Rebalancing Bilingualism

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Introduction

Some background information

My goal in authoring this article is to ensure that the careful balance of language rights enshrined in the 1988 Official Languages Act [OLA] is restored and maintained.

In engaging these issues, I recognize that it may amount to a breach of what is an unwritten convention that retired judges do not comment on matters involving their own cases and critiquing the decisions whose contrasting reasons prevailed. Specifically, I refer to my decision in *Dionne v. Office of the Superintendent of Financial Institutions*, 2019 FC 879 [*Dionne*] and those of differing opinions in *Tailleur v. Canada (Attorney General)*, 2015 FC 1230 [*Tailleur*] and *Canada (Commissioner of Official Languages) v. Office of the Superintendent of Financial Institutions, 2021 FCA 159* [*OSFI*], in addition to the Supreme Court decision in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768 [*Beaulac*] that is the primary focus of this article because of its incorrect application by the courts. I only ask that judgment be reserved on my intervention by this article until I have completed my commentary such that readers can decide for themselves whether I was required to intervene or not.

For the record, I state that my personal preference, certainly as a retired judge, is to avoid becoming engaged in a critique of the reasons of other judges, knowing just how difficult it is to be a judge in modern times, especially when required to rely on independent expert parties in formulating reasons.

The simple fact is that my unique circumstances allow and compel me to comment, in the timelines required, on the precarious legitimacy that now attaches to official language legislation based upon the *Tailleur* and *OSFI* decisions. The urgency of the need to comment is exacerbated by the looming extensive Amendments to the OLA, now before Parliament. If adopted without appropriate input from the Anglophone community whose language rights have been steadily eroded, of which most are unaware, there is a real risk to national unity down the road. That risk is enhanced given the charged nature of modern populist politics and the already strained national east-west ties now holding the country together.

Both my academic and practical background, as a certified civil litigator employed by the Department of Justice (DOJ) and in private practice, and former judge of both the Ontario Superior Court of Justice and Federal Court of Canada, allow me to speak to this matter with understanding and some authority. My doctoral thesis examined the theoretical and practical foundations of official language legislation, with particular reference to the Ontario experience when the Province declared French in 1985 as an official language of Ontario Courts and in which I participated extensively. This included an article in the Ontario Law Society Journal distributed to all its members that provided the history of Ontario's discrimination of Francophones and outlined the requirements of the Society to respond to French being an official language of the courts, including describing the bar admission program requirements. Perhaps the most salient demonstration of my support for official languages and Francophones generally was publicly supporting the distinct society clause and arguing that both Ontario and Ottawa as the capital of the country, should declare French an official language, even going to the point of attempting to initiate

actions to affect these ends, ironically only to be discouraged by the Office of the Commissioner of Official Languages (OCOL). Also relevant, I acted as advisor and counsel to the OCOL for a number of years. In that role I provided opinions and appeared in cases regarding the OCOL's mandate, participating in the Court of Appeal decision in *Canada (Attorney General) v Viola*, [1991] 1 FC 373 [*Viola*]. The Court confirmed that section 91 "was but a revised statement of the duty … to maintain the principle of selection based on merit", an issue of fundamental importance in this paper.

None of my views have changed in my support and belief in bilingualism, or my appreciation for Canada's Francophones, and particularly their minority communities. It is only a matter of maintaining proper relations of mutual respect for, and reasonable consensual accommodation by, members of the two linguistic communities, which now is in peril for the reasons that follow. I apologize to those I criticize and any mistakes I have undoubtably made from a simple interpretation of Bill C-13 in its original form. Despite any remarks, I remain convinced of the good faith of all concerned.

Rebalancing Bilingualism is divided into four Parts

Part 1 Why the *OSFI* decision must be appealed to the Supreme Court of Canada

Part 2 Chronological history of the *Beaulac* principle and its applications

Part 3 Comments on Bill C-13 and Amendments to the Official Languages Act

Part 4 The Use of French in Federally Regulated Private Businesses Act [UFFRPBA]

Part 1 Why the *OSFI* decision must be appealed to the Supreme Court of Canada

In my view, the 1988 OLA represented a carefully drafted and balanced social and political statement of language rights and commitments agreed to by the two official language communities. Its contents are consistent with the finest principles intended to remedy past linguistic and community injustices, provide for a just and diverse society, which establishes a degree of mutual respect underpinning a sustainable relationship of the two linguistic communities needed as a foundation for national unity. It is also my view that the 1988 OLA has generally achieved its purpose in the fifty years since these issues were first acted on in terms of the 'catching up' of Francophone communities, to the extent and level that the federal government can play a meaningful role.

However, recent developments in the past decade seriously threaten the fine balance of the 1988 OLA. I will show in this article how policy and legal interventions and decisions, have minimized the use of English by bilingual Francophones to the extent possible. The merit principle in staffing actions, enshrined in the 1988 OLA, has been trumped by language rights.

The 'new directions' of the 1988 OLA started with a 'purposive interpretation principle' pronounced by the Supreme Court in the 1999 decision in *Beaulac*. This purposive interpretation principle ('*Beaulac* principle'), which presently appears to apply 'in all cases', favours all Francophone language rights over those of Anglophones, although never stated as such.

Its endpoint in terms of application as recently held in the FCA *OSFI* decision, has resulted in an order that gives priority to Francophone language rights over the merit principle in federal institution staffing actions. This was confirmed in the *OSFI* decision by its order upholding the language re-designation of 12, what would have formerly been unilingual English positions in Toronto, a unilingual region. The order required these positions to be re-designated as bilingual in order to permit Montréal coworkers in bilingual positions in a bilingual region to communicate with their Toronto coworkers in French. The FCA also added two bilingual supervisory provisions, not requested in the Applicant's pleadings, and lacking any supporting provision in the OLA for this order.

The *OSFI* decision was not appealed for reasons that will be explained later, but mostly pertaining to a failure of the adversarial principle. That thereby leaves it as the final statement binding federal institution staffing.

Within normal time constraints foundational errors of the FCA *OSFI* decision prioritizing asymmetric Francophone language rights over meritocratic staffing principles would automatically have provided sufficient grounds for a successful leave to appeal application to the Supreme Court. Given that we are now one year after the release of the *OSFI* decision, and the fact that the Attorney General (AG) of Canada has already decided not to seek leave to appeal the decision to the Supreme Court, although past AG agents played a leading role contributing to this outcome, this article may seem to serve no purpose. However, given the potential impact of the changes on the very foundations of national unity, of which the present AG is most likely unaware, this AG must reconsider his decision.

At least two irrefutable arguments exist that in terms of demonstrating grounds for appeal are sufficient to request that the Government of Canada seek special leave to appeal the FCA *OSFI* decision.

A. Transparency failures

1. No mention or consideration of merit requirements in staffing actions

The overriding and most significant error was the FCA's refusal to even recognize that merit staffing was the heartland in *Dionne*'s reasonings.

For example, the term 'merit' was referred to 59 times in *Dionne*, relating to Toronto re-staffings. In the FCA reasons, the term is referred to 0 times, i.e. not found, or referred to.

Probably the best example of the reference in *Dionne* was that of imploring the Francophone communities not to abandon the merit principle, because of the same concerns that I have with Parliament proceeding with most of the Amendments. That concern was the potential to unbalance national unity as carefully and mutually established by the 1988 OLA. No one seems to recognize upholding national unity as the true purpose of the OLA, particularly now with the highly negative attitudes in the four Western Provinces sparking talk of separation. The comment is as follows:

> [112] Given that the services and language of work provisions of the OLA provide the Francophone community with a competitive advantage in the 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 basis of an alleged purposive interpretation of sections 35(1)(a)(i) [services provisions] or section 36(2) [key language of work provision].

Moreover, a close perusal of the FCA decision leads to no other conclusion but that the omission to engage with the merit discussion was inexplicable. The apparent reason seems obvious: there is simply no court in Canada that would give priority, or at least say it out loud, that language rights trump merit in any fair and reasonable staffing circumstance. This is even more so when the OLA says nothing in the Act shall derogate from the merit principle (6th Preamble, sections 39(3) and particularly 91).

2. Impermissible 'collateral bilingual staffing'

Collateral bilingual staffing is a figure of speech coined in the *Dionne* decision to describe the re-staffing of the 12 Toronto unilingual coworker positions, not based on merit of language skills being required to accomplish the functions of the job, but collaterally to uphold the language rights of the Francophone applicant in a bilingual position to communicate in French with his Toronto coworker resulting in the bilingual staffing action. This was placing Francophone language rights ahead of the merit principle.

The phrase 'collateral bilingual staffing' [CBS] was referred to 41 times in the *Dionne* decision. The *OSFI* reasons referred to CBS 1 time, and then only as a passing reference to a submission of the intervener submission, left unanswered by the FCA.

3. Disregard of Section 91

However, the most 'inexplicable' failure to contend with the core concept of merit in the *Dionne* decision, has to be the FCA's dismissal and refusal to consider section 91, except in an irrelevant closing four-line paragraph, briefly discussed below.

Section 91 is set out here.

> 91 Nothing in Part IV [=*services to the public*] or V [=*language of work*] 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.

Section 91 unambiguously states that in any staffing action the official language requirements arising from Part V, i.e. Section 36(2), must defer (*Nothing … authorizes*) to the precept of merit, i.e., unless they are "objectively required to perform the functions "of the position, this being the acknowledged definition of merit in staffing. There is no interpretive principle of any Court that can re-write that intention of Parliament to place merit staffing ahead of language rights, when so clearly expressed.

The entire explanation for why the FCA did not consider section 91 relevant is found at the completion of its analysis in the statement contained in paragraph 114 of its decision as follows, with the added comment in the title and the three reasons offered by the FCA not to consider section 91 marked by my bracketed highlighted letters:

> Did the Federal Court err in holding that section 91 of the OLA 'has precedence' [absence of any reference based on merit] over the duties set out in subsection 36(2) of the OLA?
>
> [114] Since [**A**]I am in favour in endorsing the approach and comments of the Federal Court in *Tailleur* (*Tailleur* v. Canada (Attorney General), 2015 FC 1230 (CanLII), [2016] 2 FCR 415), I am of the view that section 91 of the OLA does not apply in this case. [**B**] It was not raised in the complaint made to the Commissioner, and [**C**] neither Mr. Dionne nor the Commissioner have ever raised its scope. Therefore, I will not discuss this issue any further.

[**A]** There is no 'approach and comments' in *Tailleur* that could in any way be relevant to section 91. As shall be seen below, the case did not involve staffing or even mention section 91.

[**B**] There was no requirement that section 91 had to be raised in the complaint. The respondent first pled section 91 as a defence to the applicant's Court Remedy application. This is all that is needed to have the provision considered by the Courts. Moreover, no OLA provisions of any kind were mentioned in the complaint. Eventually, it was the applicant who added the claim based on section 36(2), but only when the Court Remedy application was commenced. Only at that time did section 91 have any relevance, when pleaded as a defence to section 36(2).

[**C**] It is expected that neither the applicant or the Commissioner would have raised section 91. It was a complete defence to their arguments supporting bilingual staffing of coworker's positions in Toronto. In any event, once raised as a defence the Court was required to consider it.

Nor is section 91 the only reference to merit staffing. The 6th Preamble clause of the OLA states the Government of Canada's commitment "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". This is similarly repeated in section 39(3) of the Act: 'Merit principle -- (3) Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit.'

4. Disregard of unilingual regions

A further transparency issue was the Court of Appeal's refusal to consider or mention that the Federal Court in *Dionne* concluded that Parliament's intention in establishing unilingual regions was to protect unilingual employee positions from having to work in French. This thereby also barred any requirement that the Toronto employees were required to be bilingual or work in French. And certainly not to allow the applicant to exercise language rights to communicate in French that would entail staffing changes. Although clearly advanced in Dionne as another ground to refuse the application, the FCA in *OSFI*, refused to mention the issue or specifically reject the lower court's reason to dismiss the application based on Parliament's intention in creating unilingual regions. This decision, once understood by Anglophones will damage attitudes towards official languages , in some regions of the country worse than others, with a potential to generate serious national unity issues.

5. Conclusion

It is difficult for a lower court judge to accept that a Court of Appeal would not even mention issues that were central to its decision. Either the merit or unilingual regions defences was sufficient to prevent the FCA from rendering a decision upholding collateral bilingual staffing. In its essence, the FCA OSFI decision was unfair and lacking in common sense by placing Francophone language rights ahead of merit staffing and unilingual regions intended to protect Anglophone jobs. There is no comparable decision from a Canadian court of appeal that refused to consider issues which were the crux of the lower court's reasoning in anything approaching modern times.

One thing is certain, if the FCA OSFI decision remains binding on staffing in the Canadian Government, Anglophones in Canada will have good reason to question everything having to do with its legal system, official languages, bilingualism and the benefits of Canadian federalism.

If the fundamental unfairness of the OSFI decision is not a compelling ground to require the AG to seek special leave to appeal the OSFI decision, then what else in the Rule of Law will be pitched overboard for what ever other interest the Government is trying to advance?

B. Failure to adhere to the Modern Principle by not engaging with key terms of 36(2)

Any valid interpretation of a challenging section like section 36(2), which was the centre piece of the *Dionne*/*OSFI* case, must comply with standard interpretation principles enunciated by the Supreme Court commonly described as the Modern Principle: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

The working description of the Principle is best described by Professor Sullivan:

> "The chief virtue of the modern principle is its insistence on the complex-multi-dimensional character of statutory interpretation … a court must form an impression of the meaning of its text … it must also take into account the purpose of the provision and all relevant context."

The mandatory interpretive methodology of the Modern Principle obviously requires as a first step in any interpretation, the considered definition of keywords of the provision in their ordinary and usual meaning. In fact, considering the words of the statute is necessity at every step of legislative

interpretation. It is the first and last step, because the words are the anchor around which everything else turns in construing legislation.

Section 36(2) is the key provision of debate and of singular importance to the working relationship of all employees of federal institutions, although in this instance it refers to those relationships between coworkers, and thereby is described in this article as the 'coworker provision'. It reads as follows with its three essential components identified in order of determinative effect by bracketed capital letters:

> (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), [**C**] such measures are taken in addition to those required under subsection as can reasonably be taken to establish and maintain [**A**] work environments of the institution that are conducive to [**B**] the effective use of both official languages and [**B**] accommodate the use of either official language by its officers and employees.

This provision only applies to workers in a bilingual region. Montreal and Ottawa are in bilingual regions, whereas Toronto is in a unilingual region.

The first and second levels of key components in section 36(2) that establish the standard or threshold that federal institutions must meet are, first to provide 'work environments' that are 'conducive to', and second 'the effective use of both languages' and 'accommodate the use of either' for its employees.

Both the *Tailleur* and the FCA *OFSI* reasons did not interpret the determinative phrase 'work environments' or the second conducive factor 'accommodate the use of either'. In *Tailleur*, the Court focused on the third level determinative component of [C] 'such measures are taken … as can reasonably be taken to establish and maintain' linguistically conducive work environments in conjunction with only the 'effective use of both' factor.

Recognizing that the pure equality of 'effective use of both languages' was not achievable, it relied on the '*Beaulac* purposive interpretation principle' to favour the language rights of Francophones (without ever saying this in a transparent fashion) and established a rule whereby Francophones would only have to use English if otherwise the institution could demonstrate this caused 'serious significant' operational problems. *OSFI* adopted this reasoning from *Tailleur*.

The meaning of 'work environments' is the first determinative issue, in the sense that the managers of bilingual federal institutions must be advised of the practical meaning of a 'a work environment that is different from a simple workplace. Environments refer to a workplace that generates a positive sense of comfort and team work to achieve the objectives of the employer. Thereafter, the manager must understand how to generate this positive work environment that is conducive to the effective use of both languages', while at the same time an environment that 'accommodates the use of either'. If not satisfied that an appropriate work environment has been achieved, only then can a manager determine whether the federal institution's particular work environment meets these standards. Only then must the manager decide what measures need to be taken that are reasonable to achieve the required work environment that complies with section 36(2).

To better explain these circumstances that both the *Tailleur* and *OSFI* decisions failed to interpret the key phrases of 'work environments' and 'accommodate the use of either official language' in section 36(2), the Table of Contents in *Dionne* relating to the interpretation of this provision is set out below. It describes the interpretative steps the *Dionne* Court followed that can be used to compare what the other two Courts did not interpret.

D. Analysis of section 36(2)
(1) Introduction
(2) *Tailleur* is a service-driven decision bearing no relevance to section 36(2)
(3) The terminological and internal contextual interpretation of section 36(2)
    (a) The scheme of section 36(2)
    (b) Work environments
    (c) The primary objective of appropriate official language work environments: being conducive to the effective use of both official languages
    (d) The secondary objective of work environments: accommodating or permitting the use of either official language
        (i) "accommodate/permettre"
        (ii) "either/l'une ou l'autre" and "both/deux"
        (iii) Criticism of linguistic accommodation in *Beaulac* is specific to its particular Facts
            1. Paragraph 24 in *Beaulac*
            2. Paragraph 82 in *Tailleur*
    (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
        (ii) The contextual significance of "toutes autres mesures possible" [such measures "as can reasonably be taken"]
        (iii) "reasonably be taken"/"mesures possibles"
        (iv) "such measures"/"toutes autres mesures"
        (v) The significantly serious [importantes et sérieuses] operational difficulties factor
        (vi) Reasonable measures does not imply an employee's right to dictate the language requirements of a co-worker
(4) Contextual interpretation of section 36(2)
    (a) Internal contextual interpretation of section 36(2)
    (b) External contextual interpretation provisions of the OLA: sections 91 and 36(1)(c)(i)
        (i) Section 91
        (ii) Section 36(1)(c)(i)
(5) Jurisprudence regarding unilingual employees in the workplace
(6) Extrinsic evidence as an aid to interpretation of section 36(2)
E. Conclusion on the interpretation of section 36(2)

The *Tailleur* and *OSFI* Courts limited their interpretations of 36(2) to the interpretive issues described in D (3)(e) and D (5) and D (6) of the *Dionne* Table of Contents. It is respectfully submitted that by failing to interpret the most relevant and determinative terms of section 36(2), the interpretation of both Courts was erroneous.

Parliament's intent for bilingual workplaces was based on three, not just one, key determinative factors. Its vision described a cooperative, collaborative, interactive and effective work environment - not a linguistically separated workplace driven by the single objective of the unattainable effective equal use of both languages, as promoted over the years by the OCOL that infringes the OLA. The foregoing will be expanded on somewhat when examining the cases in the chronological analysis of the development of events that created the FCA OSFI mindset that contributed to it foreclosing on merit and unilingual regions.

It is respectfully submitted that these obvious interpretative failures of not interpreting key terms in a statutory provision, would similarly be sufficient by themselves to require the Supreme Court to grant a special leave to appeal the *OSFI* decision that lacks all common sense.

It goes without saying that the issues raised in *OSFI* are of singular national public importance. Indeed, no other decision has ever come close to so radically altering the application of the language of work provisions in federal institutions to degrade the merit staffing principle and limit the protections afforded unilingual employees in unilingual regions to work in their only language of choice. Perhaps it is a personal opinion but rectifying with the least delay the Federal Court of appeal decision is of extreme importance to the maintenance of national unity. This comes at a time when Western Canadian citizens are reconsidering the benefits and costs of Canadian federalism, when official language legislation comes out always on the debit side of the ledger in every form and fashion.

Part 2 Chronological history of the *Beaulac* principle and its applications

1999: The *Beaulac* purposive interpretation principle

1. The asymmetrical application of the *Beaulac* principle

The *Beaulac* principle is stated as follows, with the Supreme Court's highlighting, in one sentence found at paragraph 25 of the decision. Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada … where they [language rights] do apply.

None of the courts that have considered or referred to the *Beaulac* purposive interpretation principle have attempted to explain the oxymoronic phrase 'where they do apply'. None have addressed the issue of where the principle does not apply. By the principle's reference to 'preservation and development', it clearly does not apply to a language right of members of the Anglophone majority community outside of Quebec.

Thus, based on the asymmetrical application of the Beaulac principle in favour of Francophones, when the language rights of Francophones confront those of Anglophones, it was successfully argued that the language rights of members of the minority language community must stand ahead of those of the majority. This was its application in the *Tailleur* and FCA *OSFI* decisions, although never stated with any degree of transparency in both cases.

2. The *Beaulac* principle as a 'shield'

It is submitted that the *Beaulac* interpretive principle can only be used defensively to ensure the equality of language rights. This describes its use as a 'shield'; a metaphor sometimes stated in case law. The logic in this also means that the principle cannot be used as a 'sword', to go beyond the attainment of the equality of language rights.

The Supreme Court in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 [*Mazraani*] appears to have stated this limitation on the *Beaulac* principle as a general rule for the equality of language rights, but not in a sufficiently clear statement to establish it as a rule. The statement to this effect is found at paragraph 28 of the Court's reasons.

> 28. A purposive reading of s. 19(1) of the Charter requires that the court attach the utmost importance to the protection of each person's [equality] right to speak in the official language of his or her choice.

Merit staffing promotes its own 'relevant' equality factors involving fairness and reasonableness, as well as embodying positive policy outcomes of employers engaging the most qualified persons for positions based on objective criteria. The Beaulac principle cannot be used as a sword to destroy fundamental staffing canons upon which federal institutions are founded and which Canadians have adopted as the basis for legitimizing the Federal Government.

Similarly, an interpretive principle cannot be used as a sword to erode job protections of Anglophones in unilingual regions, which, based on agreements between the two official language communities, represents a geographical limitation on bilingual staffing. The fact that the FCA has proceeded to apply the *Beaulac* principle to overturn both the merit principle and the protections of unilingual

Anglophones' language rights is therefore, not good law. Given the damage such an application causes to fundamental staffing conventions and the breakdown of unilingual regions, and the fact that it is potentially to be enshrined in the Amendments, makes it imperative that the Supreme Court reconsider the *Beaulac* principle along with the FCA *OSFI* decision before they destabilize a well-balanced official language regime. This is yet another reason why the Amendments and the UFFRPBA cannot proceed before these issues are resolved by the Supreme Court.

3. Unilingual Anglophone positions based on merit will need to be accommodated.

The third point regarding the *Beaulac* principle is that two subsidiary 'mandatory' rules which were stated in the *Beaulac* case and are now cited whenever the principle is referred to, are situational in application and do not apply to language of work cases.

The first rule stated in *Beaulac* was that bilingual Francophones should not be required to accommodate the use of English. The fact that Francophones are bilingual is irrelevant to whether their equality rights are to be applied. This is entirely appropriate when discussing communications with the public and for their provision of services. This latter category includes access to public court services as were the facts in both *Beaulac* and *Mazraani*. The Court processes were not available or at least not provided in French, leaving the bilingual Francophones to communicate in English.

As is evident, the facts of these cases and upholding the applicants' rights are relatively simple 'bright line' situations. Any breach of the entitlement of the public to use one's language in services and communications is clear. Equally clear is the requirement to repair the situation. If this does not occur the requirements for measures to be taken by the federal institution is similarly clear. There is no issue of any degree of accommodation being required.

However, there is no bright line for bilingual workers' language rights when they are being paid to use their bilingual skills to accommodate unilingual persons. There can never be an equality of use of both languages when one of the parties is unilingual. They start from the situation of unequal use of the two languages. The only question is to what extent is accommodation required. Section 91 ensures that unilingual workers will be in the workplace. Thus, the need for accommodation. This is what section 36(2) is intended to resolve. There is no intention by Parliament however, that it should be resolved in favor of one language community over another contrary to the conclusions in the *Tailleur* and *OSFI* decisions.

Bilingual employees are paid to accommodate the use of unilingual person's language. It is really a matter of contract terms to a large extent, where the operation of federal institutions cannot be any less productive and effective than those in the private sector. That is part of their job as long as the workplace situation possesses a conducive 'work environment' based both on the effective use of languages and 'accommodation' of the use of either.

4. The 'substantive equality' principle has no application to language of work principle

The second mandatory rule taken from *Beaulac* and now stated in every language rights case is that the institution must ensure the substantive equality of whatever language right is being considered.

> 24. The principle of substantive equality provides that language rights are institutionally based, require government action for their implementation and therefore create obligations for the state.

The concept of substantive equality is said to support what one would have thought was an obvious obligation of the institution to ensure that the language rights were being properly enforced.

Such a duty is already stated in section 36(2) by its requirement that the institution take reasonable measures to provide conducive work environments. This language does not lend itself to any concept of substantive equality, except to a mutually shared comfortable work environment that accommodates different amounts of use of languages where unilingual employees are involved. Even when the OCOL and the *Tailleur* and *OSFI* Courts warp the meaning of section 36(2) by not interpreting key words leaving only 'effective use of both languages' as the guiding factor that evokes some form of equality of actual use, it still does not apply by the admission that there exists situations where English must be employed by a bilingual Francophone worker. The expression 'substantive equality' is simply irrelevant to language of work situations. There is no such thing as a bright line or any concept of equality in language of work circumstances involving bilingual and unilingual employees working together.

2012: Treasury Board Secretariat [TBS] Language of Work Policy

1. Directive supporting collateral bilingual staffing in unilingual and thereby bilingual regions

The first evidence of a step towards collateral bilingual staffing is found in the 2012 TBS *Directive on Official Languages for People Management*, [TBS Directive].

The TBS Directive was the earliest example found of the incomplete interpretation of the key words of section 36(2). Moreover, the TBS would have had to rely on the DOJ [also the AG] for its legal interpretations of the provision. As well, there is also no doubt that the OCOL [really its legal advisors who would make the call on this legal issue], possessing an expertise in official language law and objectives, would have been consulted, and probably the driving agency behind the reformulation of the TBS Directive.

The 2012 Directive repealed the 2004 Directive. The earlier Directive required that interregional linguistic communications be conducted in the language of the unilingual region. The 2012 Directive did not provide an alternative policy in replacement directing the use of either language. It did not have to.

The termination of a clear policy governing linguistic interregional communications over several decades amounts to an implicit directive to human resource managers that the old policy protecting English-language positions in unilingual regions should not be followed, as it no longer applies.

It would also logically follow and have been well understood by the decision-makers who eliminated the legacy interregional language policy, that the absence of any policy would favour the creation of bilingual positions in the unilingual regions. If bilingual Francophones have the right to communicate in French with employees in unilingual English regions, this requires the replacement of unilingual positions in unilingual regions with bilingual ones, to allow French communications from bilingual regions to occur. This was the first known instance therefore, of a non-meritocratic policy of collateral bilingual staffing in federal institutions. It was instituted without any legal foundation and in complete disregard to the rights and interests of unilingual Anglophones. There should be some form of inquiry into this to determine how public servants could so overstep their obligations and unilaterally take it upon themselves to radically transform staffing rules in federal institutions across Canada.

In other words, the 2012 Directive was a form of order to all federal institutions similar in effect to that of the FCA in *OSFI* that upheld bilingual staffings of the Toronto specialists. The important difference however, is that the TBS/DOJ/OCOL were promoting a violation of the merit principle of staffing actions, long before the Court of Appeal sanctioned it, and without any foundation to support their Directive.

In 2012, there was no apparent basis for implementing collateral bilingual staffing in bilingual regions. The linguistic situation had been relatively quiescent during the 13 years since the formulation of *Beaulac* principle. The drafters of the 2004 Directive, five years after the *Beaulac* principle was enunciated, could not justify relying on the *Beaulac* principle to promulgate a radical change of interregional communication rights when there was no radical change in the law to support such a mandatory directive. Moreover, the legacy interregional language policy had worked harmoniously since the beginning of the OLA. Parliament clearly intended unilingual regions to protect the territoriality of unilingual Canadians' job rights. The TBS, OCOL and DOJ simply decided unilaterally to invoke the Directive, apparently in order to replace unilingual positions with bilingual ones. Or, of latent concern to the Court, the 2004 Directive was repealed but without any specific replacement policy, in order to facilitate the addition of a cause of action based on section 36(2) to the *Dionne* case, as is described below.

Logically and significantly if If bilingual employees in bilingual regions are allowed to communicate in their preferred language with their coworkers in unilingual regions, then the same logic must apply to bilingual regions based on the same principles.

2. Directive supporting collateral bilingual staffing in bilingual regions

Thus, the TBS Directive also directed federal institutions "to create and maintain a workplace that is conducive to the effective use of English and French in bilingual regions." There is no doubt that this language was intended to reflect the interpretation of section 36(2) as agreed upon by the three agencies. However, the Directive portrayal of section 36(2) misstates the essence of section 36(2) in the usual respects.

As evident from the wording of TBS Directive described above, its drafters fixated only on the first factor being the 'effective use of both official languages' that should contribute to a conducive 'workplace', instead of a conducive 'work environment' that also 'accommodate'[s] each language. To repeat, the OCOL has consistently adopted this erroneous interpretation of section 36(2) by ignoring the words of the provision.

See for example the OCOL's questionable reasoning supporting the call for entirely bilingual workplaces recently stated in the document titled *Modernizing the Official Languages Act* that is the road map to the Amendments (footnote p. 25).

> Employees who are required to communicate with or serve the public in both official languages (Part IV) can perform their duties much better if their work environment is conducive to the effective use of both official languages (Part V). In other words, federal institutions that value the equality of English and French in their work environments are more likely to communicate with and provide quality serves to the public in both official languages.

As demonstrated by this excerpt, the erroneous interpretation of section 36(2) by the failure to include in a meaningful fashion the second factor of conducive work environments that 'accommodate the use

of either official language'. In this fashion, the interpretation of this key provision by the OLA has thereby become the erroneous motif on which the Amendments and the UFFRPBA are unfortunately but incorrectly, founded.

In addition, the foregoing omission merely adds to the equally serious misstatement in the Directive describing the 'workplace' that needed to be linguistically conducive, when the appropriate term found in section 36(2) refers to 'work environments'.

In retrospect, it is most unfortunate that the drafters of the 2012 TBS Directive reframed section 36(2) of the OLA in a fashion bearing no similarity to the actual words of the provision and in significant disregard of the requirements of the Modern Principle based on the complex multi-dimensional character of statutory interpretation. For that reason alone, the 2012 Directive badly transgressed Parliament's intention in creating a suitable work environment.

The Courts in *Tailleur* and *OSF*, *I* following the direction of the OCOL, as adopted the same interpretive methodology as the TBS Directive, with the same effects. It has come full circle with the Tailleur and FCA *OSFI* decisions legitimizing the TBS Directive, as though that was always the plan, when it was always impermissible, and thereby always vitiating their Directives and decisions.

It is for that reason that there is some concern that the same agencies that participated in the composition of the 2012 TBS Directive also appeared as counsel in the cases that followed, all it turns out seeking to have the Directive officially endorsed by the Federal Courts.

As well, the AG being apprised of these events, including the apparent involvement of the DOJ hopefully, hopefully will further motivate actions intended to place the FCA OSFI decision before the Supreme Court.

2015: Federal Court *Tailleur* decision

The facts in *Tailleur* are hardly those on which to widely apply the *Beaulac* principle or to set out the foundational principles for collateral bilingual staffing. The outcome was clear from the start as an example of unreasonable behaviour on the part of the applicant, with the real issue being that of failing to perform an obvious duty required to provide services. The entire matter should have been resolved as an issue of failure to perform a reasonable duty attaching to a position. The Court relied on the *Beaulac* principle to rewrite a provision (section 31) to that effect, and turn it into a language of work decision. But that is another issue that can be straightened out if the matter goes to the Supreme Court.

The applicant was in a bilingual position with the Canadian Revenue Agency (CRA). He provided telephone income tax advice services in English to a member of the public. The applicant was required to write up his discussions with the client on an ongoing log in the language maintained by CRA. It served the obvious purposes of accurately recording the conversation (without consideration of the effects of translation) as a record for future discussions should a unilingual Anglophone CRA employee handle a call back serving the English-speaking client; and also, to review the competence of the advice provided by an employee. The applicant claimed that he was entitled to write up the contents of his English conversation in French. When refused, this led eventually to the case coming before the Federal Court.

Below are comments on the 3 main areas of concern: the influence of counsel in directing the issues for the Court's concern; the adoption of a standard without a connection to 36(2); and the extrinsic evidence not having any relation to the key terms of section 36(2).

1. Unacceptably adopting the parties' agreement narrowing the issues before the Court

The *Tailleur* Court provided the first interpretation of section 36(2) under the aegis of the first application of the *Beaulac* principle to OLA language of work rights. As noted, the *Tailleur* Court adopted the same methodology resulting in the same interpretation of section 36(2) as applied to justify the TBS 2012 Direction. The Court simply adopted the phrase 'effective use of both languages' as the only factor applying to create a conducive environment, which term it also did not attempt to interpret.

Although this was the first occasion that such an important provision was to be judicially considered, the Court left it up to the parties to determine the issues. This largely explains the Court's failure to engage with the key words of section 36(2). The Court's description of the parties' framing of the issues is as follows.

> (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 [prioritizing provisions of service to the public when incompatible with language of work provisions] and the meaning of the words "such measures . . . as can reasonably be taken" used in subsection 36(2).

First, the agreed on 'principles of interpretation' refers to the *Beaulac* purposive interpretation principle. This was the combined view of the OCOL and the AG [employees of the DOJ] who led on issues of statutory interpretation on behalf of the CRA. Thus, no consideration was undertaken of its application to entirely different facts from that in *Beaulac*, even though the AG has a duty to confront key issues when facing a provision being interpreted for the first time. I know this as a requirement from my years as a member of the litigation section of the DOJ.

This failure would include whether the interpretation principle was compatible with other purposive interpretation provisions established by Parliament in the OLA. This refers with special consideration of the first six Preamble clauses which are the expression of Parliament's interpretative statement of the related language rights provisions of individuals, all required to conform to the principle of equal status and privileges for the two languages.

Secondly, and of even more significance, the AG's statement of issues induced the *Tailleur* Court to concentrate all of its interpretive energies on the third level phrase of the words 'such measures . . . as can reasonably be taken'. As a result, the Court failed to consider the first order determinative phrase of 'work environment', and both the second order determinative phrases 'effective use of both officer languages' and 'accommodate the use of either officer language'. I have some sympathy for the Court as generally courts accept the statement of issues of the parties. However, in the realm of legal issues such as the interpretation of the provision the parties are relying on, the responsibility rests with the Court. There is also the convention of respect for the views of the OCOL, which again I am personally aware of.

Thus, the agreement of parties on legal issues has no bearing on a Court's obligation to properly state the law. The *Tailleur* Court erred in failing to interpret the key phrases that obviously made up the core of the provision. In other words, the Court failed to determine the scheme of section 36(2), sometimes described as the structure of the provision. (Personally it is my view that the Modern Principle should also refer to an obligation to consider the 'scheme of the provision', as this is a common failure on the part of courts generally). To repeat, the Court, following the parties' direction, only considered the third level determinative phrase 'such measures as can reasonably be taken'. The problem with this interpretative methodology is that one cannot start with the measures to be taken to achieve a standard, before it is determined what that standard is in terms of a conducive work environment.

This narrowed interpretation of section 36(2) and the Court's reliance on it is described at paragraphs 44 and at paragraph 115, as follows.

> [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 officer languages to be established and maintained.
>
> [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 officer languages by its agents.

2. Creating a test to apply section 36(2) that has no relation to the words of the provision

As seen above, the *Tailleur* Court interpreted section 36(2), as creating a positive obligation for federal institutions to take measures allowing a work environment conducive to the effective use of both official languages.

The effective use of both languages in the one-factor interpretation means that both languages should be used equally. Thus, everything in the *Tailleur* Court ends up being erroneous because the Court starts from the wrong textual interpretative base.

Accordingly, the three-pronged test established in *Tailleur* at paragraph is completely off base not being centered around what constitutes a conducive work environment or the need to accommodate English as what bilingual employees are hired to do. If the workplace is staffed on the principle of merit, there will be unilingual employees present, which means that the linguistic balance of the employees will determine the use of languages, subject to the standard of a conducive work environment, which provides as much flexibility as possible for managers to find solutions if problems arise.

3. Misinterpretation of extrinsic evidence to interpret section 36(2) that disregards the words of the provision

It is contended that both the *Tailleur* and *OSFI* Courts erred in their manner of reliance on extrinsic comments of a DOJ officer explaining the purpose of section 36(2), again related to their disregard of the uninterpreted key words of the provision.

Extrinsic evidence is contextual evidence of a purposive nature usually involving relevant legislative history to assist explanations of the words of the legislation. Extrinsic evidence varies in kind, but in construing the purpose of section 36(2), the words of a DOJ officer appropriately provided some

relevant legislative history. The most pertinent passage of the DOJ officer referred to in *Tailleur*, *Dionne* and the *OSFI* decisions is as follows:

> "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. "

The *Tailleur* and FCA *OSFI* Courts obviously relied on the words of the Justice officer describing the 'essence of these provisions' in controlling an unreasonable linguistic demand to use French such as that made by Mr. Tailleur. To repeat, the problem with this interpretation is its failure to connect these comments with the words of the provision. The exercise is to interpret the words of the statute, not to eliminate them from the provision itself, and then make up your own standard, which is exactly what the *Tailleur* and *OSFI* decisions accomplished by their misled interpretations.

Seen again from the drafter's purview, (I worked with drafters in my initial position in DOJ] the challenge in the statute's words is how to limit the effect of unreasonable employees linguistically interfering with the administration of the work place, a problem that exists in respect of members of both language communities. The answer is by collectivizing a shared linguistic workplace that should be a 'conducive work environment' – a linguistically positive environment that reflects gold-standard staff relations objectives - as said by the DOJ officer's 'carefully chosen' words. Using this as the standard supervisors/managers were provided with a large array of options to control or head off unacceptable linguistic issues that are usually associated with other issues. The federal institution being held to some narrowly defined standard requiring a demonstration of harm to operations if 'required to use English' would never work in the real-world of human resources management.

Thus, coming back to the ordinary meaning of the words in the provision, one may ask which words in the Justice officer's comments best encapsulate the words of section 36(2) in terms of a positive linguistic conducive work environment based on meeting recognized staff relation standards? Is it the avoidance of rigorous and inflexible demands by employees, or is it a work environment that is intended to limit such conduct by the measure of a linguistically comfortable work environment that attempts to maximize the use of each language. It must also be a standard that by applying the merit principle will always contain unilingual employees where language is not a requirement of the position in bilingual regions. This is the 'reality' of the workplace where unilingual employees have no choice of language use.

It is submitted that the interpretive answer based on the words of section 36(2) is obvious in the Justice officer's words,

> "… those words are carefully chosen … intended to make this right workable … an institution that is attempting, in a pragmatic way, to make the work environment one in which employees of both language groups are comfortable."

The Justice officer stated as clearly as possible the meaning of a conducive linguistic work environment as being one that is a linguistically comfortable environment that is intended to operate in a linguistically 'pragmatic' manner, in a proper staff relations manner of concentrating on environments, to get the job done while maximizing language use.

By section 36(2), Parliament was promoting a positive pragmatic environment with the understanding that the workplace would consist of bilingual and unilingual employees of different linguistic skills, i.e., 'accommodate the use of both'. It could operate only if bilingual employees accommodated the use of their non-preferred language. But then, only up to a point of maintaining a linguistically comfortable workplace to the extent required for the use of different languages and language skills required to achieve the objectives of the federal institution.

This is what the 1988 OLA was all about. It was a flexible, 'work it out law' to get the job done approach where nobody is really completely satisfied, recognizing that the relationship between the two language communities required flexibility and accommodation. Measures should be taken on an individual basis to make it as linguistically comfortable for each employee using the collective environment with the assistance of all the group as the general standard.

One should not lose sight of the fact that section 36(2) not only sets out language rights in the workplace but also is intended also to ensure that employees discharge their obligations in administering federal institutions for the benefit of all Canadians. To limit the effect of the unreasonable refusal to use the bilingual employee's preferred language, the concept of assessing the reasonableness of an individual language right complaint is based in part upon the collective work environment assessment that also encourages the amelioration of the work environment of the entire workplace.

In addition, working at the level of work environments also enlarges the factors to consider in assessing a complaint. This provides a better context to resolve issues in a pragmatic manner, not one that starts from a bright line, skewed approach that is intended to replace unilingual employees, with bilingual ones that cannot be justified based on the merit principle or any fulsome interpretation of all the key terms of section 36(2).

Moreover, none of this relates in any fashion to unilingual regions, that, apart from applying the merit principle, is not comprised under section 36(2). It has its own standard by 35(1)(b) that relates to the respective language use of offices in different provinces. Those offices in Quebec, pretty much operate exclusively in French, given the absence of Anglophones in their workplaces.

Two countervailing factors should be understood, however, that favour the need and support for bilingual employees. First, the more unilingual coworker employees in the workplaces in bilingual regions, the greater the need for bilingual employees to work with them; again, pure merit placements.

Second, the personal situation faced by Mr. Dionne in terms of an individual comfort level is still the most relevant consideration. The only condition that attaches to correcting the situation though, requires a holistic examination of his and others' language communications in the workplace. This requires an assessment against the general overall linguistic comfort in the workplace. It also requires some consideration of whether the individual discomfort is attributable to the difficulty of the job, regardless of language. In either case, this requires the employer's intervention to correct the situation, but perhaps not necessarily based on, or entirely on, official language rights.

Ultimately, it is for the OCOL to change its direction bent on only accommodating unilingual Anglophones in the workplace as a last resort, which is the result in both *Tailleur* and OFSI decisions. Rather, the accommodation of the unilingual employee is a duty that attaches to bilingual positions. This reasonably cannot be avoided given the reality of the workplace of mixed language skills when the institution relies on employees with superior language skills to meet its objectives.

Once, properly attuned to Parliament's purpose in section 36(2), it is up to the OCOL to establish a panoply of factors that feed into establishing a linguistically comfortable bilingual workplace. In doing so, OCOL should consult staff relation experts for their practical expertise in creating such environments.

2018: Supreme Court *Mazraani* Decision

As shall be indicated when reviewing the *Dionne* matter below, counsel did not advise or provide the *Dionne* Court with a copy of the Supreme Court Mazraani decision prior the publication of the *Dionne* decision some issue 6 months later. Therefore, the Court had no opportunity to consider its implications with respect to the application of the *Beaulac* principle. This is unfortunate, because despite the Court of Appeal's conclusions to the contrary, when carefully perused, the reasoning in Mazraani supports the conclusion in *Dionne* that the *Beaulac* principle could not be applied to overturn the merit principle or undermine Parliament's purpose of creating unilingual regions.

In the Mazraani case a judge of the Tax Court of Canada (TCC) asked witnesses in a bilingual trial to testify in English that was not their preferred language. The Court of Appeal had no difficulty overturning the decision, based on sections 14 and 15 of the OLA that guarantee equal linguistic access to public court services. In doing so the FCA did not rely on the *Beaulac* interpretive principle. The Supreme Court referred to the principle, but in doing so, it appeared to recognize that it could only be applied defensively to attain linguistic equality, logically meaning that it could not be applied offensively for any other purpose. But this point is not clearly stated, and may as well be a bit of tendentious reasoning on my part..

The point is that until the *OSFI* decision and the *Beaulac* principle are placed before the Supreme Court, merit fails before Francophone language rights, while the purpose of unilingual regions protecting unilingual positions for unilingual Canadians has been badly weakened, if of any value at all involving interregional communications.

2019: Federal Court *Dionne* decision

For the most part, the essence of the issues and conclusions in *Dionne* have already been described when pointing out the alleged errors in the *Tailleur* and *OSFI* decisions. This part of the article is limited to procedural issues, specifically whether the parties, and in particular the AG, were compromised in defending the application, In other words, was it a fair hearing in *Dionne*, from the Court's perspective?

The issues that follow relate to what might be described as a false presentation of an adversarial attitude by the AG. They are fourfold. First, the AG endorsed the legality of the collateral bilingual staffing of the Toronto specialist positions. Second, the AG's challenged to the Court's jurisdiction to rely on section 91 of the OLA to query the legality of the appointments of the 12 bilingual specialists in Toronto. Third, there are concerns regarding any and all the parties' failure to provide relevant case law to the Court, which would have significantly changed the Court's reasons. Forth, there are similar concerns of the parties not providing the Court with the TBS's 2017 Policy on Learning, Training, and Development [Learning Policy] in respect of the services issue also before the Court.

A judge should not criticize counsel publicly without very good cause that can clearly be attributed to the lawyer. There are just so many unknown factors that may lie behind submissions, and it should be understood that a case of the importance of *Dionne*, should have gone up the chain of authority and involved more than one lawyer. But there are just too many unacceptable aspects to every step in the process, terminating with the FCA *OSFI* decision that has to be the most significant official language case, after *Beaulac*, by its untoward redrafting of the 1988 OLA. This requires raising every issue of concern.

1. Under the direction of the AG, OSFI attempts to have the Court accept the principle of collateral bilingual staffing in all linguistic regions of Canada and pleads in a fashion that ultimately eliminates a right of appeal of the FCA *OSFI* decision

It is important to understand that while OSFI may be the titular party, when it comes to matters of legal interpretation and application of laws, the AG directs the litigation. I say this from experience as a former member of the litigation section of the DOJ.

The AG's counsel for OSFI, probably with some collaboration on a case as important as that of *Dionne*, would have determined OSFI's submissions in a matter consisting mostly of legal interpretive issues. Also, staffing in federal institutions is not a discretionary matter as is so often the case in the private sector. Government staffing must comply with the legal rules, particularly that of merit, in addition to any number of other regulatory, directory and policy rules in all federal staffing actions.

Because the Mr. Dionne already succeeded in having 12 specialist Toronto positions bilingually designated, his lawyers could only claim an unspecified number of additional positions. They did so in the first instance, based on section 36(1)(a)(i) that the specialists were providing training services to the generalists. Then after 2010 when the complaint was filed, the 2012 TBS Directive coincidently removed the interregional communications policy that required communications with the specialist to be in English. This fortuitous event permitted the applicant to plead the coworker section 36(2). But, because this issue was never before the OCOL, it was piggy-backed on the services claim which provided the pathway to an application to the Federal Court. It is also fair to say that the claim for additional bilingual designations was somewhat contrived as obviously unreasonable. Worse still, it was not supported by evidence. Instead it claimed that the employer had not discharged the onus to establish that 12 bilingual redesignations was sufficient not to be in violation of the Act.

On the services claim, OSFI contested all of the bilingual designations that they were not providing services, which is totally correct. However, OSFI did not contest the first 12 specialist designations based on the coworker section 36(2). With respect to the coworker provision, it only contested the additional positions.

In *Dionne*, the AG made no attempt to interpret section 36(2) and passed over the law with only headline conclusions, basically adopting the third level 'reasonable measures taken' wording. Instead, as OSFI was only contending with the additional redesignating of positions, it concentrated primarily on the onus issue of which party had the obligation to demonstrate the 12 positions met the requirements of section 36(2), or not. It was in this capacity that the AG referred to section 91.

Jumping forward, the Court of Appeal dismissed the claims for additional positions out of hand, confirming the specious nature of the section 36(2) claim. It also dismissed the services claim to bilingualize the Toronto specialist positions. Importantly however, because the 12 specialist claims were never in contention based on section 36(2) and the Court's ruling did not affect them. This meant that OFSI had no basis to appeal the decision of the FCA. Nevertheless, the reasons of the FCA remained as a precedent when it rejected the analysis in *Dionne* that had concluded that the bilingual re-designations were invalid under section 36(2).

Thus, the AG's submissions both contributed to the legitimization of the collateral bilingual staffing that the Court of Appeal upheld and probably on a narrow basis contributed to justify not appealing the matter to the Supreme Court. This would not have limited an appeal on substantive grounds given the radical change in staffing and unilingual region protection consequences.

The AG provided no explanation in Dionne why it chose to waive any challenge of the bilingual designation of the initial 12 positions. The facts in *Tailleur* and *Dionne* were entirely different from the clearly unreasonable ones in *Tailleur*, while the precedential consequences on staffing in *Dionne* are monumental in terms of eliminating Anglophone positions across Canada.

By not contesting the original 12 redesignations, the AG effectively legitimatised the conclusion that language rights of a Francophone coworkers in a bilingual position in a bilingual region could determine and require coworkers across the country to be bilingual for the purpose of their communications pursuant to section 36(2).

In every case where this occurs across the country, all Anglophones will be denied the opportunity to compete for a position where language rights are not required to perform the functions of the position, based on the asymmetrical application of a purposive interpretation principle, with merit taking a back seat to Francophone language rights, with the AG, in effect encouraging this to happen.

2. The AG contests the jurisdiction of the Federal Court to rely on section 91 as relevant to the interpretation and application of section 36(2)

Having submitted that the re-staffing of the first 12 unilingual Toronto specialist positions to bilingual positions would not be contested, the AG thereafter challenged the Court's jurisdiction to consider section 91; this despite it being a complete defence prohibiting collateral bilingual staffing. I can not repeat it enough times, section 91 describes Parliament's clear intent that the merit principle should have priority over language rights in staffing actions "objectively required to perform the functions for which the staffing action is undertaken."

For a second time, the Court could not comprehend how the AG could on the one hand rely on section 91 embodying the merit principle to challenge the additional bilingual staffings, but on the other argue that the Court did not even have the jurisdiction to consider the provision, which even the OCOL did not

contest. In retrospect, the AG realized as did the FCA in OFSI, that section 91 was a complete bar to collateral bilingual staffing.

To gauge the inexplicability of the contention that the Court did not have the jurisdiction, consider the AG's excellent submissions (translated) upholding the primacy of section 91 to prevent the bilingualization of the additional positions at paragraphs 108 to 110 of its memorandum.

> 108. Section 91 therefore contains a fundamental criterion in matters of staffing, namely that of objectivity. Consideration of official languages requirements is only permitted by section 91 if it is objectively necessary "for the exercise of the functions in question". It is that criterion that should guide the establishment of the language requirements of a position within the federal public service. The imposition of a bilingual designation must therefore be based on an objective necessity, effectively measured by the actual requirements of the position in question.
>
> 109. A case-by-case analysis must be made, for each position, to determine whether the duties of the position objectively impose a bilingual designation.
>
> 110. The measure proposed by the applicant is therefore an indirect way of obtaining, via arguments based on Part V of the OLA, which he could not obtain by means of section 91 of the OLA. <u>Section 91 of the OLA specifically provides that Part V cannot have this effect.</u> The only criterion that prevails with regard to the linguistic designation of a position is that of the objective necessity taking into account the duties of the position in question.

The Court's obvious logical response in light of these submissions therefore, was that if section 91 requires the applicant to demonstrate the basis for the bilingual redesignation of the additional positions, the applicant (and OSFI and the OCOL) similarly must explain why section 91 would not apply to prevent the redesignation of the first 12 positions. This extends to <u>the legality of the AG's consent</u> to the restaffing of the Toronto positions if contrary to the merit principle. To repeat, staffing in the public service is not discretionary; it must adhere to legal principles which for federal institutions, requires the application of the merit principle that the AG cannot ignore.

Moreover, when interpreting section 36(2) in accordance with the Modern Principle, the *Dionne* Court was required to interpret a provision with regard to its compatibility with the 'scheme of the Act'. In this instance, it certainly included section 91. By the AG's own submissions described above, section 91 established that the Toronto re-staffings were <u>all</u> illegal.

Because the Court was raising a new determinative or relevant legal issue but based on the same facts and law argued by OSFI, a direction was issued to the parties requesting their submissions regarding the relevance of section 91 to the facts of the case. Having discharged any duty of fairness, the application of law to the facts was then within the exclusive jurisdiction of the Court, obviously after hearing the parties out.

The AG's refusal to accept the application of section 91 seen today in the context of events over the last decade are of concern. This was the third time in that time-frame when the Attorney General's agents have been involved in matters that were not well-founded, all intended to advance recourse to collateral bilingual staffing.

This article is intended to persuade the AG to seek special leave to appeal the *OSFI* decision to the Supreme Court. It is hoped that the AG will take cognizance of the role his agents have played and initiate corrective measures by ensuring that the *OSFI* decision is appealed as a first step in re-balancing official language law in accordance with the 1988 OLA. It remains the optimal standard for a successful official languages law regime that will continue to support national unity. The proposed Amendments and the Use of French in Federally Regulated Private Businesses Act [UFFRPBA will have the opposite effect.

3. Failure of counsel to provide relevant case jurisprudence

Judges are not responsible for searching the law for relevant cases in the matters before them. This is the responsibility of the lawyers, although judges often obtain other relevant jurisprudence via their clerks' memoranda. Second, lawyers in litigation matters, as Officers of the Court, are required by their Law Society's deontological rules to provide the court with all the jurisprudence that is relevant to the legal issues being raised in the matter under consideration.

Particularly, this duty extends to informing the court of any relevant authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent, including those that are adverse to the client's case. In most cases, in order to be helpful, the parties will also point out the relevant passages i to assist the judge in assessing and applying the proper law.

This obligation appears not to have been discharged by any of the lawyers appearing in the *Dionne* matter with regard to three highly relevant decisions. Two of them are FCA decisions, being *Canada (Attorney General) v. Shakov*, 2017 FCA 250 [Shakov] and *Industrielle Alliance, Assurance et services financiers inc. v. Mazraani*, 2017 FCA 80 [Mazraani]. They were issued prior to the hearing. They were not included in the list of relevant jurisprudence required in the parties' memoranda. As well, the Supreme Court decision in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 [Mazraani] was not provided though available 6 months before the *Dionne* reasons were released. A request was made to determine whether mention of the cases was found in the Court registry. None turned up including the Supreme Court *Mazraani* decision, which should have been brought to the attention of the Court by the parties.

Given the significance of these cases, and the expertise of the teams of lawyers representing the two parties and appearing before the *Dionne* Court, it is difficult to believe that one of these lawyers was not aware of the FCA decisions or became aware of the Supreme Court Mazraani decision. The fact that all three participants did not advise the Court of the Mazraani decision is particularly concerning.

These cases were only brought to light upon reading critical remarks in the FCA *OSFI* reasons implying an intentional lack of transparency in the *Dionne* reasons by the failure to refer to two of the three decisions (*Shakov* and the Supreme Court decision in *Mazraani*). In fact, all three cases would have supported the conclusions of the *Dionne* Court.

The two FCA decisions were examples of recent cases where several *Beaulac* principles were cited, but without reference to its purposive interpretation principle in either case. In particular, the Shakov decision was particularly relevant. Stratas JA, had undertaken an extensive analysis of the *Beaulac* reasons citing many different passages in a language of work case, but without reference to the purposive interpretation principle. This included at paragraph 116: "Since *Beaulac*, restrictive

interpretations of language rights have evaporated in favour of a purposive approach infused with the principle of substantive equality." There was no mention of 'in all cases' and 'preserving and developing' LMCs. All provisions, and indeed all steps in the interpretative process, are required to be interpreted purposively. The FCA Court in *Mazraani* was to the same effect, citing *Beaulac*, but with fewer references and not its purposive interpretation principle.

The fact that these federal appellate Courts would have been very much aware of the *Beaulac* principle but did not rely upon it in their decision despite it applying 'in every case', is an indication of opinions that the principle still had to be relevant to the facts of their decisions. These FCA decisions would most certainly have been relied upon by the Court in *Dionne* to limit the effect of the purposive interpretation principle in its application to language of work provisions, although once the Supreme Court Mazraani decision was released, it would have taken their place in the Dionne reasons.

Turning back to the lawyers in Dionne, they would have perused these decisions searching specifically for reference to the *Beaulac* principle in order to be able to rely on FCA decisions in their argument. Indeed, the FCA in *OSFI* relied on *Shakov* and the Supreme Court *Mazraani* decision, even though the Court did not comprehend they were both to the opposite effect.

The Supreme Court decision in *Mazraani*, would have been even more helpful, as indicated above where the Court indicated that "courts must attach the utmost importance to the protection of each person's right to speak in the official language of his or her choice." In other words, the *Beaulac* principle is intended to ensure a defensive purpose of protecting language rights. It is not to be applied to achieve unequal favour of one community's language right over the other, or other foundational equality rules such as merit staffing, or to upset carefully achieved linguistic agreements such as the reason to establish unilingual regions. It is to be used defensively as a shield, not as sword used to undermine the foundational principle of merit staffing.

All of this is to say that the Federal Court had no help in *Dionne* from the parties. It expected two opposing parties representing fully adversarial official language interests, both of which would have expended the necessary effort to understand and effectively argue a contested case with the complexity of issues which were under consideration and needed to be resolved in the *Dionne* matter.

Unfortunately, this means that there was nobody in the courtroom representing unilingual, or even bilingual, Anglophones who are not favored by the *Beaulac* principle. This is not the way our adversarial court regime is supposed to function. If the *Dionne* Court had fully comprehended what was happening before it, even more so with the full appreciation of what had preceded and was to follow after its decision, it would have adjourned the matter in order to have a friend of the court appointed to represent federal institution Anglophone interests. In respect of any appeal to the Supreme Court and the review of the Amendments before passage, this same deficiency must be avoided and appropriate participation of interested communities an essential fairness requirement applied.

Finally, in the services issue the Court was not provided with a very germane TBS 2017 Policy on Learning, Training, and Development. The applicant was submitting that in effect the specialists were providing them with learning and training development advice, which was probably true, but which did not fit into the parameters of the team relationship and its on-the-job nature. In the *Dionne* reasons, the Court first commented in its summary as follows:

> [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) (which the FCA ignored).

2020: Federal Court of Appeal *OSFI* decision

There have already been a number of problems pointed out with respect to the reasoning in the *OSFI* decision. These include among others: (1) a serious lack of transparency to the point of refusing even to mention the violation of the merit principle, collateral bilingual staffing, and facile reasoning in refusing to consider section 91; (2) breaching the linguistic protections provided by unilingual regions; (3) failing to apply the modern principle of interpretation, particularly with regard to determinative key terms of section 36(2) of 'work environments' and 'accommodate' resulting in interpretations bearing no similarity to the words of the provision; (4) the failure to consider whether the asymmetric *Beaulac* principle was incompatible with the equality of status and privileges of language rights enshrined in the OLA federal institution provisions; and (5) (i) rendering an order not in the parties' pleadings of the option of providing translation support as an alternative to restaffing the Toronto positions, (ii) rendering an order not in the parties' pleadings of OSFI creating two specialists supervisors provisions in a unilingual region, absent any statutory jurisdiction to do so, (iii) applying the determinative issue of 'conducive work environments' to the facts, without interpreting the term or concluding that its interpretation in *Dionne* was in error. This is far from the full list of problematic aspects of the *OSFI* reasons. Some other examples of problematic over-reliance on the *Beaulac* principle and questionable statements are contained from the *OSFI* decision are set out in the Appendix.

In short, the OFSI decision contained erroneous statements, was based on erroneous interpretations, and relied on a bare reference to the *Tailleur* decision and the *Beaulac* principle without substantive support.

One aspect that merits comment in this article is to note how 'unhelpful' the *OSFI* Court was in refusing to assist federal institutions in understanding when it was appropriate to require bilingual Francophones to use English, and the negative attitude toward Anglophones that can be detected that motivate these comments at paragraph 105 of its reasons:

> [105] … In this regard, I do not consider it necessary to add criteria, as suggested by the intervener in order to restrict the scope of subsection 36(2) of the OLA. It is clear that subsection 36(2) does not establish an absolute right for employees in prescribed bilingual regions to work in the language of their choice at all times.

Again, the lack of transparency is evident when discussing the 'absolute right for employees in prescribed bilingual regions'. The *Beaulac* principle applies only to Francophones, not to all employees, while the Court continually used the terminology of 'prescribed region', instead of 'bilingual region' and 'unilingual region'. More significantly however, is its refusal to provide factors and examples to circumscribe in any fashion the Francophone bilingual employee's right to use French that is not only unhelpful, but also misleading in effect.

Managers in federal institutions will err on the side of caution and be reluctant to force Francophone bilingual employees not to work in 'the language of their choice' to avoid the risk of a complaint. Francophone employees are effectively in control of the work place with the OCOL working to limit exceptions when he or she 'must to some extent' be forced to work with a unilingual Anglophone as demonstrated in the *Tailleur* and *OSFI* decisions.

The answer in *OSFI* is clear regarding when the application of the *Beaulac* principle 'does not apply'. The circumstances substantively occur only when bilingual Francophones not communicating with coworkers in English in the workplace, even coworkers in unilingual regions, brings the institution to its knees. Otherwise, replace the unilingual Anglophone coworker with a bilingual worker, or alternatively 'separate' them into unilingual English silos.

How did such an unacceptable result occur? In large measure because Anglophones are not engaged in official languages discussions. They have little understanding of its governing precepts, which include the important distinction between language of service and communication requirements, and those pertaining to language of work.

Secondly, the 50-year experience in official language bilingualism, though it has successfully integrated the two languages into federal institutions, has exposed an unanticipated imbalance whereby Anglophones cannot compete with Francophones in terms of incidence, bilingual skills, or their retention of learned French, in contrast with the absorbed English skills of Francophones.

The *Tailleur* and *OSFI* decisions, along with the Amendments are intended to solidify the position of Francophones in the federal government, accompanied by a bolder harder attitude of Francophones not wanting to engage with Anglophones, rather having them despatched to linguistic silos.

If unilingual Anglophones must be siloed to comply with the reluctance of bilingual Francophones to work with them, then there is little future for the country. The official language situation, when it becomes clear to Anglophone Canadians, at best will result in a minimum of mutual respect and tolerance, as in Belgium, or at worst with a rupture in national unity, coming this time from the West. The Federal Court of Appeal appears to have misunderstood, like the OLA, that the Official Language Act should be interpreted to foster national unity, not undermine it.

Conclusions to draw from Parts 1 and 2

The FCA transgressed the reasonable canons of appellate review, while upending legacy foundational principles guiding employment law staffing and the establishment of bilingual and unilingual linguistic regions. It did so, using the myth of a super-charged purposive interpretation principle capable of shredding even the most unambiguous legal provision or rule of law when applied to official language and bilingualism law by the simple mention of the *Beaulac* purposive 'interpretative principle'.

Obviously, there is the singular and immediate need to have the FCA *OSFI* decision reviewed by the Supreme Court. Only this can bring to an end the downward spiral of bad jurisprudence, bad proposed Amendments, a bad proposed *Use of French in Federally Regulated Private Businesses Act*, and the forthcoming serious deterioration of linguistic relations in our official language regime when Anglophones understand the effects of this legislation.

With the increasing loss of jurisprudential linguistic balance, we need to return to the preciously established equilibrium of language rights and mutual respect established by the 1988 OLA. This requires an immediate response by the AG and the Government of Canada.

Part 3 Comments on the Bill C-13 Amendments to the Official Languages Act

The Amendments contained in Bill C-13 are intended to update a quasi-constitutional agreement between Canada's two official language communities known as the 1988 Official Languages Act.

It is my personal view as a long-time observer and participant in efforts to promote bilingualism in Canada as a means to solidify national unity that the 1988 OLA has served our country, and particularly Francophones, as a well-balanced agreement governing linguistic relations between the two official language communities.

In contrast, the Amendments are one-sided in favour of Francophones, and only the Francophone community is engaged in this process. Anglophones are noticeably absent, as are Amendments that promote their interests, yet the costs of the Amendments will largely be paid for by the Anglophone community through their taxes.

Accordingly, Anglophones must take their entitled place at the table and seek to participate in a meaningful manner in the drafting and implementing of the changes to the OLA. This intervention must be immediate before these Amendments become law and will be that much more difficult to challenge, except by political means.

Finally, the immediate intervention of the Anglophone provinces in the process of accepting these Amendments is essential. It is not speaking out of turn to suggest that the Federal Government appears set on passing these Amendments as rapidly as possible, having refused a request to undertake a clause by clause examination of the Amendments, as would be expected for quasi-constitutional legislation. The Supreme Court has indicated that the 1988 OLA was a political compromise (*Beaulac* para. 24). Amendments that will make substantial changes in favour of the Francophone community should equally be the result of the political compromise of two equally informed communities directly affected by the proposed legislation.

My limited comments on specific Amendments follow.

1. **In the Short Title, do not substitute the words 'for the Substantive Equality' for 'the status and use of'.**

Parliament is proposing to amend the Short Title, an 'Act respecting the status and use of the official languages of Canada', a perfectly descriptive and appropriate title, to the non-descriptive and meaningless title 'An Act for the Substantive Equality of Canada's Official Languages'.

Nothing better bespeaks the OCOL's conception of a pro-Francophone legislative statement intended to put federal institutions under the thumb of the OCOL than this legislation that unilingual Anglophone Canadians will pay for.

'Substantive' in the Title has nothing to do with the meaning ascribed to the term in *Beaulac*: "It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State." (*Beaulac* para 24). The dictionary meanings of 'substantive' are 'actual, truly existing, real, being an essential element of something, greater than average in size, amount, value or degree.' Thus, there is no connection between the real meaning of substantive and its coined meaning in the world of Canadian language rights.

The dictionary definitions related to equality make 'substantive' either a pleonasm, like an 'untruthful lie', or an oxymoron of a language 'greater than average … in value'. One cannot qualify an equal duty that is self-defined. One can only diminish its equality, such as adding near-equality. Besides, an employer has the same obligation with respect to every duty that it owes it employees, like providing a harassment free work environment. There is no concept of providing a substantive harassment free workplace, even if one is not always achieved.

Perhaps, by this title, the OCOL is trying to emphasize federal institutions must take every possible conceivable 'positive measure' to advance French in Canada. Or perhaps the intention is to expand bilingual positions replacing unilingual ones, and the separation of Francophones from Anglophones throughout Canada, now that the *OSFI* decision has opened the door and imposed 'positive measures' on federal institutions across the country.

A title provides the key to the intent of a document. The proposed title with the term 'substantive equality' is either meaningless, or only understood by Francophones, or a statement for separationist tendencies in federal institutions. It does not reflect the balanced language of the 1988 OLA.

2. **The phrase 'official language' or 'linguistic minority communities' [LMCs] should be defined to state which communities are included and which ones are excluded.**

As indicated, the interpretation of the 7th Preamble in the 1988 OLA includes the Quebec majority Francophone community as a linguistic minority community in Canada. This phraseology is not defined in the Amendments, even though ambiguous in the first instance, when a majority community is included in the concept of a minority community.

The LMC phraseology appears throughout the Amendments requiring the Government of Canada to protect and promote them, as well as the French language. LMC's therefore appear to receive the lion's share of the Government programs and direct funding.

It is unlikely that Anglophones are aware of such commitments by the Canadian Government to enhance the vitality and support the development of the Quebec Francophone majority, or to protect and promote the French language in that province, and what exactly these commitments entail. A detailed description of 'linguistic minority communities' should be included in the Act and what engagements are entailed vis-a- vis LMCs should be clearly defined.

3. **Withdraw the new section 3.1 in section 7 of the Amendments on language rights, at least until the question of language rights having priority over merit is settled by the Supreme Court; and remove any reference in the short title to 'substantive equality' as expressing the purpose of the Amended Act.**

a. *Purposive interpretations*

3.1 For the <u>purposes</u> of this Act,

(a) language rights are to be given a large, liberal and <u>purposive</u> interpretation;

(b) language rights are to be interpreted in light of their remedial character; and

(c) the norm for the interpretation of language rights is substantive equality.

'Purposive' in its context in paragraph (a) can only refer to the *Beaulac* principle. All aspects of the interpretation of a statute are required to be interpreted purposively, which does not to be expressed in language law legislation. Logically therefore, the 'purposive' reference in the Amendments is to the *Beaulac* principle alone. The problem with endorsing this provision is that as applied in the *Tailleur* and *OSFI* cases, it favours Francophone language rights over those of Anglophones with a result that degrades merit in staffing actions and creates significant expansion of the bilingualization of unilingual English positions, even in unilingual regions.

Until the Supreme Court settles the application of the *Beaulac* principle, most of the application of the Amendments remain undetermined, because their actual meaning now depends on to what extent if any, a 'purposive' interpretation favouring Francophone language rights will apply. The bottom line is that an undefined *Beaulac* principle has introduced an unacceptable degree of uncertainty into the law.

These Amendments therefore cannot be adopted until the application of the *Beaulac* principle is defined by the Supreme Court in circumstances not relating to the provision of services, but where the outcome has an unfair impact on one linguistic community e.g. as in the *Dionne* decision.

4. Do not impose bilingualism as an essential requirement for the appointment of Supreme Court judges.

Amendment paragraph 11: amending section 16 (1)

Duty [of Supreme Court judge) to ensure understanding without interpreter

16 (1) Every federal court [, ~~other than the Supreme Court of Canada~~,] has the duty to ensure that [judges understand the languages chosen by the parties without the assistance of an interpreter]

This very public Amendment is one that will make most Anglophones, particularly the Anglophone judiciary and bar, along with much of the informed general population in the further reaches of the country, question the soundness of official language bilingualism. Limiting appointments to the Supreme Court is truly a one-off where language abilities eliminate probably as much as 80% of Anglophone candidates from even being considered.

Supreme Court judges are not the same as supervisors, managers, senior public servants, politicians and federal leaders of the country, with perhaps the only more important position being that of the Prime Minister of Canada. There are already built-in representative appointments which are required, certainly gender and geography being the most important. Taking 80% of these representative appointments out of play will be seen as unacceptable to Anglophone Canada.

This is because this Amendment will substantively unbalance the selection pool of potential Anglophone candidates in comparison with that of Francophone judges who possess a much higher incidence of bilingual skills. This will be particularly difficult to accept when 'substantively', the overwhelming language used in Supreme Court cases is English, and the real work mostly involves written materials, and perhaps most importantly when artificial intelligence translation and interpretation is on the cusp of

radically changing the whole environment of language comprehension and use. The Francophone community has to understand that there is a political reality in an equality argument that favors 25% of the population, and where only 10% of the majority language are bilingual, and even then, only on a standard being able to participate in the conversation.

The movement away from legal brilliance for the appointment of Supreme Court judges affecting only the majority language community will seriously negatively affect attitudes of Anglophone Canadians about the benefits of official language bilingualism - more so in some provinces than others. And if the Québec judiciary and bar support this amendment, the country is in real trouble; the same for their support of the *OSFI* decision, knowing its fractured legal reasoning.

The Anglophone judiciary and legal bar are not just another language sub-community. In terms of today's public 'influencers' that all governments and the general population must rely on to determine what is fair and reasonable, its members' shaking of heads in conversations and meetings and other discussions amongst themselves and friends will bubble to the surface. Ultimately, this amendment may end up being the most undermining of all provisions in the OLA in terms of destroying positive attitudes of Anglophones toward Canadian official language laws.

This Amendment will bar appointments to the Supreme Court of the most important non-political positions in the Canadian government. The Court has demonstrated over the years that it has the capacity to function extremely well in both official languages. This language imposition makes little substantive sense when approximately 90% of the Anglophone community that also represents 75% of Canada's population can no longer apply, no matter how legally brilliant the applicants may be.

5. Do not proceed with the Amendment of section 36(1)(c)(i) until fully explained.

Amendment paragraph 16 (3): amending section 36(1)(c)(i): the 'advancement provision'

> Subparagraph 36(1)(c)(i) of the Act is replaced 15 by the following:
>
> (i) if [replacing 'where'] it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, [adding managers] and supervisors are able to communicate in both official languages with employees of the institution in carrying out their managerial or supervisory responsibilities, and

This Amendment requires clarification. It would appear that its effect is intended to provide more opportunities for bilingual employees to supervise siloed unilingual Anglophone workplaces, assuming siloing is allowed to continue. This concern is based on the document entitled Modernizing the Official Languages Act: The Commissioner of Official Languages' Recommendations for an Act that is Relevant, Dynamic and Strong, at page 29, last updated on September 22, 2020.

> "The Treasury Board's Directive on Official Languages for People Management stipulates that, in regions designated as bilingual for language-of-work purposes, only employees who occupy "bilingual or either/or" positions have the right to be supervised in the language of their choice. The Office of the Commissioner maintains that the Act gives the right to every employee in these regions, regardless of the language requirements of their position.

> The wording of subsection 36(1)(c)(i) of the Act should therefore be amended so that the modernized Act stipulates that all employees in regions designated as bilingual for language-of-work purposes have the right to be supervised in the official language of their choice, regardless of the language requirements of their position."

Given that bilingual employees can apply for jobs in any position based on both linguistic and non-linguistic merit, this Amendment would mean that when a bilingual employee obtains a position in a siloed Anglophone workplace, the supervisor of the group must be bilingual. The fact that one cannot predict when a bilingual employee will win out on merit for a unilingual English position, means that all supervisory positions of siloed Anglophones must be bilingual. Staffing rules cannot be based on a specific workplace make-up that may change the next week. This extends career positions available to bilingual employees as supervisors, and logically thereby reduces such opportunities for unilingual employees to advance to supervisory positions in bilingual regions. Career paths of unilingual Anglophones are already limited as supervisors in bilingual regions.

The OCOL wants to create even more bilingual positions and career paths for bilingual supervisors and managers, this time in unilingual regions. In a recent document issued by the OCOL in June 2022 entitled 'Seizing a Historic Opportunity: For a Complete Modernization of the OLA, the Commissioner has once again expressed his concept of modernization as replacing unilingual Anglophones with bilingual employees, again favoring Francophones. The following statement was found in the document propounding this concept, and as usual not being transparent with the main intention of the so-called It modernization.

> In the current OLA, regions designated as bilingual are not harmonized with [read unilingual] regions where offices must provide communications and services to the public in both official languages.
>
> This approach undermines the integral [*a new term like that of "substantive" to eliminate unilingual English employees, this time from unilingual regions*] of the OLA. First, a considerable number of federal public servants [*in bilingual positions*] who work in regions designated as unilingual for language of work purposes must provide services to the public in both official languages without being entitled to work tools, supervision [*the target of the OCOL's remarks]* or training in the languages [*which ones if bilingual*] in which they must provide these services. It stands to reason [*bilingual employees have been working in unilingual regions for many decades; the OCOL's reason should not be a substitute for hard statistics, or complaints from the bilingual employees about their situation*] that services offered to the public in the minority language in regions not designated as bilingual may be less accessible and of lower quality than those offered in designated bilingual regions.

There is no reason bilingual employees in unilingual regions should not have access to work tools or training in their own language. However, the demand for providers 'supervision' in the Francophone service provider's language is of a completely different order.

This is just one more example of the OCOL's overriding strategy. Every Francophone bilingual service provider in unilingual regions should be entitled, rather 'harmonized', to be supervised in French according to the OCOL. Obviously this adds a whole new level of bilingual personnel in unilingual regions across Canada, eliminating probably thousands of employment opportunities for unilingual Anglophones in unilingual regions.

The OCOL just does not get it that there are two official languages, that maintaining positive attitudes towards official languages and supporting national unity is in fact the OCOL's overall objective. The OCOL intends to convert every possible unilingual Anglophone position available in the public service to a bilingual position.

The 1988 OLA agreement set up unilingual regions to provide unilingual Canadians with jobs. Every occasion when the OCOL takes merit-based jobs away from unilingual Canadians or in unilingual regions, it infringes the OLA. This destroys positive attitudes that Anglophones have generally displayed towards official languages and bilingualism, which most Canadians are proud of. The OCOL is wasting positive Canadian Anglophone goodwill, without any apparent concern about relations between Anglophones and Francophones.

The OCOL concluded on this subject as follows:

> One thing is certain, the OLA must be modernized to ensure consistency between regions designated as bilingual for language of work purposes and offices that must communicate and provide services in both official languages. It is important that any changes made in this regard ensure that language of work rights in regions currently designated as bilingual are maintained.

Frankly one thing that is certain is that if the Federal Government follows the OCOL's advice in providing bilingual supervisors for bilingual Francophones in unilingual regions, it will be violating the 1988 Official Languages Act and providing every reason for the Western provinces to seriously rethink their alliances.

The addition of the term 'manager' to that of 'supervisor' is based upon the distinction between the two positions. A supervisor is a leader who directly oversees employees and follows a manager's directions. Given that supervisors would generally be bilingual, their preferred language determines the language of their managers, eliminating any unilingual managers with this Amendment. Thus, everyone in the supervisory and management chain right up to the 'management group' must be bilingual in bilingual regions.

6. Do not adopt the Amendments to section 39(2) and 40 until clarified.

Amendment section 19: amending sections 39 (2) and 40 of the OLA

Employment opportunities, [1988 OLA version], including the unchanged section 39(1)

39 (1) The Government of Canada is committed to ensuring that

(a) English-speaking Canadians and French-speaking Canadians, without regard to their ethnic origin or first language learned, have equal opportunities to obtain employment and advancement in federal institutions; and

(b) 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 the characteristics of individual institutions, including their mandates, the public they serve and their location.

39 (2) In carrying out the commitment of the Government of Canada under subsection (1), federal institutions shall ensure that employment opportunities are open to both

English-speaking Canadians and French-speaking Canadians, taking due account of the **purposes** and provisions of Parts IV and V in relation to the appointment and advancement of officers and employees by those institutions and the determination of the terms and conditions of their employment.

Employment opportunities [amended version]

39 (2) In carrying out the commitment of the Government of Canada under subsection (1), federal institutions shall ensure that employment opportunities are open to both English-speaking Canadians and French-speaking Canadians, taking into account the purposes and provisions of this Act.

Section 39 (2) refers to equal as in 39(1) 'employment opportunities'. As the title states, it is about "Participation of English-speaking and French-speaking Canadians." Four comments may be made without fully comprehending the purpose of this Amendment, except that it does not appear to favour Anglophones.

First, while the Amendments state an intention that "equal opportunities to obtain employment and advancement of federal institutions" [i.e. 'careers'] should be governed by the 'purposes and provisions of the Act', the meaning of the term 'purposes' has changed with the advent of the application of the *Beaulac* purposive interpretation principle. If as applied in the *Tailleur* and *OSFI* decisions, this requires the careers of Francophones to be favoured ahead of Anglophones to enhance the vitality and support the development of Francophone provincial minorities, the majority Quebec Francophone community, and the Quebec English minority community. The application of the *Beaulac* principle must be resolved. The *OSFI* decision must be reviewed by the Supreme Court before the Amendments can proceed.

Second, the Amendment significantly changes the scheme of section 39. As stated in section 39 (1), this section is intended to ensure 'equal opportunities to obtain' careers in federal institutions by requiring that the "composition of the work-force of federal institutions tends [already providing wiggle room] to reflect the presence of both the official language communities of Canada … taking into account the characteristics of the individual institutions .. "

In other words, the Anglophone 'presence' overall that represents approximately 75% of official language communities [actually 77%] in Canada should be maintained but recognizing this presence may be different in different circumstances depending on how institutions carry out their mandates, such as based on the effects of geography. The *Beaulac* purposive interpretation principle should not normally rewrite a provision involving relative compositions of workplaces, except that the courts have given prominence to the phrase of its application 'in all cases'. The further problem is that the FCA *OSFI* decision stands for the proposition that merit is no limitation on its application. Relying on a reasonable interpretation applying the *Beaulac* principle flies in the face of that decision.

Third, the Amendment is specifically changing the conditions of the application of section 39, which suggest that the 75/25 ratio may no longer apply. Previously, the 1988 OLA precisely set out the Parts of the Act where career opportunities were created. It previously stated that career opportunities were available "taking ~~due account~~ of the purposes and provisions of Parts IV and V".

Moreover, the previous section 39 further particularized the definition of the equality of career paths in federal institutions "in relation to the appointment and advancement of officers and employees by those institutions and the determination of the terms and conditions of their employment."

Parts IV and V referred to careers in communications with and the provision of services to members of the public and to colleagues in federal institutions, to supervisory and more senior positions, and to workplaces across Canada. It was recognized that many new jobs would be restricted to bilingual employees in bilingual regions that generally favoured Francophones. With the *Beaulac* principle being applied in the *OSFI* decision, unilingual English positions will be increasingly re-designated bilingual across Canada. There do not appear to be any other provisions that provide for careers in federal institutions.

All this previous specificity of conditions of career paths has now been generalized where careers in federal institutions will be defined by "taking into account the purposes and provisions of this Act." This takes into account the requirement to enhance the vitality and development of LMCs, [further enhanced by the application of the *Beaulac* principle]. Thus, careers in federal institutions will be in preference to every member of both Quebec linguistic communities and provincial LMCs. These conditions apply to every Canadian, except the unilingual ones, the majority of whom are Anglophones. Accordingly, despite the targets for the reduction of career opportunities in federal institutions, unilingual Canadians nonetheless are required to pay the lion's share of the costs of the re-designated bilingual positions that replaced them. It is possible that they may have a different view of substantive equality of official languages than that of the OCOL.

Fourth, there is the issue of whether the 75/25 % composition of each community's presence was sustainable, even before the proposed Amendments. As mentioned, the reality is that Anglophones cannot in general compete with Francophones in bilingualism. There is no comparison between learning and retaining French by formal education programs in an English environment, and the simple absorption of English that Francophones cannot avoid through immersion of living in an Anglophone continent, which applies even more so to provincial Francophone minorities.

The results of the 1988 OLA requiring bilingual service providers to the public and fellow federal institution employees, and of greater consequence, that their supervisors also be bilingual, was a wholesale expansion of the requirement for bilingual workers, and greatly expanded career opportunities that were foreclosed to unilingual employees, mostly Anglophones. Merit in these cases includes the essential requirement of being bilingual. A country composed mostly of unilingual citizens cannot operate without a bilingual public service. The point is that Francophones have done very well under the 1988 OLA, which is at the limits of what more that 75% of the population, mostly unilingual, will accept. This is why the expansion of bilingual positions due to the *OSFI* precedent, plus those that will result from the Amendments, need constitutional approval by the Anglophone community.

Thus, with more than 30 years of the 1988 OLA provisions generally favoring bilingual employees in bilingual regions in positions providing services and supervisory paths, there may be (already) issues of maintaining the sustainability of the 75/25 linguistic community composition presence, either numerically or in terms of the substantial value of positions filled by Anglophones and Francophones.

This is hardly the time to attempt to amend the ratios by repealing the 1988 career conditions with new factors to be defined in the future for the purpose of determining the composition of the career advancement English/French results, without knowing exactly what this means. This would include a

further objective census of the relative composition of the official language communities, that Anglophones may have confidence in.

What it comes down to is an explanation of how this approximately 75/25 balance will be maintained, especially with the enhancements to Francophone rights that are envisioned by the OCOL Amendments and FCA *OSFI* ruling. More or less, 100% of Canadians need to approve any further Amendments, not to mention attention now turning to the West over national unity, and the reality that Francophones have done well by the 1988 OLA Amendments.

7. **Do not adopt the Amendments to Part VII Sections 41 (Advancement of English and French), 42 (Specific mandate of Minister of Canadian Heritage), and 43 (Coordination); and Part VIII Section 46 (Responsibilities and Duties of Treasury Board in Relation to the Official Languages of Canada).**

These sections represent an apparent strategy by the OCOL to extend every aspect of the implementation of bilingual obligations and the creation and importance of bilingual employment positions throughout federal institutions in the economic interests of Francophones.

The acceptance of the above listed Amendments requires a clause by clause clarification as to what these administrative and intended regulatory measures entail in terms of the exclusion of unilingual Anglophone Canadians from meaningfully participating in federal institutions and related aspects of Canadian society, including the costs of these measures and their results that unilingual Canadians will bear to finance them.

To a large extent, these Amendments are aimed at administrative and regulatory changes. They have been enhanced to coordinate and significantly expand the financial and program commitments of the Government of Canada to LMCs including the province of Quebec, and the status and use of French.

There are too many provisions and aspects of these Amendments to describe in this article that advance Francophone interests at the expense of Anglophones. Besides, the purpose of this review is to engage Anglophones to become involved, and to emphasize the importance of preventing the Amendments from proceeding before the Supreme Court brings the *Beaulac* principle to ground and reverses the legitimacy of collateral bilingual staffing destroying national unity.

Therefore, I will address only two topics with regard to these Amendments: (1) the significant upgrading and strategic use of 'positive measures' to develop and enforce provision of the OLA, with limited comments regarding the duties of the TBS and Heritage Minister that relate to positive measures; and (2) the questionable recourse to regulations prescribing the manner in which the duties of federal institutions under Part VII for the advancement of English and French LMCs to be carried out.

a. <u>Super-charged 'positive measures'</u>

In its Modernizing document the Commissioner has set out the following five principles to ensure clear and coordinated governance of the Official Languages Act:

1. Establish clear direction and leadership at the most senior levels of the federal government.
2. Establish a consistent accountability framework.
3. Make official languages a top priority and a key aspect of government planning and activities.

4. Ensure effective stewardship of official languages.
5. Address setbacks while ensuring ongoing progress toward the substantive equality of official languages.

In addition, the OCOL signaled in its 2019 document, "Modernizing the Official Languages Act: The Commissioner of Official Languages Recommendations for an Act that is Relevant, Dynamic and Strong (Modernizing statement)", its intention to make greater use of regulations to particularize how it intends to carry out the skeleton to do list of administrative duties set out in the Act.

Translating '[substantive] governance of the Official Languages Act' into '[substantive] governance of bilingualism', as what these principles truly stand for, Anglophones need to carefully consider these objectives, as they will be applied against their interests and in favour of those of Francophones. The Anglophone provincial governments must be involved in this consideration, as at the federal level there is sometimes confusion between upholding proper federal institution objectives for all of Canada and gaining enough seats in the House of Commons to govern in this manner.

A brief description of the provisions of new section 41 are as follows:

> Sections 41 (1) (2) (3) set out the three principle commitments of the Government of Canada which are: enhancing the vitality of the LMCs and supporting and assisting their development; protecting and promoting the French language; and pursuing quality learning of members of LMCs.
>
> Sections 41 (5) requires positive measures to implement sections 41 (1) (2) (3). Section 41(6)(a) states positive measures "shall be concrete and taken with the intention of having a beneficial effect on the implementation of the [Government of Canada] commitments."
>
> Sections 41 (7) to (9) describes duty of institutions to consider other potential positive measures in addition to supplement
>
> Section 41 (10) requires institutions to "establish evaluation and monitoring mechanisms in relation to section 41 (5).
>
> Section 41 (11) provides for regulations "prescribing the manner in which the duties of these institutions under this Part to be carried out."
>
> Section 41 (12) states that "the express powers, duties and functions of certain ministers of the Crown provided for in this Part do not limit the duties of federal institutions under this Part (Minister of Heritage)."

Basically, these are skeleton statements, expressed in generalities with no indication of what is entailed by the commitments and duties, or where and how they are to be implemented.

The primary 1988 OLA Government of Canada commitment to LMCs remains the same in Section 41(1)(a), except that the wording "taking into account their uniqueness, diversity, historical and cultural contributions to Canadian society" has been added. This may be intended to ensure its application to the majority Francophone community of Quebec.

Second and third new primary commitments have been added requiring the Canadian Government to protect and promote the French language (41(2)) and to "advance opportunities for LMCs to pursue quality learning in their own language throughout their lives, including from early childhood to post-secondary education." (41 (3))

It is not clear how the Federal Government can commit to education costs which are a provincial jurisdiction outside of the application of the Charter obligations. The education commitment, in particular, could require extensive funding by the Federal Government. Again, the issue is what this consists of in terms of funding, and if it involves economic benefits applying singly to the majority community of a province. If so, the other provinces should be informed of what this entails and should be in agreement with what amounts to a transfer of their economic wealth to another province.

The only description of 'positive measures' applying to these Canadian Government commitments is at section 41(6)(a) that they "shall be concrete and taken with the intention of having a beneficial effect on the implementation of the three principal commitments", with the rest to be filled in by regulations.

Section 41(6)(b) contains other aspects that positive measures 'shall respect', including: "protecting and promoting the French language in each province and territory"; "the specific needs of each of the two official language communities of Canada, taking into account the equal importance of the two communities". This needs to be explained, for example, if it relates to the same degree of economic support to one quarter of the population being equal to that provided to a community three times its membership.

Section 41(6 (c) states positive measures that may include to:

- promote the learning of English and French in Canada;
- foster an acceptance and appreciation of both English and French by members of the public;
- induce [i.e. 'succeeding in persuading or bringing about'] and assist organizations and institutions to project and promote the bilingual character of Canada in their activities in Canada or elsewhere;
- support the creation and dissemination of information in French that contributes to the advancement of scientific knowledge in any discipline; and
- support sectors that are essential to enhancing the vitality of English and French linguistic minority communities, including the culture, education — from early childhood to post-secondary education — health, justice, employment and immigration sectors, and protect and promote the presence of strong institutions serving those communities.

Another innovation of the Amendments, in order to keep the pressure on federal institutions to develop new and more expansive mandatory 'positive measures', is found at sections 41 (7) to (10). These require federal institutions:

- "to consider whether other positive measures could potentially be taken" in regard to the Government of Canada's initial three commitments, while considering mitigating any "direct negative impacts" that its structuring decisions may have on the three principal commitments;

- to base the foregoing positive measures, to the extent possible, on the results of dialogue and consultation activities, on research and on evidence-based findings to permit the priorities of the English and French LMCs and other stakeholders to be taken into account; and
- to establish evaluation and monitoring mechanisms in relation to the positive measures taken in regard to the three principal commitments.

By section 46 (1), "the Treasury Board has responsibility for the general direction and coordination of the policies and programs of the Government of Canada relating to the implementation of Parts IV, V, and now VI and subsection 41(5) [i.e. positive measures relating to the three principal commitments] in all federal institutions."

The duties of Treasury Board at subparagraph 46(4) (b) require it "in consultation with the Minister of Canadian Heritage, establish policies, recommend policies to the Governor in Council or issue directives to give effect to subsection 41(5)" [i.e. positive measures relating to the three principal commitments]. Similarly, at subparagraph 46(4)(f) the TBS has a duty in "carrying out its responsibilities to "provide information to employees of federal institutions relating to the policies, directives and programs that give effect to subsection 41(5)." [i.e. positive measures relating to the three principal commitments].

The Minister of Canadian Heritage, who is responsible for exercising leadership within the Government of Canada in relation to the implementation of the OLA, is required in cooperation with the other Ministers of the Crown, to develop and maintain a government-wide strategy that sets out the overall official languages priorities that includes the implementation of the three principal commitments (Sections 2.2(1) and (2)).

As well, among the Amendments falling within the mandate of the Heritage Minister, are the responsibilities to:

- support the development and promotion of Francophone culture in Canada, including through the activities of entities for which that Minister is responsible and by ensuring that the Government of Canada's cultural policies are consistent with the purpose of this Act (22 (1) (b)); and

- induce the business community, labour organizations, non-profit organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages (22(1) (f)).

In the latter Amendment, 'encourage' was replaced by 'induce'. 'Induce' means 'succeeding in persuading or bringing about' something; in this case, taking positive measures to achieve a mandatory objective of the business community, etc. to provide services in both English and French and to foster the recognition and use of those languages. Both times the verb 'induce' is mentioned, these effects are to succeed by taking positive measures in bringing about significant change across Canada. To induce for-profit business and other private institutions to provide bilingual services, either by hiring bilingual employees or by some other unstated means, will result in costs that will be primarily paid for by unilingual Anglophones.

In conclusion, the intention of the OCOL is to significantly upgrade the importance and expansion of the duty of federal institutions to undertake 'positive measures' to extract every possible benefit as

described in the FCFF Federal Court decision which states the Government of Canada's commitments to support Francophone communities, including apparently the majority Quebec community.

The problem is that there is no indication in the bare-bones Amendments in the OLA of what this expanded application of the requirement of institutions to take positive measures will amount to for the purpose of enforcing Government commitments. Instead, it is clearly the intention of the OCOL to enact regulations providing the 'meat' on the 'skeleton' to describe the actual positive measures.

Anglophones therefore, are once again being requested to approve quasi-constitutional Amendments to their agreement with the Francophone community, but without having any real understanding of what this entails, except that these commitments are overwhelmingly for the most part in support of Francophone communities. At best they will provide little new benefit to Anglophones. At worst these positive measures will result in the replacement of more unilingual Anglophone positions with bilingual employees, which effectively amounts to promoting an inequality of status and privileges of English language in federal institutions, paid for mostly by unilingual Canadians.

b) Recourse to regulations to enact quasi-constitutional legislation

There are numerous references to regulation-making powers. However, it was the acknowledgement by the OCOL in its Modernizing document to being incentivised by comments of a Federal Court Judge that has brought the propriety of their use to the forefront for consideration. In the matter of Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development), 2018 FC ['FFCB'], the Judge's remarks were as follows.

> [293] It is undeniable, in my opinion, that the scope of the duty contained in section 41 is hamstrung by the absence of regulations. And, it must be said, this regulatory silence and the resulting vagueness are probably detrimental to the linguistic minorities in Canada, who may be losing a potential benefit under Part VII. … For the reasons stated, the remedies sought by the FFCB and the Commissioner are not supported in the current Act, as drafted, structured and implemented. However, it is easy to see that the remedies they cited could be subject to regulations under subsection 41(3).
>
> [294] If it is the wish and will of the federal government that more specific "positive measures", deemed necessary to help achieve the objectives of the OLA and further enhance the vitality of linguistic minorities in Canada, be expressly stipulated under section 41, the executive branch has the means to do so. Regulations could better gauge the requirements of Part VII in terms of "positive measures" to be taken by federal institutions, for example by specifying that the measures be related to more targeted programs or initiatives of federal institutions, or that more specific measures be stipulated in transfer payment agreements that include language clauses.
>
> [295] I accept that it is more difficult to achieve substantive linguistic equality if the guidelines for doing so are not sufficiently clear. Even if we one can" focus on substantive equality, we may end up moving away from it if the path we take does not provide the signage needed to get there. Government is responsible for clarifying these guidelines, when Parliament has given it the means to do this through regulations, as is the case here regarding federal institutions' duty to take "positive measures" under section 41.

There is the question of widening the scope of quasi-constitutional laws by use of regulations. This was something that the Government avoided for the most part under both versions of the OLA, prior to these Amendments.

That said, Parliament would have intended, by common law standards at least, that the courts were to develop the meaning to attribute to its words in a statute such as 'positive measures' in these circumstances. Ironically as well, this is exactly when it would be entirely appropriate to apply the *Beaulac* purposive interpretation principle; when not being applied asymmetrically to favour one language right over another in a regime of substantive equality.

A Francophone community in British Columbia faces unrelenting assimilative forces. This where the words "enhancing their vitality and supporting and assisting their development" should require the Federal Government to reinforce the French language and culture of the community, as being money well spent. Minority Francophone communities are a precious Canadian resource and bridges to national unity. Their preservation and development is proof to all Canadians and the world that Canada is a bilingual country from sea to sea to sea. We are committed to protecting our linguistic minorities, and at a national level as well, when needed, as integral communities of Canadian society.

It is when regulations are resorted to that the issue arises as to whether their reach is intended to be beyond what a Court would find to be fair and reasonable. Or alternatively and of more relevance, is Parliament resorting to regulations for an improper purpose to conceal the true scope of a piece of legislation. Statutory provisions should be included in the Act or the regulations enacted at the same time as the law is adopted so that Canadians can understand Parliament's intention.

In fact, *the 1988 OLA correctly avoided adopting regulations that effect a quasi-constitutional law.*

This is reflected in the Government's own guide to making regulations

> "Guide to Making Federal Acts and Regulations
>
> The following principles should also be observed:
> The power to make regulations must not be drafted in unnecessarily wide terms.
> Certain regulation-making powers are not to be drafted, unless the Memorandum to the Cabinet specifically requests drafting authority for the power and contains reasons justifying the power that is sought.
>
> [To which may be added: Regulations affecting constitutional and quasi-constitutional laws, should be avoided, unless minimally affecting the terms of the legislation, i.e., that effect federal provincial relations or support the interests of one language community, and in any event, only after providing sufficient notice to the Provinces, as per notice provisions for constitutional cases before the Supreme Court.]
>
> In particular, specific drafting authority is required for powers that:
>
> - substantially affect personal rights and liberties;
> - involve important matters of policy or principle;
> - amend or add to the enabling Act or other Acts;
> - exclude the ordinary jurisdiction of the Courts;

- make regulations having a retroactive effect;
- subdelegate regulation-making authority;
- impose a charge on the public revenue or on the public, other than fees for services;
- set penalties for serious offences

Acts and regulations are interdependent and should be developed in conjunction with one another. Regulations may be drafted at the same time as the authorizing bill or after, depending on the situation. However, if regulations are an important part of a new legislative scheme, it may be helpful to begin developing draft regulations or at least a summary of the regulations at the same time as the bill to ensure consistency with the framework being established in the bill. When regulations are developed under an existing Act, care must be taken to ensure that they fall within the authority granted by that Act." https://www.canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html

Regulations should not be used except where necessary and not on matters that "involve important matters of policy or principle or amend or add to the enabling Act or other Acts." The breach of these rules certainly applies to the intended use of regulations amending a quasi-constitutional law.

In addition, section 87(2) of the 1988 OLA confirms that regulations of the OLA, a quasi-constitutional law, should be avoided, by the fact that they may not be the subject of debate or amendment in consideration of their disposition.

> 87 (2) Motion to disapprove proposed regulation
> Where, within twenty-five sitting days after a proposed regulation is laid before either House of Parliament under subsection (1), a motion for the consideration of that House to the effect that the proposed regulation not be approved, signed by no fewer than fifteen Senators or thirty Members of the House of Commons, as the case may be, is filed with the Speaker of that House, the Speaker shall, within five sitting days after the filing of the motion, without debate or amendment, put every question necessary for the disposition of the motion.

Amending this provision will not alter the fact that Parliament previously correctly concluded that regulations under the Act are generally to be avoided. This is all the more so for Amendments that promote only the augmentation of Francophone interests, containing politically contentious provisions that will have a negative impact on national unity once their intended objectives are understood.

8. **Do not agree to the Amendments: Investigations (63.1); Compliance Agreements (64.1 (2)), including 78.2(3) in Part X; Commissioner's Orders (all), Administrative Monetary Penalties where designations to be made by regulation; imposition of strict liability of communications and services violations (65.95); Use of French in Federally Regulated Private Businesses Act references to 'region with a strong francophone presence' and related wording.**

Section 63.1: This Amendment is intended to permit the OCOL, after carrying out an investigation, to make public any aspect of its summary, findings and recommendations. In the first place this Amendment is not aimed at federal institutions, but the Crown corporations and federally regulated private businesses. The OCOL, or really its legal service, by its reporting mechanism to Parliament and

the fact that federal institutions generally attempt to avoid controversy and to resolve problems to achieve work objectives, rarely loses a battle, even unreasonable ones against a federal institution.

The only logical reason to add the threat of public shaming to the OCOL's powers is, after Crown corporations and federally regulated private businesses are included in the roster of institutions under the linguistic supervision of the OCOL, to increase the leverage on them not to take a matter to the Federal Court. The OCOL does not want to take a case like *Tailleur* and *Dionne* against business who are required to account for their economic success to their owners, and where transparency tends to exist through the extensive business coverage. Thus, a pre-emptive public relations threat may be enough to head that off.

Sections 64.1 (2) and 78.2(3) in Part X: This refers to the events in *Dionne* just discussed, where the applicant was not bound by the settlement agreement with *OSFI* and then added another form of claim in his Federal Court pleadings based on section 36(2) that had not been considered by the OCOL. Again, businesses in particular should not be forced into a compliance agreement only to have the complainant proceed to court thereafter. Similarly, no issue should proceed to court if the OCOL has not investigated it and made recommendations supported by reasons, as was the situation in *Dionne*.

Commissioner's Orders (all): This is another addition in anticipation of Crown corporations and federally regulated businesses being under the jurisdiction of the OCOL, as federal institutions have little means to confront the OCOL given the internal politics of the Federal Government. By this Amendment, the Commissioner can issue an order enforcing a recommendation, which, if not complied with, can be filed in the Federal Court and may be enforced as an order of the Court, with contempt charges and fines as a means to achieve enforcement. This procedure approaches the Quebec official language model making the use of English illegal in the business. The whole order concept exemplifies the hold that the OLOC has on languages generally throughout federal institutions and any business that will come under its jurisdiction.

Administrative Monetary Penalties and section 65.95: This subsection is a violation remedy provision applying only to services and communications to the travelling public in the Canadian transportation sector, for breach of section 23. The general remedy provisions are contained in sections 77(1) and (4) of Part X, Court Remedy, which prior to the Amendments included the travelling public.

One of the galling aspects regarding communications with the public and services is that as Charter related rights, they are strict liability provisions thus applied to both section 77 remedies (footnote Thibodeau v. Canada (Senate), 2019 FC 1474 at para 69) and the new Administrative Monetary Penalties. As described in the proposed section 65.95 for the travelling public violations, businesses will be held accountable for service and communication violations, although blameless by the exercise of due diligence to prevent the violation or reasonably and honestly believing in the existence of facts that, if true, would exonerate it.

However, being full Charter related provisions, this fact should cause problems for the legality of this new Part IV as presently formulated. There is no indication as to how these provisions are to be applied as they are almost entirely subject to implementation and enforcement by regulations, none of which is disclosed. There is an obligation on Parliament to provide the contents of the Regulations with the provisions of the Amendments. Being Charter and strict liability penalty provisions, these issues should not be left to the after-discretion of the Governor-in Council acting on recommendations of Heritage Minister.

Another problem that plagues the services remedy section is the precedent of lay person complaints repeating to escalate the penalties claimed. In Thibodeau v. Air Canada, 2019 FC 1102), the self-represented applicant and his spouse claimed 22 instances of four violations of their language rights while flying with Air Canada. In addition, 12 other similar complaints had been settled by Air Canada. The four complaints were as follows:

- Displaying only the word 'exit' or the combination of the words 'exit' and 'sortie' where the word 'sortie' is written in smaller characters to designate emergency exits in facilities or on airplanes;
- Displaying the words 'warning' and 'avis' beside the exit door of an airplane, where the word 'avis' is written in smaller characters;
- Engraving only the word 'lift' on the buckles of airplane seatbelts;
- Having a less detailed boarding announcement in French than in English for passengers at Fredericton airport (15 seconds versus 5 seconds preceded by a recording of equal description).

After 77 paragraphs, in which the OCOL offered four definitions of equality: two apparently identified in the Charter and two stated in *Beaulac*, the latter two being described as substantive equality, and thereafter, accompanied by a careful examination of various caselaw, the complaints were upheld on all four claims. The Court made the following orders:

- Declares that the applicants' language rights were violated.
- Orders Air Canada to send each applicant a formal apology letter.
- Orders Air Canada to pay to Ms. Thibodeau damages of $1,500 per complaint, for a total sum of $9,000.
- Orders Air Canada to pay to Mr. Thibodeau damages of $1,500 per complaint, for a total sum of $12,000.
- Awards costs in favour of the applicants.

Before making this order, Air Canada informed the Court that, if it found that the signage violates the Act, it was willing to file with the Commissioner, within six months of the final judgment, a work plan for replacing the signage in orderly fashion, as recommended by the Commissioner in his final report. The Court noted this willingness, yet in effect awarded the couple $33,000 for the violation of their language rights, plus costs.

Conclusions on the Amendments

Three key conclusions follow from a consideration of the Amendments.

First, many unilingual Anglophone positions in federal institutions will be re-designated bilingual if Bill C-13 is passed in its present form. Career paths for unilingual Canadians, even in unilingual regions, will be severely limited. Career paths should be open to all Canadians in a bilingual setting, taking into consideration the fact that Francophones enjoy a comparative bilingual advantage in incidence and skills and must apply them in a reasonable fashion.

Second, the super-charged 'positive measures" to maximize funding from the federal Government to support the LMCs reaches a new order of magnitude with the inclusion of Quebec as an LMC. Support

for provincial linguistic minority communities is uncontested and in the letter and spirit of the OLA. However, if the majority population of Québec comes to be considered a linguistic minority community and a beneficiary of what would mostly appear to be economic transfers, than this is a different issue requiring informed input from the other provinces.

Third, the over-recourse to regulations appears intended to limit transparency allowing for a less fractious passage of the Amendments. This practice also appears to be in contradiction with federal government regulation-making principles, and particularly with legislation that is in fact quasi-constitutional. Restraint on recourse to regulations the prudent policy of the previous two OLAs and should continue to be respected in this legislation.

Part 4 Use of French in Federally Regulated Private Businesses Act [UFFRPBA]

There is insufficient time to complete the analysis of this complex legislation and certain comments that follow may prove to be inaccurate or may no longer apply due to changes made in the course of its review.

However, it would appear to a fair and reasonable reader of Bill C-13 that its enactment has the serious potential to cause irreparable harm to federally regulated private businesses (FRPBs), to destroy positive attitudes of Anglophones towards official bilingualism, and even provide the spark, in addition to *OSFI*s degradation of unilingual regions, to justify substantive support for Western Canada's latent separatism. Accordingly, it is imperative that these comments be provided at this time, for no other reason than to engage another perspective on what appears to be a very biased Act, at least for the interests of unilingual Anglophones, who will be the most adversely affected, despite being the community which must mostly pay for its consequences.

The three principal concerns to be addressed here are based on what is concluded to be a reasonable interpretation of the Bill. This interpretation of the UFFRPBA takes into consideration that the Federal Courts will continue to rely on the *Beaulac* purposive interpretations of language rights with the same vigor already employed to radically amend the 1988 OLA in the *Tailleur* and *OSFI* decisions.

The first area of concern is with respect to the Act applying the Quebec language of work model in the federal arena to FRPBs. The language of work provisions and the powers of the OCOL to enforce them along with the leverage attached to the concept of it being a duty to foster a language, backed up by compliant Federal Courts, will amount to the introduction of a metastasizing 'linguistic bomb' of the Quebec French-language regime into the heart of federally regulated private businesses operating in Anglophone Canada.

The second area of concern is the OCOL's application of the Act first in Quebec and thereafter by regulation. This strategy will cloak and confuse the later introduction of the Act into Anglophone regions with a strong Francophone presence, as explained below. Parliament is violating the spirit and probably the application of the Rule of Law, in attempting to conceal the true objective of the Act which is to 'substantively' impose a new and comparatively radical official language regime on federally regulated private businesses in Anglophone regions with a strong francophone presence outside of Quebec. This legislation amounts to a significant change in Canadian constitutional official language law. Moreover, in many respects the legislation contradicts the equality of status and privileges of the two official languages prescribed in the 1988 OLA. By its improper, and perhaps illegal, adoption of the Act as described below, it lacks legitimacy without the appropriate informed agreement of the Anglophone community outside of Quebec, whose members will be negatively affected by its provisions.

The third area of concern is the over-recourse to regulations that should be presented at the same time as the Amendments.

1. **The Quebec language of work model will govern the language of work in federally regulated private businesses in designated Anglophone regions**

It may not be immediately understood that the OCOL has intentionally drafted the Act to apply to both Quebec and designated Anglophone regions outside of Quebec. The language of work provisions must meet the requirements of Quebec language law. The Quebec regime operates entirely in French, with

exceptions on a necessary basis only. This is what will apply to federally regulated private businesses like the banks, the national transportation sector, national communications companies and the like, which are the heart of Canada's national businesses and industries.
The provisions relevant to language of work are set out below. Comments will be made in an annotated fashion after each provision.

> Language rights
> 3 For the purposes of this Act, language rights
> (a) are to be given a large, liberal and purposive interpretation; and
> (b) are to be interpreted in light of their remedial character.

'Purposive' is code for interpretations to be in accordance with the *Beaulac* principle. This interpretative principle was asymmetrically applied in the FCA *OSFI* language of work decision in favour of the language rights of Francophones over those of Anglophones. That is not required here, as the Act specifically indicates its purpose is to favor Francophones. The application of this purposive interpretation in *OSFI* resulted in the disregard of the merit staffing principle and undermining the job protections of unilingual regions. Again, this is not required, as the clear words of the provisions below already provide for this. What this provision does mean however, is that there can be no expectation that section 9(1)(a) and (b) will be interpreted to provide exceptions to the right of Francophones "to carry out their work and be supervised in French" when Anglophones have no language rights despite comprising the overwhelming majority in the regions.

> Purpose
> 4 The purpose of this Act is to foster and protect the use of French in federally regulated private businesses in Quebec [and regions with a strong francophone presence].

A clear statement of the beneficiaries of the UFFRPBA, and leverage for a generous application to foster and protect the use of French by purposive interpretations.

> Communications and services in French
> 7(1) Consumers in Quebec [or a region with a strong francophone presence] have the right to communicate in French with and obtain available services in French from a federally regulated private business that carries on business in Québec [or the region].

This is the communications and services provision that requires unilingual or bilingual Francophone employees, and bilingual Anglophones, to work in designated Anglophone regions. It also applies to any federally regulated private business outside the designated Anglophone region to communicate and similarly provided services in French.

> Language rights at work
> 9 (1) Employees of a federally regulated private business who occupy or are assigned to positions in a workplace in Quebec [or a region with a strong francophone presence] have the right to
> (a) carry out their work and be supervised in French;
> (b) receive all communications and documents from the federally regulated private business, including offers of employment or promotion, notices of termination of employment, collective agreements and grievances, in French; and
> (c) use regularly and widely used work instruments and computer systems in French.

Paragraph 9(1)(a) and (b) are the radical linguistic bomb provisions which impose the Quebec language of work model on designated Anglophone regions. Unilingual Anglophones probably do not recognize this, despite being the most adversely affected linguistic community, as the intended design is to displace them in FRPBs with bilingual employees.

Given the unambiguous wording, the provisions need little contextual assistance to clarify what they say. It describes the language rights of Francophones in Quebec to work and be supervised in their language – point blank, no further discussion required. There is no scope for the application of some helpful attenuating interpretation. Such leeway is prevented by sections 3(1), stating that the Francophone language rights, via *Beaulac*, "are to be given a large, liberal and purposive interpretation."

OCOL has intentionally applied the language of work rules in Quebec (absolutely appropriately for a province that operates almost entirely in French) to designated Anglophone regions. This was not some oversight, misunderstanding, or omission on the part of the OCOL, as the most linguistically informed agency in the Government of Canada. It is a specific strategy to remove unilingual Anglophones from FRPBs in designated Anglophone regions to be replaced by bilingual employees. This is the means considered by the OCOL to 'foster' French in federally regulated private businesses in designated Anglophone regions.

These language of work provisions in the UFFRPBA are much more of a mandatory and peremptory nature than in the OLA, even after the OFSI decision in favor of Francophones. These provisions will cause the removal of most unilingual Anglophones from the workplaces in FRPAs in Anglophone regions, unless siloed off from Francophone employees, and even then, with limited career paths ahead of them.

This follows from the repeating fact that once Francophone employees are granted the right to work in French that covers off both the right to work, receive communications and be supervised in French, the linguistic composition of the workplace in that region will overtime end up overwhelmingly composed of Francophone bilingual employees, given their higher incidence and skill level in French.

Bear in mind that Anglophones have no similar rights, as this is a totally asymmetric Francophone language right environment. As such it is more effective than anything found in the OLA to displace unilingual Anglophones. Bear in mind also, even under the FCA *OSFI* ruling, pursuant to the Charter, bilingual employees have no right to require communications to them to be in French. Use of language was always a facultative right of each person. It is in the Charter! However, this is the result of adopting a pure Quebec language of work law in a unilingual French province.

The right of Francophone employees to work in French applies horizontally to require Francophone co-workers to be bilingual, regardless of the merit principle [the *OSFI* result]. Then, each new Francophone coworker employed on this collateral bilingual staffing basis, has the same right to work, communicate and receive communications in French. No English co-worker has a similar right. This right then progresses vertically to the Francophone's supervisors who also must be bilingual, and then horizontally once again to other co-supervisors who will also be required to be bilingual. This continues on working up the career ladder to all managers, not even stopping at the most senior manager in the designated Anglophone region. Managers outside of the region will also have to communicate with Francophones in French in a designated region, and of course receive their communications in French. In addition, all communications outside a designated Anglophone region will also have to be in French with bilingual Francophone workers.

This is explained by the fact that because the rights in section 9 are grounded in designated Anglophone regions, they apply to communications within and from others outside the designated region. This is application confirmed by the FCA *OSFI* decision applying the right of the bilingual generalist employees to communicate in French with the specialist coworkers in French, although located in unilingual regions.

To really understand the impact of these provisions and similarly the FCA *OSFI* decision, one should consider its impact from the perspective of a unilingual Anglophone. Because of bilingualism requirements, more than 90% of unilingual Anglophones that make up the Anglophone population, cannot even apply for a bilingual position anywhere. However, when a position comes up that does not require bilingual requirements, thereby allowing 100% of Canadians to apply for it that should be filled totally based on merit, they are told that because of language rights of a coworker to work in French, they are also ineligible for those positions as well. Then tell them that this rule not only applies to federal institutions in bilingual regions, but also in unilingual regions, (thanks in both cases to the FCA *OSFI* decision), and now in designated Anglophone regions where these national and significantly important federally regulated private businesses work, and then outside of those designated regions when communicating regularly with Francophones in the designated Anglophone regions.

> Duty
> 9(2) The federally regulated private business has the duty to ensure that employees are able to exercise the rights set out in subsection (1).

This is a reference to the term 'substantive' inappropriately included in title of the amended OLA. It makes the designated FRPB the perspective violator of the UFFRPBA subject to investigation etc. by the OCOL for not fulfilling, fostering and promoting French in designated Anglophone regions.

> Fostering use of French
> 10 (1) A federally regulated private business that has workplaces in Quebec [or a region with a strong francophone presence] must take measures to foster the use of French in those workplaces. Those measures must include
>
> > (a) informing employees that it is subject to this Act;
> > (b) informing employees who occupy or are assigned to positions in those workplaces of their language of work rights and available remedies; and
> > (c) establishing a committee to support the management group that is responsible for the general direction of the federally regulated private business in the fostering of French and its use within the federally regulated private business.

Particularly of concern is the requirement to establish a committee to support the senior management in the fostering the use of French. This requirement describes another means how the OCOL intends to require compliance of FRPBs at their upper most level. The OCOL must rely on complaints from workers. In this instance, if members of the committee complain that measures it suggested to foster the use of French were not acted on by senior management, this will provide the OCOL with the authority to enter into the bowels of the highest management group of FRPBs to force them to implement the committee's suggestions. Senior management will know that if they dispute the matter, ultimately the

record of the Federal Courts is pretty much always to support the OCOL and require strict liability enforcement.

> Adverse treatment
> 11(1) A federally regulated private business that has workplaces in Quebec must not treat adversely an employee who occupies or is assigned to a position in one of those workplaces for the sole reason that the employee does not have a sufficient knowledge of a language, [i.e. English] other than French or that the employee has exercised a right under this Act or made a complaint to the Commissioner.
>
> (2.1) A federally regulated private business that has workplaces in a region with a strong francophone presence must not treat adversely an employee who occupies or is assigned to a position in one of those workplaces on or before the day on which this subsection comes into force for the sole reason that the employee does not have a sufficient knowledge of [not 'other than'] French.
> Language other than French
>
> (3) Requiring an employee to have a knowledge of a language other than French [English] does not constitute adverse treatment for the purposes of subsection (1) if the federally regulated private business is able to demonstrate that a knowledge of that language is objectively required by reason of the nature of the work to be performed by the employee.

As can best be understood, section 11(1) is intended to protect unilingual Francophones who do not have a knowledge of English who therefore may be invited to apply for positions at the same time that unilingual Anglophones are being replaced by bilingual employees. This is a very Quebec provision. It is also typical of the lack of transparency that 'other than French' is not openly stated as 'English'. This typifies the overall approach to the Amendments and this Act which seems to be to hide and confuse.

Sections 11 (2.1) and (3) are intended to protect unilingual Anglophones in two instances. First by section 11(2.1), they will be afforded protection during the time before the provision comes into force. Otherwise, section 11(3), follows the Quebec employee law that Anglophones can remain employed by the FRPB if it can be 'objectively' demonstrated based on merit that English is required to perform the work of the employee. Ironically, this wording, 'objectively demonstrating', parrots that of section 91 in the OLA which would prevent all the collateral bilingual staffing described in the scenarios above from occurring because they are not based on merit, but language rights. In addition, allowing these Anglophone positions in the FRPBs workplace will somehow have to be implemented without infringing section 9 that provides an absolute right for employees to work in French.

> Duty
> 14 (1) It is the Commissioner's duty to take all actions and measures within the Commissioner's authority with a view to ensuring recognition of the rights and respect for the duties under this Act concerning the use of French in communications with and services to consumers and as a language of work in relation to federally regulated private businesses, and the fostering by those businesses of the use of French in their workplaces as required by this Act.

This section provides the OCOL with the capability of 'inducing' FRPBs over time to favour the interests and benefits of a significantly enlarged and empowered Francophone workplace, at the expense of unilingual Anglophones. It is another entirely Quebec provision. The OCOL retains all of the same powers

to investigate, force compliance agreements, issue orders to be filed with the Federal Court and shame companies publicly to force compliance.

In conclusion, the OCOL intends to impose on FRPBs the same language regime that applies in Quebec. The intention is to duplicate the existing Quebec private business regime in presently undisclosed regions, which are also to be determined by regulations. The OCOL will stand in for the 'Office québécois de la langue française' in regions with a strong Francophone presence in Anglophone Canada, with a significant bilingual overspill on the operations of federally regulated businesses in the rest of Canada. This latter statement is premised on the *Beaulac* principle and the language of work provisions as interpreted by the Federal Courts in the *Tailleur* and FCA *OSFI* decisions.

2. Applying the UFFRPBA first in Quebec

The scheme of the UFFRPBA is to first implement it in Quebec. It is on this basis that the language of work regime must be equivalent to that in Quebec. In addition, however, the Act contains a number of confusing amending provisions applying to its application in Anglophone regions, buried in sections 51 to 77. They are intended to come into force by extensive detailed and multi-faceted regulations at a time chosen by the OCOL, representing a *fait accompli* imposed on Anglophone regions. These revelations will arrive when the time for challenge is long past, although revealing for the first time the intended content, scope and effect of its provisions. This extends to which businesses will be affected, which Anglophone regions are designated, and what adverse effects it will have on unilingual Anglophones.

This scheme of adoption and implementation of an effectively quasi-constitutional official language regime is in breach of the fundamental Rule of Law transparency procedures required for the adoption of legislation. Its passage will constitute a shameful abuse of legislative powers if Parliament proceeds in this fashion.

It would appear that first implementing the Act in Quebec is a diversionary tactic of the OCOL to direct attention away from its implementation in the more problematic designated Anglophone regions. Later implementation prevents any meaningful consideration of its contents, all buried in one of the most confusing set of Amendments, regulations and coming in to force provisions possible.

The UFFRPBA has no meaningful effect on the official language situation in Quebec. The statement in section 4 that its purpose "is to foster and protect the use of French in federally regulated private businesses in Quebec" is ludicrous. French is already well fostered and protected by very effective language laws enacted by the Quebec provincial government. The Province already operates in French, with few exceptions allowing for English in most economic-generating circumstances in public or private institutions, unless proven necessary. The UFFRPBA will not substantively change the status or privileges of either language.

Conversely, the UFFRPBA represents a sea change adversely affecting in real time the linguistic workplaces of FRPBs and in doing so displacing unilingual Anglophone employees. Unlike Quebec that already operates almost entirely in French, including FRPBs, and has a very large contingent of very bilingual citizens that makes the application of the UFFRPBA of little difficulty or consequence, the situation in Anglophone Canada is exactly the opposite. It barely operates in French and most of their skilled bilingual citizens are Francophones or with Francophone roots.

If the substantive effect on language rights in Quebec is minimal, by comparison it is worth considering the potential change to the Canadian linguistic landscape that the OCOL may achieve once its substantively undisclosed Amendments come into force with the regulations providing the meaningful content that results in the enactment of the UFFRPBA outside of Quebec.

A recent document prepared by the Secretariat to the Expert Panel on Modern Federal Labour Standards describes the extent and scope of the federally regulated private business sector in a publication available on the internet aptly entitled "A portrait of the federally regulated private sector" - Canada.ca, Feb 24, 2022: (footnote) [https://www.canada.ca/en/employment-social development/corporate/portfolio/labour/programs/labour-standards/reports/issue-paper-portrait-federally-regulated-private-sector.html]

> "The federally regulated private sector (FRPS) is comprised of approximately 910,000 employees and 18,000 employers whose labour rights and responsibilities are defined by the Canada Labour Code (the Code). Federal labour standards, which establish minimum working conditions, are set out in Part III of the Code. They apply to employers and employees in, or in connection with, the operation of any work, undertaking or business under the legislative authority of the Parliament of Canada.
>
> The businesses and industries covered by Part III include banks, air transportation, rail and road transportation that involves crossing provincial or international borders, marine transportation, pipelines crossing provincial borders, feed, flour and seed mills and grain elevators, telecommunications and broadcasting. Part III also applies to Crown corporations (including Canada Post)."

The number of employees based on 2015-17 of the main grouping of the businesses are as follows:

> Banks 257,600, Telecom and broadcasting 148,400, Road transportation 141,700, Postal and pipelines 127,600, Air transportation 107,600, Rail transportation 61,700, Feed, flour, seed, grain 17,800, Maritime transportation 17,400

Applying the Quebec language of work provisions to employees in federally regulated workplaces outside of Quebec in the future regulation-designated regions, (or carry on business there), would represent a quantum increase in the scope and extent of bilingualization of unilingual positions, while significantly expanding the OCOL's and Federal Courts' jurisdictions to enforce the Act beyond that of federal institutions.

It is also not clear what the cost and effects of these Amendment will entail for FRPBs outside of Quebec. Substantial change in the linguistic character of the workplace of FRPBs could well affect the efficiency, costs and competitiveness of doing business. This is without considering the OCOL acting on complaints. This would involve slow-moving investigations, with all the new powers the OCOL has bestowed upon itself, with a record of assisting complainants in bringing them before the Federal Courts in a strict liability regime, all bolstered by *Beaulac* asymmetric interpretations favouring Francophone language rights.

There is no indication that the OCOL has sat down with whomever the representatives are of federally regulated private businesses in the Anglophone regions to determine their views, either before or after drafting the UFFRPBA. This would ensure implementation of the Act with the least amount of disruption

to business operations while maintaining positive attitudes towards bilingualism in these businesses and industries. It is hoped that close coordination has been established with the appropriate federally regulated private businesses and their views have been taken into consideration. If not, and this Act represents the OCOL forging ahead, laying down rules and waiting for an opportunity to apply its enforcement provisions, then all Canadians should be concerned.

in any event, the OCOL should be required to provide a full report of its advance and after drafting meetings with the potentially most immediately affected businesses and the nature of the discussions, the concerns of the businesses, and whether they have been considered and responded to effectively to ensure that the implementation of the UFFRPBA does not damage their operations. Again, it is noticed that the UFFRPBA will have no meaningful impact on how federally regulated private businesses operate in the province of Québec in comparison with what lies ahead once it becomes known in the designated Anglophone regions and among designated Anglophone FRPBs.

3. Over-recourse to regulations

The OCOL and brain trust who put this legislation together were forced to include regulations to cover off a wide range of outcomes they could not foretell, as the UFFRPBA ventures into unknown territory where its impacts are not understood. They had to be able to quickly adapt the legislation to head off unexpected circumstances or overcome new forms of resistance. A plethora of regulations capable of altering a bare-bones Act was the only possible solution to achieve a desired end. This has meant providing the widest possible regulation-making power to meet evert pit fall that the OCOL and/or Heritage Minister might encounter. This normally would not be necessary if enacting the legislation at the time it was to be implemented.

If any readers with a legal background and some experience in dealing with legislation are interested in following up, they should review how bordering on the intractable this legislation is and is also intended to be. (https://www.parl.ca/DocumentViewer/en/44-1/bill/C-13/first-reading)

The regulations referred to here pertain to three issues: (i) the definition of a 'region with a strong Francophone presence'; (ii) fixing the 'number of employees' to define an FRPB; and (iii) other regulation-making powers.

(i) Definition of a 'region with a strong Francophone presence'

Sections 33 (1) (b) and (2.1)

> (1) (b) "the Governor in Council may, on the Minister's [Heritage] recommendation, make regulations for the purposes of this Act, including regulations, … (b) defining …. [added by amendment] "region with a strong Francophone presence"
>
> (2.1) [added by amendment] in making a regulation that defines 'region with a strong francophone presence' under paragraph 33 (1)(b) [as amended], the Governor in Council may take into account any factors (sic) that the Governor in Council considers appropriate, including

(a) the number of francophones in a region; (b) the number of francophones in a region as a proportion of the region's total population; and (c) the vitality and specificity of French linguistic minority communities."

Note: The terms 'vitality and specificity' are highly discretionary and require their own objective, measurable and comparable definitions - not left to the discretion of the OCOL.

(ii) Fixing the 'number of employees' to define an FRPB

Section 33 (1) and paragraph (a) and (2)

33 (1) "the Governor in Council may, on the Minister's [Heritage] recommendation, make regulations for the purposes of this Act, including regulations"

"(a) specifying, for the purposes of paragraph (a) of the definition of federally regulated private business in section 2(1) [the definition section], a number of employees;" ….

(2) [by later Amendment] "A regulation made under paragraph [33] (1) (a) may specify a different number of employees for federally regulated private businesses that have workplaces in Quebec, for those that have workplaces in a region with a strong francophone presence and for those that do not have workplaces in Quebec or a region with a strong francophone presence but carry on business in Quebec or such a region."

Note: This appears to be the only reference to the undefined FRPBs who are not in the region but are said to carry on business in the region and are therefore subject to the mandatory linguistic obligations of this Act. This non-designated group of FRPBs raises a raft of complicated definitions including what linguistic requirements are being imposed upon them. There should be a distinct paragraph in the Act to clarify the many variables and criteria that will apply to carry on business in a designated region. This cannot be left to the discretion of the OCOL.

(iii) Other regulation-making powers

Section 33 (3) basically allows the Governor in Council to take into account any factor it considers appropriate in making a regulation based on the Heritage Minister's recommendation pursuant to Section 33 (1), presumably allowing for other input, but more specifically related to the enumerated factors.

They relate to (a) the volume of communications or services provided by federally regulated private businesses; (b) the type of services, documents, computer systems or work instruments required by the employees of federally regulated private businesses; and (c) the mandates of and the nature of the activities carried out by federally regulated private businesses. Frankly however, it is not clear how these factors line up with the relevant paragraphs of subsection 33 (1).

The factors in the paragraph above would appear to relate to 'number of employees' issues. However, the exercise of discretion is much wider as it relates to all of the paragraphs of section 33 (1). The relevant ones with respect to these discussions, beyond paragraph (a) and the amended definition of 'region with a strong francophone presence' in paragraph (b) are as follows:

(b) defining 'close to retirement', 'conditions that could impede the learning of French', 'consumer', 'employee', 'many years of service', region with a strong Francophone presence [added by amendment], 'treat adversely' and any other term or expression that is used in any of sections 5 to 13 but not defined in section 2;

(d) respecting the establishment and operation of a committee referred to in paragraph 10(1)(c);

(f) exempting, with or without conditions, federally regulated private businesses from the application of any provision of this Act or its regulations in respect of activities or workplaces that are related to a specified sector of activity; and

(g) exempting, with or without conditions, federally regulated private businesses from the application of any provision of this Act or its regulations for any reason, including reasons related to intellectual property rights, international standards or the conduct of interprovincial or international business.

The last two paragraphs (f) and (g) appear to be escape provisions when the impact of language rights is seen to adversely affect FRPBs and for political reasons or whatever, the government wants to create exceptions with the widest possible terms applying to the interests of businesses that would permit this. These are not confidence building factors, suggesting that the Government does not know what will happen when they try to implement this Act.

33 (1) (d) is intended to perhaps limit or strengthen the Heritage Minister's hand depending upon the developments that follow from inserting the 'fostering of French committee' in its dealings with upper managers of FRPBs (10 (1)(c)). This suggests that the drafters have no idea how such a committee of top management can possibly work.

33 (1) (b) authorizes the broadest and most questionable discretion of the Governor in Council in respect of the Minister's recommendations. The power to define terms relating to language of work, apart from the Amendment adding the power to define a region with a strong Francophone presence, do not appear to be problematic.

However, the alleged regulation making power relating to "and any other term or expression that is used in any of sections 5 to 13 but not defined in section 2" raises issues of permissible executive privilege. Does the Minister have the authority to define the meaning of terms - in effect amending the most significant provisions in the Act as adopted by Parliament, for example:

- sections 5 to 13 include regulation-making powers pertaining to the definitions of any term in services and language of work provisions 7 to 11. What use are terms in an Act if the executive privilege can define them. Could there be a clearer statement that the OCOL and Government have no idea how these language of work provisions for example are going to work in our largest national business corporations, as though they operate on the same principles as federal institutions.

- section 12 provides a wide empowering regulation term defining power of any term that falls within the Minister's mandate, i.e. "The Minister is responsible for the administration of this Act.

- section 13 provides term definition regulation making power in regard to the Minister's responsibility "for promoting the rights set out in subsections 7 (1) [Communications and services in French] and subsection 9 (1)" ["employees of FRPB's have the right to carry out their work and be supervised in French" etc.], as well as "providing assistance, education and information to federally regulated private businesses in relation to those rights." This addressing language rights. This is power by 'definition' regulations to affect the affairs of providing services, and working in French as the Minister sees.

Conclusions on Amendments and the UFFRPBA

With respect to the Amendments, the UFFRPBA and FCA *OSFI* decision reflect a strategy among Francophones to seek their linguistic separation from unilingual Anglophones. This increases their economic well-being, the value of French, and the authority of Francophones within the Canadian federal Government, as unilingual Anglophones are induced to leave with no reasonable career paths available to them in federal institutions.

If the Amendments and the UFFRPBA and passed, and Anglophones come to understand what has changed in terms of official language law, future Canadians may look back and realize the country was at an inflection point in the early 2020s. The Federal Government and Federal Courts steered Canada into a new era of bilingualism without proper regard and respect for its impact on unilingual Anglophone Canadians. Canada will find itself either in a Belgian-like relationship between the two official language groups in open hostility towards each other; or worse, with a new country called Canada West and whatever consequences flow from that.

Two conclusions regarding the UFFRPBA are clear.

First, it is unacceptable to impose the Quebec language of work model anywhere in Anglophone Canada. Quebec's model is based on a linguistic situation where the population is overwhelmingly French and overwhelmingly bilingual, such that it easily has the capacity to work in English when the need arises. This makes for a very effective linguistic workplace situation in Quebec. It is exactly the opposite in the Anglophone provinces. If FRPBs must work under the mandatory and overwhelmingly French-based Quebec language of work regime, this will require the wholesale linguistic restructuring of affected FRPBs with an unknown and unpredictable outcome, but one that can only adversely affect their operations as these private businesses become entangled in federal government language law.

Second, there is no reasonable justification to enact the prospective Amendments to the UFFRPBA at this time, to come into force in the future, without all the significant regulations completed, in accordance with the Government's normal modus operandi when passing legislation. Those dependent on or in some way involved with federally regulated private businesses will not understand the implications of this legislation which has been sprung on Canadians as a 'fait accompli'.

Canadians in the future, taking stock of deteriorated Canadian Anglo-Franco relations, will have a sense of appreciation for the successfully well-balanced 1988 OLA, worked out and agreed to by Canada's two official language communities. From that fair and reasonable perspective, they will come to realize that jurisprudence from the Federal Courts and initiatives to 'modernize' the Official Languages Act and foster the use of French in FRPBs was not good for Anglophones, not good for business, not good for relationships between Anglophones and Francophones. In short, not good for Canada, and maybe worst of all not good for Francophones.

Appendix Additional examples of problematic aspects of the *OSFI* reasons

1. *OSFI*: "[98] In this case, the Federal Court rejected *Tailleur* on the basis of its previous rejection of the interpretive principles of *Beaulac* (Decision, paragraphs 20–21, 457–62, 474, 477, 485)."

   Comment: The seven differences in conclusions with *Tailleur* are summarized at paragraph 24 of the *Dionne* reasons, e.g. [407] The 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).

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

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

   Comment: The FCA relied on the *Beaulac* principle ['applicable interpretive principles'] to change the order of the determinative components of the provision making the third level component the only one that counts. With respect, there is no possible route whereby an interpretative principle can change the structure of a provision and reorder the drafter's scheme of the provision. To repeat, one has to know whether the work environment is compliant and only if not, before one can take measures to make it so. This is an excellent example where the FCA simply throws out the *Beaulac* principle to arrive at the interpretation that the Court wants.

3. *OSFI*L [100] Firstly, subsection 36(2) must be given a broad and liberal interpretation, in accordance with the principles established in *Beaulac*. In *Tailleur*, the Federal Court stated that such an interpretation of subsection 36(2) creates "a positive duty for federal institutions to take measures to establish and maintain work environments that are conducive to the effective use of both official languages" (at paragraph 44)."

   Comment: This is confirmation that neither the *Tailleur* nor *OSFI* Courts applied the modern principle of interpretation. It required at a minimum the interpretation of 'accommodate the use of either', the second factor in section 36(2), in addition to the FCA referring to 'work environments' in this passage, but that it did not attempt interpret or comment on, despite the extensive interpretation of the phrase in *Dionne*.

4. *OSFI*: "I cannot accept the respondent's submission that Mr. Dionne is basing his argument on the false premise that he has a right that must be interpreted in the same way among bilingual and unilingual employees."

Comment: Bilingual employees, whatever the language, share the same reality of unequal use of language when working with unilingual coworkers. In other words all bilingual employees are all in the same situation vis-à-vis unilingual employees. This equality between all bilingual employees is destroyed by the application of the *Beaulac* principle that applies only to Francophones. This is contrary to the equality requirements of equal status and privileges of members of both linguistic communities in similar work situations.

5. *OSFI*: "The concept of substantive equality with respect to language rights of an institutional nature "require[s] government action for their implementation and therefore create[s] obligations for the State . . . . It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation" (*Beaulac* at paragraph 24)"

   Comment: This is an example of rhetorical language applying perfectly to equality rights relating to services/communications situations, with little similarity to language of work rights when bilingual employees are working with unilingual coworkers. Accommodation of unilingual coworkers is expressly provided for in section 36(2) and therefore not something that is requested when interpreted in accordance with the canons of the Modern Principle.