to the file. The investigation described some of the CRA's explanations and findings in the following terms:

> [TRANSLATION]
>
> The CRA confirmed that front-line agents must respond and take action concerning compliance and enforcement. They must be able to understand the notes entered in taxpayers' files so that they can respond to questions immediately or obtain the necessary information from taxpayers whose file has been found to be non-compliant and has been assigned to a compliance officer.

[20] Based on his investigation, the Commissioner concluded that the procedure established by the CRA requiring that notes to the file be entered in the taxpayer's language was reasonable:

> [TRANSLATION]
>
> The investigation showed that if a CRA employee wrote notes to the file in the employee's preferred official language rather than the taxpayer's, this could cause errors or undue delays in response time. In addition, in order to respond to taxpayers' calls in real time, the agent has to understand the notes to the file to determine whether they are related to the new request. Therefore, in order to ensure equal, immediate service to all clients, we believe it is reasonable that notes be entered in the files in the taxpayers' official language of choice.

[21] The Commissioner therefore found that it was appropriate, under subsection 58(3) of the OLA, to exercise his discretion to refuse to investigate Mr. Tailleur's complaint further because he considered any further investigation unnecessary.

C. *CRA*

[22] The CRA plays a sensitive role in the operation of the federal government. It is the federal institution responsible for the administration and establishment of assessments and the collection of hundreds of billions of tax dollars every year in Canada. Its mandate is to administer tax, benefits and related programs and to ensure tax compliance on behalf of governments across Canada. The CRA receives and processes millions of income tax returns per year as well as benefit payments.

[23] Under the self-assessment tax system in place in Canada, the CRA is responsible for providing accurate information to taxpayers promptly so that taxpayers can comply with Canada's tax laws.

[24] Under Part IV of the OLA, the CRA has a duty to provide its services to Canadian taxpayers in the official language of their choice. This duty extends to all CRA services, whether they are provided on the Internet, by telephone, in writing or at designated bilingual offices. This is recognized in the *Taxpayer Bill of Rights* established by the CRA. The purpose of this Bill of Rights is to ensure adequate service for taxpayers, and it states in section 2 that taxpayers have the right to receive services in either official language. Section 6 recognizes the right of taxpayers to complete, accurate, clear and timely information.

[25] Call centres like the one Mr. Tailleur works at are an important component of the services provided by the CRA to Canadian taxpayers. To deliver these telephone services, the CRA publishes national toll-free telephone numbers accessible to callers from both official language groups. Separate telephone numbers are provided for each official language and dedicated to each of the two language clienteles. The CRA considers this an active offer of service put in place to respond, in real time, to requests from members of the Anglophone and Francophone communities in Canada. The volume of telephone interactions between CRA agents and taxpayers is very high: in fact, the CRA received no fewer than 16.5 million calls in 2012-2013.

[26] The CRA has nine call centres throughout Canada. The Montréal call centre, where Mr. Tailleur works, is one of them. Although they are located in different regions of the country,

these nine call centres are inter-connected; thus, a taxpayer's call will be routed to the next available agent in any CRA call centre, regardless of where the agent is located. The calls are in fact redirected to the different call centres based on volume, irrespective of their place of origin and the taxpayer's location.

[27] We add that employees at the CRA call centres occupy key positions within the federal institution because they are often the point of entry for taxpayers to access their file and tax information. This involves complex work that is generally sensitive and delicate for the taxpayer who has decided to use the CRA's telephone system.

[28] The CRA directs taxpayers' calls based on the language chosen by the taxpayer and his or her selection of the English or French toll-free telephone line. In this way, calls from Francophone taxpayers who use the Francophone toll-free number are forwarded to the CRA's bilingual agents. Calls from Anglophone taxpayers who use the Anglophone toll-free number are sent to unilingual Anglophone agents or to bilingual agents. In other words, the CRA's bilingual agents (like Mr. Tailleur) deal with calls that may come from Anglophone or Francophone taxpayers, based on the demand.

[29] There is no unilingual Francophone call centre agent at the CRA. Indeed, the CRA's call centres use only unilingual Anglophone agents or bilingual agents. From the Anglophone taxpayer's perspective, this means that his or her telephone call may be handled by either a unilingual Anglophone call centre agent or a bilingual call centre agent. However, for a Francophone taxpayer, all telephone calls are handled by bilingual call centre agents. The CRA

identifies taxpayers' files as "French" or "English" based on the preferred official language declared by the taxpayer.

[30] All the front-line agents working in CRA call centres use different computer software to do their work and to quickly clarify the questions that taxpayers ask them when they call. In addition to the T1BEN system described above, this software includes the following:

- The Automated Collections and Source Deductions Enforcement System [ACSES]. This system is a record of collection files. It enables agents to view information and enter the steps taken with respect to a taxpayer's account. It includes a permanent diary that serves as a chronological record of all entries in the diary;

- the Electronic Letter Creation System [ELCS]. This system is used to send, by letter, information or requests for information to clients or their representatives. It includes a "notepad" where agents can enter notes to the taxpayer's file;

- The Electronic Revenue Accounting System [ERA]. This system is used to process financial and non-financial information about a taxpayer's account. Some of these actions may be carried out by call centre agents while others may be sent to the tax centre;

- Le système universel Delpac System [SUDS]. This system enables agents to access enforcement actions that are taken if a taxpayer does not file his or her income tax returns.

[31] This dispute deals with a note written by Mr. Tailleur in the "notepad" part of one of the CRA's electronic systems, the T1BEN system. Mr. Tailleur's complaint deals only with the notes entered in this "notepad" part (also called "diary") of the CRA's electronic systems.

[32] The notes entered in taxpayers' files by call centre agents compile observations and information in the CRA's electronic systems. These notes can be used for various purposes. They are used to both initiate actions on taxpayers' accounts and to find out the status of a file and what has happened in it. In the case of telephone calls, these notes are prepared by call centre agents during or after their conversation with the taxpayer; they may, for example, relate the details of a discussion with a taxpayer, refer to a taxpayer's aggressive or insistent behaviour or to repeated communications by a taxpayer, identify a step to take or be the vehicle for simply sending a document or for a change of address.

[33] The CRA submits that it is necessary for its call centre agents to understand these notes so that they can provide a service to the public in real time that meets the CRA's commitments and duties as well as taxpayers' expectations. The CRA has therefore established procedures for information requests [the Procedure] that its call centre agents must follow. The Procedure, last updated on December 16, 2009, includes a section entitled "Language – Responsibilities and Service Standards", which sets out the language standards to follow. Because the CRA has a duty to provide its services in the official language chosen by the taxpayer and because the CRA wants to ensure that calls are managed consistently regardless of the taxpayer's language, the Procedure provides that all data entered in the "notepad" portion or in the "diary" in the CRA's T1BEN, ELCS, ERA, ACSES and SUDS systems must be entered in the official language chosen by the taxpayer. Accordingly, CRA employees must complete these notes and forms in processing a taxpayer's file in the taxpayer's preferred language.

[34] The Court notes that all entries other than the data that must be included in the "notepad" portions may, however, be entered in the CRA's electronic systems in the official language chosen by the call centre agent.

[35] Mr. Tailleur argues that, prior to 2009, employees could write these notes and forms in their chosen language of work and that that was, in fact, his personal experience at the CRA. The CRA disagrees with this statement and indicates that its language of service procedures have been in place and applied for a long time, in accordance with the requirements of the OLA.

D. *Provisions of OLA*

[36] The OLA is at the heart of this dispute. Its purpose is to "ensure[e] respect for English and French as the official languages of Canada and the equality of status and equal rights and privileges as to their use in all federal institutions" (*Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau*] at para 9). It also specifies the powers and duties of federal institutions with respect to official languages. In fact, "[t]he OLA and its regulations form a comprehensive statutory regime that governs all matters related to language rights within federal institutions" (*Norton v Via Rail Canada Inc.*, 2009 FC 704 [*Norton*] at para 61).

[37] Language rights are a cornerstone of Canadian society, and the OLA is therefore a fundamental law of the land, closely linked to the values and rights enshrined in the Canadian Constitution and particularly in the *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c 11 [Charter]. Moreover, the Supreme Court of Canada has recognized its quasi-constitutional status (*Lavigne v*

Canada (Commissioner of Official Languages), 2002 SCC 53 [*Lavigne*] at para 25). Thus, the language rights engaged in this case are all based on the Constitution.

[38] The OLA contains a number of parts including Part IV on communication with members of the public and the right to be served by federal institutions in the official language of their choice, and Part V on language of work and the equality of status and use of both official languages in Government of Canada institutions. Each of these parts has a constitutional foundation: section 20 of the Charter for language of service and subsection 16(1) of the Charter for language of work (*Schreiber v Canada*, [1999] FCJ No 1576 [*Schreiber*] at para 125; see also Jennifer Klink et al, "Le droit à la prestation des services dans les langues officielles" in Michel Bastarache and Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed, (Cowansville QC: Yvon Blais 2014) at pp 523-24).

[39] In Part IV of the OLA, section 21 sets out the right of members of the public to communicate with and to receive available services from federal institutions. Sections 22 and 24 impose a duty on federal institutions to ensure that any member of the public can communicate with and receive available services of equal quality from their offices in either official language. In addition, section 27 provides that the duties of federal institutions in respect of communications and services in both official languages apply in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services.

[40] Lastly, section 31 of the OLA expressly provides that, in the event of any inconsistency, the language rights of members of the public to communicate with and to receive available services from federal institutions in the official language of their choice prevail over the language rights conferred by Part V on officers and employees of federal institutions. Section 31 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.

[41] With respect to Part V of the OLA on language of work, section 34 prescribes that English and French are the languages of work in all federal institutions and confers on officers and employees of these institutions "the right to use" either official language. Sections 35 to 37 of the OLA set out more specifically the duties of federal institutions in respect of language of work.

[42] In particular, section 35 of the OLA creates a distinction between the language rights of employees working in prescribed regions and employees working outside those regions. It sets out a general rule that institutions must establish and maintain an environment that accommodates employees' use of the official language of their choice in prescribed regions:

Duties of government	Obligations des institutions fédérales
35. (1) Every federal institution has the duty to ensure that	**35.** (1) Il incombe aux institutions fédérales de veiller à ce que:
(a) within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed, work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees; and	a) dans la région de la capitale nationale et dans les régions ou secteurs du Canada ou lieux à l'étranger désignés, leur milieu de travail soit propice à l'usage effectif des deux langues officielles tout en permettant à leur personnel d'utiliser l'une ou l'autre;
(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.

[43] Section 36 of the OLA further clarifies the rights of employees in prescribed regions, including prescribed bilingual regions like the Montréal region where Mr. Talleur works. The minimum duties of federal institutions are set out at subsection 36(1) while additional duties are contained in subsection 36(2). These provisions, which it is necessary to reproduce in this case, read as follows:

Minimum duties in relation to prescribed regions

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

(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;

(b) ensure that regularly and widely used automated systems for the processing and communication of data acquired or produced by the institution on or after January 1, 1991 can be used in either official language; and

Obligations minimales dans les régions désignées

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) 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;

b) de veiller à ce que les systèmes informatiques d'usage courant et généralisé et acquis ou produits par elles à compter du 1er janvier 1991 puissent être utilisés dans l'une ou l'autre des langues officielles;

(c) ensure that,

(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

(ii) any management group that is responsible for the general direction of the institution as a whole has the capacity to function in both official languages.

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.

Additional duties in prescribed regions

(2) Every federal institution has the duty to ensure that, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(a), such measures are taken in addition to those required under subsection (1) as can reasonably be taken to establish and maintain work environments of the institution that are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees.

Autres obligations

(2) Il leur incombe également de veiller à ce que soient prises, dans les régions, secteurs ou lieux visés au paragraphe (1), toutes autres mesures possibles permettant de créer et de maintenir en leur sein un milieu de travail propice à l'usage effectif des deux langues officielles et qui permette à leur personnel d'utiliser l'une ou l'autre.

[44] Subsection 36(2), therefore, creates a positive duty for federal institutions to take measures to establish and maintain work environments that are conducive to the effective use of both official languages.

[45] Finally, Part X of the OLA deals with court remedies and provides in subsection 77(1) that any person who has made a complaint to the Commissioner in respect of language rights under the OLA may apply to the Federal Court for a remedy. If the Court concludes that a federal institution has failed to comply with the OLA, the Court has jurisdiction to grant such remedy as it considers appropriate and just in the circumstances, as contemplated in subsection 77(4).

[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.
>
> [Emphasis added]

III. Analysis

A. *What is the scope of subsection 36(2) of the OLA and of the CRA's language of work duties?*

[47] The first issue concerns the scope of the duty of federal institutions like the CRA under Part V of the OLA regarding language of work, and the interpretation that should be given to subsection 36(2) of the OLA.

[48] The Commissioner's submissions were very helpful in this regard. His intervention in this Court did not deal with the facts underlying this case or the isssue of whether the CRA breached its duties under Part V of the OLA. The Commissioner restricted his submissions to the principles of interpretation of the OLA and the legal test for determining whether a federal institution has breached the right of one of its officers or employees to work in the language of their choice and, in particular, the duties listed at subsection 36(2) of the OLA.

(1) Principles of interpretation of the OLA

[49] The principles of interpretation that apply to language rights are not an issue in this proceeding.

[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 Beulah*, [1999] 1 SCR 768 [*Beaulac*] at para 25, 41). Language rights "are a well-known species of human rights and should be approached accordingly" (*R v Mercure*, [1988] 1 SCR 234 at p 268).

[51] Courts are therefore required to give the OLA, a quasi-constitutional statute, a liberal and purposive interpretation (*DesRochers v Canada (Industry)*, 2009 SCC 8 [*DesRochers*] at para 31). However, this does not alter the traditional approach to statutory interpretation, which requires us 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 (*Thibodeau* at para 112; *Lavigne* at para 25, quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p 87).

[52] The purposes of the OLA also assist in interpreting it:

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 œuvre 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; and	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;
(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.	c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.

[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.

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

[54] Although the parties agree on the principles of interpretation that apply, they do not agree on the proper interpretation of subsection 36(2) of the OLA. The dispute is twofold: the scope of section 31 of the Act and the meaning of the words "such measures . . . as can reasonably be taken" used in subsection 36(2).

[55] Of course, both section 31 and subsection 36(2) of the OLA must be interpreted in light of the principles of interpretation generally applicable to language rights and bilingual legislation, both versions of which are equally authoritative. Accordingly, "differences between two official versions of the same enactment are reconciled by educing the meaning common to both" (*R v Daoust*, 2004 SCC 6 [*Daoust*] at para 26, citing Pierre-André Côté, *Interpretation des lois*, 3rd ed, (Montréal: Thémis, 1999) at p 410). Thus, the interpretation of a bilingual enactment consists first in searching for the common meaning between the two versions of the statute and, where their scope differs, in preferring the narrower meaning common to both versions (*Daoust* at para 29). Then, it must be determined whether the common meaning that has been identified is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent (*Daoust* at para 30).

(a) ***Impact of section 31***

[56] The Attorney General submits that it is sufficient to look at section 31 and Part IV of the OLA to resolve the apparent conflict between language of service and language of work in this case, without necessarily having to consider Part V and subsection 36(2) of the OLA or even Mr. Tailleur's language rights with respect to language of work. The Attorney General is, in effect, arguing that section 31 of the OLA responds to any tension between Parts IV and V of the OLA and that any dispute should be determined in favour of Part IV pursuant to section 31; indeed, where there is a conflict, the right of members of the public to be served in the language of their choice always prevails over the right of employees.

[57] The Court disagrees with this argument and this interpretation of the OLA.

[58] If section 31 of the OLA clearly establishes that Part IV takes precedence over Part V, it does not do so absolutely but to the extent that the provisions of Part V are inconsistent with the provisions of Part IV. In fact, the French version of the section speaks of "dispositions incompatibles de la partie V" while the English version of the OLA provides that Part IV prevails "to the extent of the inconsistency". Interpreted jointly and with a meaning common to the two versions, this section clearly states that the window of inconsistency that section 31 refers to is limited. Indeed, Part IV will only take preccedence to the extent of the inconsistency that has been identified. How can this inconsistency be measured without first identifying its nature and scope (and therefore analyzing the duties of federal institutions under Part V)?

[59] Since a substantive inconsistency is required to depart from the language rights in Part V in favour of those in Part IV, the Court finds that there cannot be an inconsistency without considering the scope and extent of section 36 of the OLA. The notion of conflict in section 31 of the OLA should be interpreted narrowly because both Part IV and Part V of the Act must be given a liberal and purposive interpretation that is consistent with the preservation and development of both official language communities in Canada.

[60] Therefore, the Court is of the opinion that, interpreted correctly, the meaning and scope of section 31 cannot be divorced from an assessment of the duties imposed on federal institutions by subsection 36(2) of the OLA.

(b) ***Scope of subsection 36(2)***

[61] What remains to be determined now is the scope of subsection 36(2). The French version of this subsection requires federal institutions to take “toutes autres mesures possibles” 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 officers and employees. The English version of this subsection uses the expression “such measures . . . as can reasonably be taken”.

[62] .We will first analyze the scope of the words “toutes autres mesures possibles”. At the hearing, Mr. Tailleur agreed with the Commissioner’s position that subsection 36(2) requires federal institutions to take [TRANSLATION] “any other measures that it is reasonable to take” to establish and maintain work environments that are conducive to the effective use of both official

languages. The Attorney General submits, for his part, that the OLA requires only that [**TRANSLATION**] "reasonable" measures in the circumstances be taken and that there is no real difference between the two linguistic versions of the OLA. He notes that the term "reasonable" is used a number of times in the OLA and that it is translated in various ways in French (sometimes as "raisonnable", "justifié. dans les circonstances" or "indiqué"). Consequently, the expression "mesures possibles" in the French version of subsection 36(2) should be interpreted in the same way and would correspond more closely to the concept of [TRANSLATION] "reasonable measures".

[63] There is certainly an ambiguity between the French and English versions of subsection 36(2) of the OLA, and the Court concurs with the interpretive approach and principles of interpretation put forward by the Commissioner. Moreover, the parties recognize that, where there is a difference in the terms used, "differences between two official versions of the same enactment are reconciled by educing the meaning common to both" (*Daoust* at para 26, citing Pierre-André Côté, *Interpretation des lois*, 3d ed. (Montréal: Thémis, 1999) at p 410).

[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.

[65] Next, bilingual interpretation requires determining whether the common meaning 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. He mentioned first the evidence of the Honourable Ramon Hnatyshyn, who said the following to the House of Commons, 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:

> 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.
>
> [Emphasis added]

[66] The Commissioner then cited the evidence of the Honourable Ramon Hnatyshyn at 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:

> Turning now to the important area of language of work, I remind Honorable Senators that Section 16 of the Charter guarantees that the official languages have "equality of status and equal rights and privileges as to their use in all institutions of the Parliament and the Government of Canada.
>
> 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 implemented without great administrative difficulty.
>
> [Emphasis added]

[67] In summary, in light of the review of Parliament's intent at the basis of Part V of the OLA on language of work, the Court is of the opinion that the correct interpretation of subsection 36(2) of the Act is, in fact, that federal institutions must take any other measures that it is reasonable to take, in addition to those already set out at subsection 36(1) of the OLA. These measures must assist in establishing and maintaining, in a realistic and practical manner, work environments that are conducive to the effective use of both official languages and accommodate the use of either of those languages by employees. The term [TRANSLATION] "reasonable" presupposes an objective standard, and the measures adopted must therefore be able to be justified objectively.

[68] However, the Commissioner goes further in the interpretation he is suggesting for subsection 36(2) and in the scope of the duty conferred on federal institutions with respect to language of work. According to the Commissioner, federal institutions must not only consider the reasonable measures they could implement but must consider all measures. Accordingly, there is a certain universality in what federal institutions must weigh in terms of reasonable accommodation measures they must consider to ensure that their employees' language rights are respected. In the Commissioner's view, federal institutions cannot simply choose the measures

that suit them best and are not too restrictive but must consider all measures that would enable them to meet the objective of subsection 36(2) and then weed out those that are not reasonable.

[69] Implementing the duty under subsection 36(2) of the OLA would therefore require an almost holistic approach by federal institutions. The Commissioner even argues that there is a certain reverse onus on federal institutions, which should adopt a proactive approach.

[70] The Court does not accept this last component of the interpretation of subsection 36(2) of the OLA proposed by the Commissioner. First, this interpretation is not consistent with the French and English versions of the Act. The English version speaks of "such measures" not [TRANSLATION] "all measures"; only the French version speaks of "touts" other measures. The meaning common to both versions of subsection 36(2) is therefore not the universality of measures.

[71] Moreover, considering the concrete, substantive dimension of the measures that is apparent from Parliament's intent, 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. On the contrary, subsection 36(2) only requires federal institutions to consider all reasonable measures. It is difficult for the Court to see how, in the interpretation and practical application of the OLA, the reading of this section can be divided by separating the component "toutes" from the concept of "raisonnables".

[72] The two-stage approach advocated by the Commissioner would impose far too onerous a burden on federal institutions by requiring them first to comb the universality of possible measures and then to reduce everything to the measures that it is reasonable to take. What the OLA imposes is a duty to take all possible reasonable measures, and there is no need, either in the interpretation or implementation of this duty, to segment it or break down its elements. Instead of a step-by-step approach that would distort the duty imposed by the OLA on federal institutions, the Court is of the opinion that it is important to emphasize the [TRANSLATION] "reasonable" component because that is the essence and foundation of the duty under subsection 36(2). If a measure is not reasonable, the federal institution does not have to adopt it. This interpretation reflects the common meaning that emerges from the two versions of the Act, and it is consistent with Parliament's intent as revealed by the parliamentary debates and the legislative history of Part V of the OLA that are cited.

[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.

(c) *Whether measures are [TRANSLATION] "reasonable"*

[74] Lastly, it remains to be determined what is [TRANSLATION] "reasonable" and how, in each circumstance, a federal institution can fulfil its duty and justify why an alternative measure would not be acceptable because it is unreasonable. The Commissioner notes that this a positive duty imposed on federal institutions: it is not just an obligation of means, and a federal institution has the burden of explaining why an accommodation measure would not be reasonable. The

Commissioner takes the position that three relevant criteria must be looked at to determine whether the implementation of a measure by a federal institution satisfied this condition. The Court concurs with this opinion while specifying, however, that these criteria are not necessarily exhaustive.

[75] A liberal and purposive interpretation, consistent with the preservation and development of official languages in Canada, identifies a list of factors that may be considered in determining whether a measure taken by a federal institution to satisfy the requirements of the OLA is reasonable. These criteria are not exhaustive, but they certainly include the following: (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.

[76] The first factor to consider is the extent of the operational or administrative difficulty caused by the measure in question. In light of the comments made during the parliamentary debates on Part V of the OLA, a federal institution may only exclude measures that cause significant or serious operational difficulties. A mere operational inconvenience or administrative burden will not be sufficient for a federal institution to not take a measure on the basis that it was considered unreasonable. Martin Low's comments on behalf of the Department of Justice Canada during the *Proceedings of the Senate Special Committee on Bill C-72*, 33rd Parl, 2nd Sess, No 1, (July19 and 20, 1988) at p 1: 51 are particularly instructive in this regard:

> 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 workabe, 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.
>
> [Emphasis added]

[77] A second factor stems from the primacy of Part IV of the OLA in the event of any inconsistency with Part V, as established in section 31 of the Act. Accordingly, a measure will not be reasonable if its implementation conflicts with the federal institution's duties under Part IV of the OLA. It is important to note that the notion of conflict must be interpreted narrowly because both Part IV and Part V should be given a liberal and purposive interpretation that is consistent with the preservation and development of official language communities in Canada.

[78] Lastly, paragraph 38(2)(b) of the OLA provides an indication of a third factor to consider. This provision reads as follows:

38. (2) The Governor in Council may make regulations	**38.** (2) Le gouverneur en conseil peut, par règlement:
. . .	[…]
(b) substituting, with respect to any federal institution other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Conflict of Interest and Ethics Commissioner, a duty in relation to the use of the official languages of Canada in place of a duty under section 36 or the regulations made under subsection (1), having regard to the equality of status of both official languages, if there is a demonstrable conflict between the duty under section 36 or the regulations and the mandate of the institution.	b) en cas de conflit — dont la réalité puisse se démontrer — entre l'une des obligations prévues par l'article 36 ou les règlements d'application du paragraphe (1) et le mandat d'une des institutions fédérales, y substituer, compte tenu de l'égalité de statut des deux langues officielles, une autre obligation touchant leur utilisation.

[79] Therefore, a measure will not be reasonable if implementing it causes a conflict, clearly demonstrated by the federal institution, with the mandate of the institution. Although the Governor in Council has not yet adopted a regulation under paragraph 38(2)(b), this provision sheds light on the type of measures that could be excluded from the possible reasonable measures to be considered by the federal institution.

(3) Conclusion

[80] Pursuant to his analysis, the Commissioner suggested a two-part test to the Court that could be articulated to measure and determine whether a federal institution has complied with its duties under subsection 36(2) of the OLA. The Court adopts some of its elements.

[81] For the reasons stated above, the Court is of the opinion that subsection 36(2) does not require a proactive universal approach that would oblige a federal institution to first consider all possible measures and then isolate those that are reasonable. Rather, the Court concludes that to comply with the requirements of subsection 36(2) of the OLA a federal institution must, in the same vein, consider and adopt all measures that it is reasonable to take to establish a work environment conducive to the use of both official languages. Whether the measures are reasonable will depend on the circumstances of each case, but a specific measure will not be reasonable if it imposes significant or serious operational diffidulties on a federal institution or if implementing it would cause a demonstrable conflict with Part IV of the OLA on language of service or with a federal institution's mandate. This in an interpretation of the OLA that is in harmony with the meaning common to the English and French versions of the Act and that reflects the objectives of Parts IV and V.

[82] The Court adds the following observation. The Attorney General contends that, in determining whether a federal institution has taken reasonable measures, consideration must be given to the bilingual nature of the position of an employee whose duties and tasks require the use of French and English. The Court cannot accept this argument. This is not a factor to consider in determining whether a measure taken by a federal institution to meet the requirements of subsection 36(2) of the OLA is reasonable. First, both Part IV and Part V must

be given a liberal and purposive interpretation consistent with the preservation and development of Canada's official languages. 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.

B. ***Did the CRA take reasonable measusres in the circumstances?***

[83] The second issue that the Court must resolve is whether, on the facts of this case and in light of the interpretation criteria developed above, the CRA's Procedure infringed Mr. Tailleur's right to work in the official language of his choice and whether the measures imposed by the CRA in this case complied with the dictates of Parts IV and V of the OLA.

[84] For the following reasons, the Court finds that, by requiring that the notes in the "notepad" of taxpayers' files be written in the official language chosen by the taxpayer, the CRA not only complied with its duty to allow members of the public to receive its services in the

official language of their choice in accordance with Part IV of the OLA, but also met the language of work requirements of Part V.

[85] In fact, the measure that the CRA put into place was justified and reasonable because notes in the taxpayer's language are essential and necessary to enable the federal institution to provide a service of equal quality in both official languages. Moreover, at the hearing, Mr. Tailleur admitted that, contrary to his written submissions, the notes entered in the T1BEN system's "notepad" or "diary" and in the CRA's various computer systems are required in order to respond appropriately to taxpayers, that is to say, to provide them with an effective and equal service.

[86] On the other hand, the Court finds that the alternative measure proposed by Mr. Tailleur in terms of transferring calls to bilingual agents is not within the limits of reasonableness because implementing it would cause a clearly demonstrable conflict with the CRA's duties under Part IV of the OLA.

(1) The notes are essential and necessary

[87] In the Court's view, the CRA did not breach Mr. Tailleur's language rights by asking that his note entered in the T1BEN system's "notepad" be written in the taxpayer's language, that is, English. On the contrary, the CRA's requirement to enter notes in taxpayers' electronic files in the official language of their choice is necessary and essential to ensure service of equal quality to Anglophone and Francophone taxpayers, and thus to respond to the dictates of Part IV of the OLA.

[88] The Court is satisfied that, based on the evidence in the record, the notes entered in the file are objectively necessary to provide the service required by taxpayers who use the CRA's telephone lines. Even though the notes are not intended for taxpayers themselves, they are undoubtedly linked to the service provided to them.

[89] This evidence is based essentially on the affidavits of Mr. Adams and Ms. Buchanan filed by the Attorney General and on Mr. Tailleur's cross-examination. The evidence established that the notes entered in the "notepad" have different uses, in response to the great variety of reasons for the calls received by call centre agents like Mr. Tailleur. The type of telephone service provided by the call centre agents requires direct, personal contact between the call centre agent and the taxpayer. The notes in the "notepad" allow the agents to quickly see the status of the taxpayer's file and to understand the opinions already given. In addition, these notes to the file guide the call centre agents and enable them to ask taxpayers the right questions. They also avoid taxpayers having to repeat the details of their question or information they have already provided. These notes are not simply internal documents but tools that contribute directly to serving taxpayers.

[90] It goes without saying that if a unilingual Anglophone call centre agent cannot understand the notes to the file because they were not entered in the language of the Anglophone taxpayer the agent is serving, the service to the taxpayer suffers.

[91] The evidence also shows that the notes are essential to provide service of equal quality in both official languages that is just as reliable, efficient and quick for Anglophone taxpayers as

for Francophone taxpayers. Without access to these notes, the service provided by the call centre agents could, in fact, result in inaccurate or incomplete information, incorrect actions, repetitions for the taxpayer and prolonged response times. The agents must be able to understand the notes entered in taxpayers' files in order to answer their questions immediately and in real time and to have access to all the necessary information about the taxpayer. The rapidity, accuracy and efficiency of the service provided by call centre agents are affected if a call centre agent cannot understand the notes to the file. Therefore, if a unilingual Anglophone agent is faced with a note written in French that the agent cannot understand, the result would be service of a different, unequal quality to the detriment of members of the Anglophone community.

[92] The Court concurs with the Attorney General that the quality of service provided to taxpayers by call centre agents depends on their ability to consult and understand the notes to taxpayers' electronic files. The evidence was that call centre agents refer to them when they are on the telephone with taxpayers in order to understand the actions taken on an account, quickly identify the details of an account and find out the status of a file.

[93] The rights conferred on taxpayers by Part IV of the OLA must mean something. As the Court said in *Norton* at para 76, the right to communicate in the official language of their choice "implies a right to be heard and understood by the institution in either official language". In order for taxpayers to be understood and receive equal service in the language of their communicatios with the CRA, call centre agents must be able to understand the file of the taxpayer with whom they are speaking, including the notes in the "notepad". "Lip service does not satisfy the letter and spirit of provisions found in Part IV of the OLA " (*Norton* at para 76).

[94] Accordingly, the Court is satisfied 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. This involves something other than mere administrative convenience (*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at para 70). It should be noted that, with the telephone system in place at the CRA, calls from Anglophone taxpayers may be routed to a bilingual agent or a unilingual Anglophone agent and that those taxpayers have the right to receive the same quality of service, irrespective of the language proficiency of the call centre agent who answers their call.

[95] Furthermore, the evidence indicates that call centre agents cannot simply rely on the [TRANSLATION] "codes" used in the CRA's computer systems because they do not, by themselves, give sufficient information about a taxpayer's file to understand its status or the actions that have been or will be taken. The call centre agent must, in fact, be able to consult the notes to the file to understand the specific codes that apply, to distinguish between the codes and to fully understand the nature of an action. Simply consulting the screens and the codes is not sufficient for the work of a call centre agent.

[96] In these circumstances, the constitutional guarantee of Mr. Tailleur and the CRA's call centre agents to be able to use French or English as the language of work in this federal institution must yield to the taxpayers' right to be able to communicate with call centre agents and receive their services in the language of their choice.

(2) Mr. Tailleur's alternative is not reasonable

[97] Mr. Tailleur also submits that the CRA did not consider all possible reasonable alternatives in order to fulfill its duties under subsection 36(2) of the OLA. With respect to the possible measures that the CRA could have taken, Mr. Tailleur criticizes it in particular for failing to consider transferring calls to bilingual agents or translating the notes to the file. However, at the hearing before this Court, Mr. Tailleur abandoned the translation argument, focusing on the transfer of calls.

[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 [TRANSLATION] "bilingual" when that is the case and that the 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.

[99] Mr. Tailleur raises, among other things, the fact that the CRA did not conduct appropriate studies and analyses to determine the risks associated with his proposed solution of transferring calls. Mr. Tailleur argues, in effect, that there is no evidence before this Court on the impact of transferring calls because the CRA did not analyze the implementation of an alternative system to reroute calls to bilingual employees.

[100] The Court does not agree. The evidence clearly establishes that Mr. Tailleur's alternative is not reasonable because it would invariably lead to unequal service between Anglophone and Francophone taxpayers. In fact, 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. However, the transfer of calls proposed by Mr. Tailleur is not, in the Court's view, a measure that can reasonably be taken within the meaning of subsection 36(2) of the OLA.

[101] It is true that the Court is not in possession of a scientific or quantitative study measuring the impact that the transfer of calls would have. However, even without such a study, it is clear from the evidence that transferring calls would cause additional delay and result in some repetition. The taxpayers transferred would therefore receive lower quality service.

[102] The evidence in the record (and simple logic) shows, in fact, that there would necessarily be a delay in processing Anglophone taxpayers' requests if a call had to be rerouted to a bilingual call centre agent. Even if the calls were transferred in the most efficient way possible, delays are certain. With the telephone service provided to taxpayers by the CRA, a call centre agent cannot know ahead of time who the taxpayer on the telephone is and whether the taxpayer has notes in his or her file in an official language that is not the agent's. The unilingual Anglophone agent who answers the taxpayer's call must at the very least begin preliminary exchanges with the taxpayer and scroll through part of the information before seeing that a note in the taxpayer's file is written in a language that the agent is not proficient in. Thus, some time will have elapsed, and the taxpayer will necessarily have had some exchanges with the call

centre agent before the agent sees that he or she must transfer the call to a bilingual agent. Therefore, the service received by the taxpayer would be longer and of lower quality.

[103] The transfer of calls mechanism also implies that taxpayers would have to repeat part of their information because, before discovering that the notes in the "notepad" are written in French, the unilingual Anglophone call centre agent will have to have begun a discussion with the taxpayer to find out the details of the file and the purpose of the call. Anglophone taxpayers would need to repeat this information to the bilingual agent who takes over.

[104] In addition, once the decision is made to transfer the call, the Anglophone taxpayer's call would not be automatically and instantly picked up by a bilingual agent. Instead, the call would be sent back to a queue for the next available bilingual call centre agent. The evidence indicates, in fact, that the volume of calls to the CRA is considerable and that there are no call centre agents [TRANSLATION] "on standby" who could be instantly available to absorb these transferred calls, which would also result in additional delays for the taxpayer involved.

[105] With the solution proposed by Mr. Tailleur, and even without scientific evidence, the Court is satisfied that there will certainly be unequal service provided to one of the two language communities, namely, the Anglophone community. This inequality would take the form of longer processing times and a burden on the taxpayer to have to repeat the information given to the call centre agents. But taxpayers who choose to call on the Anglophone telephone line are entitled to expect service of equal quality in their language.

[106] Regardless of how its impact would be measured, there is no doubt in this case that transferring calls would create unequal service through the delays and the return to the queue that it would impose. The issue here is not when the scope or degree of inequality becomes sufficient. Counsel for Mr. Tailleur stated that a language of work right cannot be sacrificed [TRANSLATION] "for a few seconds". The Court does not agree with that position. Rather, it is of the opinion that unequal treatment does not suddenly become less so because it does not last long or affects the rights of a language community in only a minor way. As this Court said in *Doucet v Canada*, 2004 FC 1444 at para 79, "a service [that] leaves much to be desired absolutely fails to meet the objectives stated in section 2 of the OLA". The right to equal access to services in both official languages that is enshrined in Part IV of the OLA means substantive equal treatment, and the concept of equality cannot accept half-measures.

[107] In the Court's opinion, it is not necessary that the unequal treatment be precisely quantified to allow the Court to conclude that the evidence in the record is sufficient in this case. The evidence shows in fact that transferring calls will undoubtedly create some form of waiting and repetition by adding a step in processing calls from Anglophone taxpayers. A breach of a right recognized by Part IV would exist, regardless of its specific scope.

[108] Pursuant to subsection 36(2) and the interpretation proposed above, 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 duty is to provide equal service (meaning substantive equality) to Canadian taxpayers. When taxpayers call the CRA, they choose the French or English line and exercise at that point their choice of official language

in which they wish to be served. The alternative measure proposed by Mr. Tailleur would create inequality in that some Anglophone taxpayers would experience additional delays waiting until a bilingual agent is available to deal with their file. Considering the CRA's duty to ensure that members of the public receive service of equal quality in either official language (sections 22 and 24 of the OLA), the transfer of calls proposed by Mr. Tailleur is inconsistent with Part IV.

[109] Moreover, that is the conclusion the Commissioner's investigation reached; he noted in his decision that [TRANSLATION] "to ensure equal, immediate service to all clients, [it] is reasonable that the notes to the files be entered in the taxpayers' official language of choice".

[110] The Court is therefore of the opinion that the CRA has shown why the measure proposed by Mr. Tailleur is not reasonable, because implementing it would breach Part IV of the OLA. Accordingly, the proposed measure is inconsistent with Part IV within the meaning of section 31. As the parliamentary debates point out, where there is an inconsistency, the duty to serve members of the public in the language of their choice prevails. Given this finding, the Court does not need to consider whether the transfer of calls suggested by Mr. Tailleur would cause significant operational or administrative difficulties for the CRA or whether implementing it would conflict with the CRA's mandate.

[111] In addition, the Court notes that all the other parts of the CRA's computer systems are accessible in both official languages for call centre agents and that only the notes in the "notepad" or diary must be written by call centre agents in the taxpayer's language. The CRA even made model notes available in both official languages that employees can use in typical

cases. In fact, the evidence indicates that the CRA is deeply concerned about protecting the language rights of its call centre agents and that it has already adopted a number of measures to respect and recognize these rights and to facilitate the use of the language of work chosen by its employees. Indeed, the evidence shows that the CRA has implemented numerous accommodations over the years to enable its agents to work in the language of their choice while honouring its service duties to the public. The Court notes that the CRA has increased efforts to accommodate the work of call centre agents in the language of their choice through measures such as the following:

- Drop down menus and checkboxes in the agent's official language of choice;
- Model notes and scripts to copy and paste in the "notepad" screen;
- Standardization of entries in the notes everywhere that this is possible;
- Regular review of the electronic systems to put greater emphasis on standardization.

[112] In terms of notes to the file, these adaptations were not reasonably possible. The solution adopted by the CRA requiring that notes in the "notepad" be written in the taxpayer's official language is within the bounds of reasonableness. But the duty under subsection 36(2) to take measures that can reasonably be taken is not a duty to take all imaginable measure or to allow CRA's employees to always use the language of work of their choice. On the contrary, this duty is circumscribed by the constraints in Part IV.

[113] Since it is impossible in the circumstances to reconcile duties and language rights in terms of both language of service and language of work because of the need to provide equal service to Anglophone and Francophone taxpayers, Part IV of the OLA must take precedence.

IV. Conclusion

[114] For the preceding reasons, Mr. Tailleur's application under subsection 77(1) of the OLA is dismissed.

[115] In this case, the Court finds that the CRA took all measures that it was reasonable to take to establish and maintain a work environment conducive to the effective use of both official languages by its agents and specifically by Mr. Tailleur. To comply with the OLA requirements, the CRA in fact considered all possible reasonable measures in an attempt to reconcile Part IV and Part V of the Act. Lastly, on the basis of the evidence in the record, the CRA also demonstrated why it could not adopt the solution proposed by Mr. Tailleur regarding the transfer of calls to bilingual agents. Even if this measure would have created, according to Mr. Tailleur, a work environment that would have authorized call centre agents to use the language of work of their choice, such a measure is not reasonable because it is inconsistent with the CRA's duties regarding service of equal quality that it is required to provide to all of its clientele.

[116] The general principle is that costs follow the event. However, the question of costs falls within the Court's discretion. Despite the fact that Mr. Tailleur did not succeed in this proceeding, the Court is of the opinion that the application raised an important principle with respect to the application and implementation of the OLA and the tension between language of service and language of work. Therefore, in the exercise of its discretion, the Court has decided to not award costs in this case.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application under subsection 77(1) of the OLA is dismissed without costs.

"Denis Gascon"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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