Chapter 2: Federal Laws

Federal Laws – Main Law and Regulations

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp)

An Act respecting the status and use of the official languages of Canada

Preamble

WHEREAS the Constitution of Canada provides that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada;

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

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

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

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

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

AND WHEREAS the Government of Canada is committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two official language communities of Canada, and to fostering full recognition and use of English and French in Canadian society;

AND WHEREAS the Government of Canada is committed to cooperating with provincial governments and their institutions to support the development of English and French linguistic minority communities, to provide services in both English and French, to respect the constitutional guarantees of minority language educational rights and to enhance opportunities for all to learn both English and French;

AND WHEREAS the Government of Canada is committed to enhancing the bilingual character of the National Capital Region and to encouraging the business community, labour organizations and voluntary organizations in Canada to foster the recognition and use of English and French;

AND WHEREAS the Government of Canada recognizes the importance of preserving and enhancing the use of languages other than English and French while strengthening the status and use of the official languages;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53 (CanLII)

[21] The *Official Languages Act* is a significant legislative response to the obligation imposed by the Constitution of Canada in respect of bilingualism in Canada. The preamble to the Act refers expressly to the duties set out in the Constitution. It cites the equality of status of English and French as to their use in the institutions of the Parliament and government of Canada and the guarantee of full and equal access in both languages to Parliament and to the laws of Canada and the courts. In addition, the preamble states that the Constitution provides for guarantees relating to the right of any member of the public to communicate with and receive services from any institution of the Parliament or government of Canada in English and French. The fact that the *Official Languages Act* is a legislative measure taken in order to fulfil the constitutional duty in respect of bilingualism is not in doubt.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[33] Section 41 of the Act refers to a commitment by the federal government ("s'engage" in French) that reproduces for all intents and purposes the seventh whereas in the preamble to the Act. The preamble, according to section 13 of the *Interpretation Act*, R.S.C., c. I-21, "shall be read as a part of the enactment intended to assist in explaining its purport and object" ("fait partie du texte et en constitue les motifs"). [...]

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[112] In its preamble, the *Official Languages Act* recognizes the fundamental principles underlying its enactment, including the constitutional foundation for the equality of the English and French languages and for the right of a member of the public to communicate with and receive services in either official language from any institution of Parliament or the government. The preamble also highlights that the government of Canada has engaged itself to various commitments, including the achievement of the full participation of English-speaking Canadians and French-speaking Canadians in its institutions "with due regard to the principle of selection of personnel according to merit", the enhancement of the development of English and French linguistic minority communities, and the enhancement of the bilingual character of the National Capital Region. [...]

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[29] Next comes the *Official Languages Act*, a statute which has been described as a quasi-constitutional document. In its lengthy preamble, the Act repeats the constitutional rights and guarantees of the *Charter* with respect to communications with and services from the Government of Canada in either official language. The preamble also reflects on the in-house requirement of the government to provide equal opportunities to its employees to choose either language as their language of work.

[...]

[57] In the case before me, it is obvious that there exists under the *Official Languages Act* a broad picture and a narrower one. The object of the Act is not only to permit the use of our official languages and give citizens the right to deal with federal institutions in the language of their choice. It is more than that. It is to promote the use of both languages or, as expressed in the Act's preamble, "enhancing the vitality and supporting the development of English and French linguistic minority communities". Such a policy commitment by the Government of Canada imposes a double duty which must sooner or later be exercised in concrete terms.

[...]

[64] This brings me to comment on what I view is the second duty which the statute imposes on federal institutions. If there is imposed a tight line in designations of individual positions to protect the majority language group in the Public Service, the other duty is reflected in the preamble to the Act and in section 41 of the Act. My interpretation of section 41 gives credence to the proposition that policy requires the respondent not only to react or respond to pressures for more or better bilingual services, but to initiate programmes to offer these services where there is a perceived need for them, a need which might not be fully reflected in a statistical analysis of the number of enquiries, the number of files, or the current incidence of French and English cases in any particular public office.

[...]

[86] I should add another comment. The carrying on of statutory duties and obligations of the *Official Languages Act* in the strongly English-speaking environment of the Halifax Office, as well as in other similar places, must not always be easy. Language, as is often noted, includes strong cultural ties and characteristics, and there are historical discordant notes still being heard over language duality in Canada. No matter his background, the individual manager must remain publicly discreet, yet there must come to his ears, from time to time, negative observations from colleagues and friends, which add to the constraints of his office and which impose upon him many conflicting pressures. He often faces ignorance of the law, which in turn breeds fear, and which in turn breeds resentment. The manager must cope with all this and still run a happy ship.

SEE ALSO:

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (QL) (FCA) [hyperlink not available]

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1. Short title

1. This Act may be cited as the *Official Languages Act*.

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2. Purpose

2. The purpose of this Act is to

> **(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in**

legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[22] Section 2 of the *Official Languages Act* sets out the purpose of the Act: […]

Those objectives are extremely important, in that the promotion of both official languages is essential to Canada's development. As this Court said in *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 744:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

The *Official Languages Act* is more than just a statement of principles. It imposes practical requirements on federal institutions, as Bastarache J. wrote in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 24: […]

[23] The importance of these objectives and of the constitutional values embodied in the *Official Languages Act* gives the latter a special status in the Canadian legal framework. Its quasi-constitutional status has been recognized by the Canadian courts. […]

The Federal Court was correct to recognize the special status of the *Official Languages Act*. The constitutional roots of that Act, and its crucial role in relation to bilingualism, justify that interpretation.

[...]

[25] [...] The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation, defined by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, 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 quasi-constitutional status of the *Official Languages Act* and the *Privacy Act* is one indicator to be considered in interpreting them, but it is not conclusive in itself. The only effect of this

Court's use of the expression "quasi-constitutional" to describe these two Acts is to recognize their special purpose.

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[20] […] The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees […].

[22] The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. […]

[24] [...] The idea that s. 16(3) of the *Charter*, which has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case, *supra*, limits the scope of s. 16(1) must also be rejected. This subsection affirms the substantive equality of those constitutional language rights that are in existence at a given time. Section 2 of the *Official Languages Act* has the same effect with regard to rights recognized under that Act. This principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State […]. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation. [...]

[25] Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act* (Man.), *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. [...]

DesRochers v. Canada (Industry), [2007] 3 FCR 3, 2006 FCA 374 (CanLII)

[37] […] Paragraph 2(a) of the *OLA* provides for equality of status and use for both official languages. Paragraph 2(b) is meant to support the development of English and French linguistic minority communities and advance the equality of status and use of the English and French languages. And, needless to say, this cannot be a merely virtual or purely formal equality, without substantive or concrete application. On that basis, I am willing to subscribe to the opinion of Bastarache J. [in the *R. v. Beaulac decision*] that “language rights that are institutionally based require government action for their implementation and therefore create obligations for the State”, at paragraph 24.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (QL) (FCA) [hyperlink not available]

[16] The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter*, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but are nonetheless the result of a delicate social and political compromise, it requires the courts to exercise caution and to "pause before they decide to act as instruments of change", as Beetz J. observed in *Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education et al*.

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

[37] Language rights are a cornerstone of Canadian society, and the *OLA* is therefore a fundamental law of the land, closely linked to the values and rights enshrined in the Canadian Constitution and particularly in the *Canadian Charter of Rights and Freedoms*, Part I of The *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c 11 [*Charter*]. Moreover, the Supreme Court of Canada has recognized its quasi-constitutional status (*Lavigne v Canada (Commissioner of Official Languages)*, 2002 SCC 53 (CanLII) [*Lavigne*] at para 25). Thus, the language rights engaged in this case are all based on the Constitution.

[…]

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

[50] It is widely accepted that language rights in Canada "are meant to protect official language minorities in this country and to insure the equality of status of French and English" and "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities" (*R v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768 [*Beaulac*] at para 25, 41). Language rights "are a well-known species of human rights and should be approached accordingly" (*R v Mercure*, 1988 CanLII 107 (SCC), [1988] 1 SCR 234 at p 268).

[51] Courts are therefore required to give the *OLA*, a quasi-constitutional statute, a liberal and purposive interpretation (*DesRochers v Canada (Industry)*, 2009 SCC 8 (CanLII) [*DesRochers*] at para 31). However, this does not alter the traditional approach to statutory interpretation, which requires us to read the words of an Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention

of Parliament (*Thibodeau* at para 112; *Lavigne* at para 25, quoting Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p 87).

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

[53] In *Beaulac* at para 24, the Supreme Court of Canada stated that section 2 of the *OLA* affirms that the *OLA* protects and contemplates a substantive equality of languages in Canada. […]

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[3] The fundamental importance to this country of the bicultural nature of its birth was further emphasized in the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which gives English and French equal status as "official" languages having preferred status over all other languages in the country with respect to federal institutions. This Act is the keystone legislation of official bilingualism in Canada, the quality of this country that, in my view, by virtue of its effect on the character of its people, is a profound and resonating source of its national and international pride and strength.

[4] Language is more than the sum of its parts -- words. It is the vehicle by which ideas, thoughts, history, events, emotions and perspectives are expressed. It is a permanently open door to the ethos of the other; understanding, support, tolerance, development and security. Language sustains the past, the present and the future of the cultural identity of both the individual and his or her community. Its fundamental importance to the survival of the cultural whole cannot be overemphasized with respect to those communities of people whose numbers form a minority of the population of the area in which they live.

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[79] It seems clear to the Court as well that equal access to services in both official languages means equal treatment. In my opinion, the procedure established by the RCMP, described by Staff Sgt. Hastey, is totally inadequate for the Francophone minority driving in the Amherst area. Motorists should not have to go out of their way or use a telephone or radio when they want to address a member of the RCMP in French. Such a service, which leaves much to be desired, absolutely fails to meet the objectives stated in section 2 of the *OLA* and is contrary to section 16 of the *Charter*, which recognizes the equality of both official languages.

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[59] Although the Act does not state that the Commissioner's report is binding on a court, it is surely evidence which is to be taken into consideration upon an application for a remedy under the Act. The Commissioner of Official Languages is specifically authorized to monitor the protection of language rights in accordance with the Act. The status of this Act as "quasi-constitutional legislation" was recognized by the Federal Court of Appeal in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at page 386 as follows : [...]

[60] In my opinion, the nature of the Act as quasi-constitutional legislation means that a report of the Commissioner, after the conduct of an investigation, can be accepted as evidence that a breach of the Act has occurred. The findings and conclusion of the Commission were not seriously challenged by the respondent. Accordingly, I confirm the findings of the Commission that the staffing mode for the position in question should have been bilingual non-imperative, with a linguistic profile of CBC. Further, I find that the improper designation for the position breached the applicant's language rights.

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[128] In applying the purposive approach adopted in *Beaulac v. The Queen*, supra, the starting point must be section 2 of the *Official Languages Act*. That section articulates in expansive and powerful terms the purpose of the Act, including the equality of status and equal rights and privileges of the use of English and French "...in all federal institutions...in communicating with or providing services to the public and in carrying out the work of federal institutions". Section 2 therefore affirms the substantive equality of the language rights recognized in the enactment. As indicated at page 791 of *Beaulac v. The Queen*, supra, the principle of substantive equality has meaning, and provides that institutionally based language rights "...require government action for their implementation and therefore create obligations for the State...".

SEE ALSO:

Thibodeau v. Air Canada, [2014] 3 SCR 340, 2014 SCC 67 (CanLII)

Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, 1974 CanLII 6 (SCC)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

Paulin-Kaïré v. Canada, 2004 FC 296 (CanLII)

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

Interpretation

3. (1) Definitions

3. (1) In this Act,

"*Commissioner*" means the Commissioner of Official languages for Canada appointed under section 49; (*commissaire*)

"*Crown corporation*" means

> **(a) a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and**
>
> **(b) a parent Crown corporation or a wholly-owned subsidiary, within the meaning of section 83 of the *Financial Administration Act*; (*sociétés d'État*)**

"*department*" means a department as defined in section 2 of the *Financial Administration Act*; (*ministère*)

"*federal institution*" includes any of the following institutions of the Parliament or government of Canada:

> **(a) the Senate,**

(b) the House of Commons,

(c) the Library of Parliament,

(c.1) the office of the Senate Ethics Officer and the office of the Conflict of Interest and Ethics Commissioner

(c.2) the Parliamentary Protective Service,

(d) any federal court,

(e) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the Governor in Council,

(f) a department of the Government of Canada,

(g) a Crown corporation established by or pursuant to an Act of Parliament, and

(h) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown,

but does not include

(i) any institution of the Legislative Assembly or government of Yukon, the Northwest Territories or Nunavut, or

(j) any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people; (*institutions fédérales*)

"*National Capital Region*" means the National Capital Region described in the schedule to the *National Capital Act*. (*région de la capitale nationale*)

3. (2) Definition of "*federal court*"

3. (2) In this section and in Parts II and III, "*federal court*" means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament.

ANNOTATIONS – DEFINITION OF "FEDERAL INSTITUTION"

Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada, [2008] 1 S.C.R. 383, 2008 SCC 15 (CanLII)

[14] The RCMP, which is constituted under s. 3 of the RCMPA [*Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10], is responsible for enforcing federal laws throughout Canada. There is no doubt that the RCMP remains a federal institution at all times. This principle was confirmed in *R. v. Doucet* (2003), 222 N.S.R. (2d) 1, 2003 NSSCF 256, and in *Doucet v. Canada*, in which it was held that the RCMP retains its status as a federal institution when it acts under a contract with a province. This means that the RCMP cannot avoid the language responsibilities flowing from s. 20(1) of the *Charter* when it acts as a provincial police force. The Federal Court and the Federal Court of Appeal recognized this in the instant case. But s. 20 of the RCMP's enabling statute provides that it may also be given responsibility for the administration of justice and law

enforcement in provincial or municipal jurisdictions. As a result, the fact that, in light of its nature and by virtue of its constitution, the RCMP is and remains a federal institution does not answer the question before this Court.

3.2 Institutional Obligation

[15] Section 20(1) of the *RCMPA* authorizes the RCMP to enter into agreements with the provinces and enforce the laws in force therein. This is not in dispute. Provincial laws must, of course, be enforced in a manner consistent with the Constitution; there is no reason to think that the legislature might have intended anything else in this case. Does this pose a problem because the RCMP is a federal institution? I do not think so.

[...]

[19] The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

Commissioner of the Northwest Territories v. Canada, [2001] 3 FCR 641, 2001 FCA 220 (CanLII)

[26] Subsection 3(1) of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 and section 2 of the *Canadian Multiculturalism Act,* R.S.C., 1985, (4th Supp.), c. 24 state that the expression "federal institution" does not include, for the purposes of enforcement of these Acts, "any institution of the Council or government of the Northwest Territories". In addition, subsection 7(3) of the *Official Languages Act* states that ordinances of the Territories and the instruments made thereunder are not subject to the bilingualism requirements applicable to legislation made in the execution of a legislative power by the Governor in Council or federal ministers.

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[34] In the case at bar, both parties acknowledge that, when patrolling Nova Scotia highways or responding to calls from citizens, the RCMP is a federal institution offering services to the public. The parties further agree that, as such, the RCMP is bound by the provisions of the *OLA* and the *Charter* on the right of Canadians and the public in general to communicate with federal institutions and receive services in either of the two official languages, at their choice.

[35]The fact that the RCMP performs policing duties in Nova Scotia under a contract entered into with the Province does not in any way alter its status as a federal institution. [...]

R. v. Doucet, 2003 NSSC 256 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[29] This is not at all about whether the R.C.M.P. is an institution of Parliament or of the Government of Canada. It is established under the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10. The R.C.M.P. is a national police force. Does the R.C.M.P. lose its federal status when it performs all duties of peace officers under contract with a province or when it enforces compliance with provincial laws? In this province, the R.C.M.P. enforces all laws, federal or not, in districts where it is hired on a contract basis by the provincial government. The trial judge found that [Translation] “the act of issuing the (speeding) ticket was not, in that circumstance, an activity of the federal government.” There is no doubt that members of the R.C.M.P. are mandated to enforce both provincial and federal laws. Section 18 of the *R.C.M.P. Act* stipulates the following:

> 18. It is the duty of members who are peace officers, subject to the orders of the Commissioner,
>
> (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
>
> (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
>
> (Emphasis added.)

[31] In my opinion, members of the R.C.M.P. do not lose their federal status when they act under contract with a province or enforce provincial laws. It is their mandate under the *R.C.M.P. Act* and they are simply fulfilling it. Thus, it is still a service of a federal institution. Subsection 20(1) of the *R.C.M.P. Act* supports this finding:

> 20 (1) The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.

[32] In my opinion, a contract with a province does not change anything with respect to the status of the R.C.M.P. It remains a federal institution. To decide otherwise would allow the R.C.M.P. to avoid its language obligations to citizens, as guaranteed by the Charter. This would certainly not be consistent with the purpose of constitutional language rights. Justice Bastarache commented on this issue in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, when he stipulated the following at paragraph 25:

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

[33] Federal institutions are not permitted to avoid their constitutional language obligations through contracts or other arrangements that transfer or delegate some of their functions. […]

In my opinion, subsection 20(1) of the *Charter* applies to this case. Finding otherwise could have the illogical effect of giving an accused constitutional language rights if he or she were arrested for a federal offence, but not if he or she were, at the same time, arrested for a provincial offence. The conduct of the R.C.M.P., acting as a police force by enforcing provincial laws, is the conduct of a federal institution, regardless of whether it is under contract with a province, and the requirements of subsection 20(1) of the *Charter* apply to that conduct. The R.C.M.P. has a protocol to provide services in both official languages if there is a need, even on roads.

Lavigne v. Canada (Human Resources Development), [2002] 2 FCR 165, 2001 FCT 1365 (CanLII)

[63] The applicant seeks relief under Part X of the *OLA*. The Federal Court Trial Division is the tribunal designated to grant relief under the *OLA* but that relief can only be granted, pursuant to subsection 77(4), if the Court concludes that a federal institution has failed to comply with the *OLA*. The term "federal institution", is defined in section 3 of the *OLA*. The two Quebec respondents, the Quebec Minister of Labour and Employment and Quebec's Attorney General are not federal institutions. This is in recognition of Canada's limited constitutional jurisdiction (as

well as Quebec's for that matter) in matters related to language as decided by the Supreme Court of Canada in *Jones v. Attorney General for New-Brunswick*, [1975] 2 S.C.R. 182.

SEE ALSO:

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

Quigley v. Canada (House of Commons), [2003] 1 FCR 132, 2002 FCT 645 (CanLII)

ANNOTATIONS – DEFINITION OF "FEDERAL COURT"

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[35] Although the complaint to the Commissioner [of Official Languages of Canada] and the investigation that follows form the basis for the remedy, it must be made clear that the Commissioner is not a tribunal for the purposes of the OLA and that an application under s. 77 is not an application for judicial review.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[16] The Commissioner [of Official Languages], it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a report that she may accompany with recommendations (subsections 63(1), (3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 FCR 212, 1999 CanLII 9386 (FCA)

[22] There is no doubt that the [Immigration and Refugee] Board is a "federal board, commission or other tribunal" within the meaning of subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] of the *FCA* [*Federal Court Act*]. This "federal board, commission or other tribunal" is also subject to the *OLA* and to the provisions of that Act since it is a "federal court" within the meaning of subsection 3(2) and section 20 of the *OLA*. Subsection 3(2) defines a "federal court" as "any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament". It must then be determined whether, as the respondent argued, the action brought by the appellant is excluded by Part X of the *OLA*.

[...]

[53] It was admitted by each of the parties that the *OLA* applies to the respondent since it is a "federal court" within the meaning of subsection 3(2) of the *OLA*.

Belair v. Canada (Solicitor General), 2000 CanLII 14967 (FC)

[7] Section 3 of the Act states that a federal court is any "body that carries out adjudicative functions and is established by or pursuant an Act of Parliament". It was not in dispute that the inmate disciplinary tribunal was created pursuant to a federal statute, the *Corrections and Conditional Release Act*.

[8] The only question is whether this tribunal "carries out adjudicative functions", which is the phrase that appears in the English version of the Act.

[9] If this were the first time that the question had arisen, I would consider that the disciplinary tribunal carried out adjudicative functions because of the consequences which the decision of the tribunal entails for inmates, such as a fine, restrictive conditions and so on.

[10] However, the Supreme Court and the Federal Court of Appeal have held that this type of tribunal is an administrative tribunal and so is not a tribunal that carries out adjudicative functions. I refer to *Martineau v. Matsqui Institution Disciplinary Board*, [1978] 1 S.C.R. 118 (*Martineau No. 1*), [1980] 1 S.C.R. 602 (Martineau No. 2.) and *Hanna v. Mission Establishment*, [1995] F.C.J. No. 1370 (F.C.A.) […].

[13] Accordingly, a disciplinary tribunal is not a tribunal which carries out adjudicative functions within the *Official Languages Act*, and the application for judicial review must be dismissed.

SEE ALSO:

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

Knopf v. Canada (House of Commons), 2006 FC 808 (CanLII)

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 FCR 212, 1999 CanLII 9386 (FCA)

Canadian Union of Postal Workers v. Canada Post Corporation, 2012 FC 110 (CanLII)

Pelaez v. Canada (Citizenship and Immigration), 2007 FC 35 (CanLII)

Parasiuk v. Québec (Tribunal administratif), 2004 CanLII 16530 (QC SC) [judgment available in French only]

Taire v. Canada (Minister of Citizenship and Immigration), 2003 FC 877 (CanLII)

Syndicat des débardeurs, Section locale 375 v. Association des employeurs maritimes, [1993] T.A. 79 (TAQ) [hyperlink not available] [judgment available in French only]

Part I – Proceedings of Parliament

4. (1) Official languages of Parliament

4. (1) English and French are the official languages of Parliament, and everyone has the right to use either of those languages in any debates and other proceedings of Parliament.

4. (2) Simultaneous interpretation

4. (2) Facilities shall be made available for the simultaneous interpretation of the debates and other proceedings of Parliament from one official language into the other.

4. (3) Official reports

4. (3) Everything reported in official reports of debates or other proceedings of Parliament shall be reported in the official language in which it was said and a translation thereof into the other official language shall be included therewith.

ANNOTATIONS

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

[9] The Committee [House of Commons Standing Committee on Canadian Heritage] adequately respected Mr. Knopf's right to address himself to its members in the language of his choice. The first Judge was right in concluding that the Committee, through its decision not to distribute the documents sent by the appellant, did not infringe on Mr. Knopf's language rights, as provided for in section 4 of the Act.

[...]

[38] Subsection 4(1) of the Act reiterates the right first recognized by section 133 of the *Constitution Act, 1867* and reaffirmed by subsection 17(1) of the *Charter*. These three sections recognize the right of any person participating in parliamentary proceedings "to use" (d'employer) English or French. Subsection 4(1) of the Act, as well as subsection 17(1) of the *Charter* create a scheme of unilingualism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v. City of Montreal et al*., [1986] 1 S.C.R. 460, at page 483).

[39] However, in some other language rights provisions, such as subsection 20(1) of the *Charter* and section 25 of the Act, the legislator chose the term "to communicate" (*communiquer*). In my opinion, this is not accidental.

[40] To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the Act.

[41] I do not read into subsection 4(1) of the Act any requirement for a Committee to distribute documents to its members in one official language. Subsection 4(1) of the Act provides the appellant with a right to address the Committee in the language of his choice only. Once this right has been exercised, subsection 4(1) of the Act does not compel the Committee to act in a certain way with the oral or written information provided to it.

[42] Justice Layden-Stevenson was right in finding that the distribution of documents does not fall within the scope of subsection 4(1) of the Act. The right to use an official language of choice does not include the right to impose upon the Committee the immediate distribution and reading of documents filed to support one's testimony. The decision on how and when to treat the information received from a witness clearly belongs to the Committee. I find, therefore, that the appellant's language rights were not infringed upon.

VOIR ÉGALEMENT :

Quigley v. Canada (House of Commons), [2003] 1 FCR 132, 2002 FCT 645 (CanLII)

Part II – Legislative and Other Instruments

5. Journals and other records

5. The journals and other records of Parliament shall be made and kept, and shall be printed and published, in both official languages.

6. Acts of Parliament

6. All Acts of Parliament shall be enacted, printed and published in both official languages.

7. (1) Legislative instruments

7. (1) Any instrument made in the execution of a legislative power conferred by or under an Act of Parliament that

> **(a) is made by, or with the approval of, the Governor in Council or one or more ministers of the Crown,**
>
> **(b) is required by or pursuant to an Act of Parliament to be published in the *Canada Gazette*, or**
>
> **(c) is of a public and general nature**
>
> **shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.**

7. (2) Instruments under prerogative or other executive power

7. (2) All instruments made in the exercise of a prerogative or other executive power that are of a public and general nature shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.

7. (3) Exceptions

7. (3) Subsection (1) does not apply to

> **(a) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, or any instrument made under any such law, or**
>
> **(b) a by-law, law or other instrument of an Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people,**
>
> **by reason only that the ordinance, by-law, law or other instrument is of a public and general nature.**

ANNOTATIONS – SUBSECTION 7(1)

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[28] In my opinion, a patent does not meet the formal criterion developed by the Supreme Court in *Reference re Manitoba Language Rights*, *supra*, at p. 224, because it is not made by a government or subject to approval by a government, and no positive action by the government is required to breathe life into it. The Supreme Court determined that the bilingualism requirement applied to instruments about which it can be said that “positive action of the Government is required to breathe life into them” in *Blaikie*, *supra*, at p. 329. If we read that decision, it is clear

that when the Supreme Court referred to “the Government” it was referring to Cabinet, not the entire executive branch (see, in particular, pp. 319-21). No “positive action” by the federal Cabinet is required to “breathe life into” a patent. The patent is effective once it is issued by the Commissioner.

[29] A patent also does not meet the content criterion because it does not have “force” of law in the sense in which the Supreme Court used that expression, because it is not a unilateral rule. The text of a patent is proposed by the inventor. The Commissioner can neither create a patent on his own initiative nor even modify a single word in a patent application

[30] The requirement that an instrument be “made in the execution of a legislative power” is essential in order for subsection 7(1) of the *Official Languages Act* to apply. Patents do not meet that requirement and so that provision is not applicable in this case.

SEE ALSO:

R. v. Saulnier (1989), 90 N.S.R. (2d) 77 (Co. Ct.) [hyperlink not available]

ANNOTATIONS – SUBSECTION 7(2)

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[31] The applicant’s argument concerning subsection 7(2) of the *Official Languages Act*, which makes it mandatory for “[a]ll instruments made in the exercise of a prerogative or other executive power that are of a public and general nature” to be published in both official languages, also cannot be accepted. The origin of patents, in English law, indeed “rests in the royal prerogative of granting letters patent” (Adam Mossoff, “Rethinking the Development of Patents: An Intellectual History, 1550-1800”, 52 *Hastings L.J.* 1255 at p. 1259), and a patent was therefore, initially, “an instrument made in the exercise of a prerogative”.

[32] However, the rules relating to Crown prerogative are merely common law rules, which can be ousted by legislation. Accordingly, when a statute occupies a field formerly left to Crown prerogative, the statute is the source of the executive power to do what was formerly authorized by the prerogative. The *Patent Act* creates a complete statutory scheme which, in Canada, replaces the Crown prerogative to grant a patent for an invention. Accordingly, subsection 7(2) of the *Official Languages Act* does not apply to patents.

SEE ALSO:

R. v. Layne, 1998 CanLII 6325 (BC SC)

ANNOTATIONS – SUBSECTION 7(3)

Commissioner of the Northwest Territories v. Canada, [2001] 3 FCR 641, 2001 FCA 220 (CanLII)

[26] Subsection 3(1) of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 and section 2 of the *Canadian Multiculturalism Act,* R.S.C., 1985, (4th Supp.), c. 24 state that the expression "federal institution" does not include, for the purposes of enforcement of these Acts, "any institution of the Council or government of the Northwest Territories". In addition, subsection 7(3) of the *Official Languages Act* states that ordinances of the Territories and the instruments made thereunder are not subject to the bilingualism requirements applicable to legislation made in the execution of a legislative power by the Governor in Council or federal ministers.

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8. Documents in Parliament

8. Any document made by or under the authority of a federal institution that is tabled in the Senate or the House of Commons by the Government of Canada shall be tabled in both official languages.

SEE ALSO:

Motard v. Canada (Procureur général), 2016 QCCS 588 (CanLII)

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9. Rules, etc., governing practice and procedure

9. All rules, orders and regulations governing the practice or procedure in any proceedings before a federal court shall be made, printed and published in both official languages.

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10. (1) International treaties

10. (1) The Government of Canada shall take all possible measures to ensure that any treaty or convention between Canada and one or more other states is authenticated in both official languages.

10. (2) Federal-provincial agreements

10. (2) The Government of Canada has the duty to ensure that the following classes of agreements between Canada and one or more provinces are made in both official languages and that both versions are equally authoritative:

> **(a) agreements that require the authorization of Parliament or the Governor in Council to be effective;**
>
> **(b) agreements entered into with one or more provinces where English and French are declared to be the official languages of any of those provinces or where any of those provinces requests that the agreement be made in English and French; and**
>
> **(c) agreements entered into with two or more provinces where the governments of those provinces do not use the same official language.**

10. (3) Regulations

10. (3) The Governor in Council may make regulations prescribing the circumstances in which any class, specified in the regulations, of agreements that are made between Canada and one or more other states or between Canada and one or more provinces

> **(a) must be made in both official languages;**
>
> **(b) must be made available in both official languages at the time of signing or publication; or**
>
> **(c) must, on request, be translated.**

ANNOTATIONS:

Wolf v. Canada, [2002] 4 FCR 396, 2002 FCA 96 (CanLII)

[99] As mandated by subsection 10(1) of the *Official Languages Act* (R.S.C. 1985, c. 31 (4th Supp.)), the Government of Canada ensured that the *Convention* [*between Canada and the United States of America with Respect to Taxes on Income and on Capital*] was "authenticated in both official languages" of Canada. The penultimate paragraph of the Convention expressly states that the Convention was "done in the French and English languages, each text being equally authentic". The applicable rule of interpretation is, therefore, that expressed more than a century ago by J.B. Moore, *A treatise on extradition and interstate rendition*, Boston, Boston Books Co., 1891, vol. 1, no. 88, p. 100:

> Where a treaty is executed in two or more languages, those of the respective contracting parties, each text is regarded as an original, and as intended to convey the same meaning as the other.

(see Beaupré, *Interprétation de la législation bilingue*, Montréal, Wilson-Lafleur, 1986, at 94ff; *P.G.C. c. Mekies et P.G. du Québec*, [1977] C.A. 352 (Que. C.A.)).

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11. (1) Notices, advertisements and other matters that are published

11. (1) A notice, advertisement or other matter that is required or authorized by or pursuant to an Act of Parliament to be published by or under the authority of a federal institution primarily for the information of members of the public shall,

> **(a) wherever possible, be printed in one of the official languages in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that language and in the other official language in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that other language; and**
>
> **(b) where there is no publication in general circulation within a region where the matter applies that appears wholly or mainly in English or no such publication that appears wholly or mainly in French, be printed in both official languages in at least one publication in general circulation within that region.**

11. (2) Equal prominence

11. (2) Where a notice, advertisement or other matter is printed in one or more publications pursuant to subsection (1), it shall be given equal prominence in each official language.

SEE ALSO:

R. v. Saulnier (1989), 90 N.S.R. (2d) 77 (Co. Ct.) [hyperlink not available]

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12. Instruments directed to the public

12. All instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages.

ANNOTATIONS

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[278] As neither the terms “Government” nor “Legislature” is synonymous with “Legislative Assembly”, and because Hansard is a publication of the Speaker, it follows that Hansard is not covered by s. 8 [of the Northwest Territories *Official Languages Act*].

[279] The counterpart provisions in the *OLAC* [*Official Languages Act* of Canada] and OLANB [*Official Languages Act* of New Brunswick] differ from the *OLA* [of the Northwest Territories]. Section 12 of the *OLAC* refers to instruments made or issued under the authority of a “federal institution”. The *OLANB* has two similar provisions, both of which are worded more generally than the *OLA*. Section 14 refers to “Notices, advertisements and other announcements of an official nature” without mentioning their source. Section 15 relates to notices, announcements and other documents required to be published under the *OLANB* or another Act “by the Province or its institutions”. The wording of these statutes further supports the conclusion that Hansard does not fall under s. 8 of the *OLA*.

Centre québécois du droit de l’environnement v. National Energy Board, 2015 FC 192 (CanLII)

[...] In the alternative, the moving parties maintained that they could also avail themselves of section 12 of the *OLA*, which sets out that “[a]ll instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages”. However, that provision clearly does not apply in this case because the application filed by Energy East did not originate from the [National Energy] Board.

The moving parties raised this Court’s decision in *Picard v Canada (Commissioner of Patents)*, 2010 FC 86 (CanLII); that decision, however, does not support their claim. In that case, the applicant maintained that he was entitled to a French version of a patent application filed with the Commissioner of Patents of Canada. While acknowledging that a patent is “directed to or intended for the notice of the public”, Justice Tremblay-Lamer nevertheless rejected the application of section 12 of the *OLA* on the ground that patents do not originate from a federal institution, but from an inventor. The Court also explicitly stated that the Patent Office has no obligation to translate applications submitted to it (at paragraphs 48-49):

> For one thing, in that situation, an applicant for a patent would, if they wished to retain control of the application, have to understand and approve the translation done of the patent. That is in direct contradiction with the objective of the *Official Languages Act*, which is to implement the constitutional guarantee of everyone’s right to communicate with federal institutions in either official language, at their option.
>
> For another, if the inventor is required to approve the translation of their application without understanding it, the objective of the patent system, to give inventors control over their applications and place full responsibility for the resulting patent on them, would be compromised. In addition, where there was a discrepancy between the two versions of the patent, an interpretation of the patent based on the objectives of the inventor, as advocated by the Supreme Court in *Free World*, supra, would become impossible, unless it were recognized that the “original” version of the patent, the one in the language of the inventor’s application, took precedence over the translation. The effect of such recognition would be to cancel out any benefit for linguistic equality resulting from the fact that both versions of a bilingual instrument are equally authoritative, under section 13 of the *Official Languages Act*.

Those reasons are equally valid, it seems to me, in the context of an application for the construction of a pipeline system to the Board. As a result, section 12 of the *OLA* also does not apply here. The same is true for Part IV of the *OLA*, also raised by the moving parties. That part concerns communications with and services to the public. It is clear that the Board is an organization that exercises quasi-judicial functions and is not an institution that provides services. The moving parties also failed to substantiate their arguments on this point and were unable to provide any precedent in support of their claims.

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[40] In my opinion, a patent is a hybrid instrument, both private and public. Its authority derives from the approval by a public institution, the Commissioner, but its content is determined by a private person, the inventor. In exchange for disclosure of that content, the inventor obtains a right that is characterized as both a monopoly and a private property right. In the past a patent was a privilege deriving from royal favour, and today it is a title deed confirming a right created by law. […]

[43] Contrary to what the respondents argue, I am of the opinion that patents are public documents. Although the issuance of patents is now authorized by a statute and patents are issued on the conditions set out in the statute, they are nonetheless letters patent. Blackstone explained that letters patent are "open letters, literae patentes: so called, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large" (William Blackstone, *Commentaries on the Laws of England: a Facsimile of the First Edition* 1765–1769, Chicago, University of Chicago Press, 1979, vol. 2 at p. 346; emphasis added). The fact that a patent, like letters patent confirming any other royal grant, are ostensibly intended for the owner does not change the fact that they are public in nature.

[44] It is also easy to understand the importance of a patent being public. A patent is different from a title deed to movable or immovable property in that it is a monopoly, which means that it grants "the exclusive right, privilege and liberty of making, constructing and using the invention and selling it to others to be used" (*Patent Act*, section 42). It therefore creates an exception to the general principles of free commerce and even of freedom itself, under which people should be free to "make, construct and sell to others" anything in which there is no law prohibiting commerce. An individual must therefore be able to know what they are not entitled to "make, construct, use or sell", when, hypothetically, they may do that with anything that is not banned from commerce by law.

[45] However, although a patent is directed to or intended for the notice of the public, it is made or issued not by a federal institution, but by the inventor. Notwithstanding the fact that it originates in the discretionary exercise of Crown prerogative, a patent today represents recognition of a right rather than the expression of the favour of the sovereign. The role of the Commissioner of Patents is limited to ascertaining that the patent application submitted by the inventor meets the requirements laid out in *Patent Act* and the regulations made under that Act. Section 27 of the *Patent Act* gives the Commissioner no discretion in that regard: if the requirements are met, he must issue the patent (*Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45, at paragraph 144).

[46] When the Commissioner of Patents issues a patent, he confirms the inventor's right, but it is the inventor who defines the scope of their right by writing the claims. The text of a patent, including when it results from amendments made to the patent application, is proposed by the inventor, and the inventor is responsible for it. If the inventor proposes a text that is too restrictive, they will have to bear the potential loss of profits resulting from the fact that the "field" of the monopoly granted to them is too narrow; if they propose a text that is too vague, they risk having the patent subsequently found by a court to be invalid. A patent is therefore really made or issued

by the inventor, not by the Commissioner of Patents. As a result, section 12 of the *Official Languages Act* does not apply.

[47] In addition, the translation of patents by the Patent Office would lead to serious tensions between the various objectives of the Canadian patent system and the *Official Languages Act*, and this suggests to me that Parliament never contemplated that Act applying to patents.

[48] For one thing, in that situation, an applicant for a patent would, if they wished to retain control of the application, have to understand and approve the translation done of the patent. That is in direct contradiction with the objective of the *Official Languages Act*, which is to implement the constitutional guarantee of everyone's right to communicate with federal institutions in either official language, at their option.

[49] For another, if the inventor is required to approve the translation of their application without understanding it, the objective of the patent system, to give inventors control over their applications and place full responsibility for the resulting patent on them, would be compromised. In addition, where there was a discrepancy between the two versions of the patent, an interpretation of the patent based on the objectives of the inventor, as advocated by the Supreme Court in *Free World*, *supra*, would become impossible, unless it were recognized that the "original" version of the patent, the one in the language of the inventor's application, took precedence over the translation. The effect of such recognition would be to cancel out any benefit for linguistic equality resulting from the fact that both versions of a bilingual instrument are equally authoritative, under section 13 of the *Official Languages Act*.

[50] Given all these difficulties, we can draw a parallel with the reasoning of Bastarache J. and the majority of the Supreme Court in *Harvard College*, *supra*, at paragraph 167, and conclude that the fact that the *Official Languages Act* and the *Patent Act*, as they now stand, do not allow for proper handling of the translation of patents is a sign that Parliament never intended that the words "instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution" would cover patents.

SEE ALSO:

Stauffer v. R., (1981) 62 C.C.C. (2d) 44 (AB CA) [hyperlink not available]

R. v. Saulnier (1979), 50 C.C.C. (2d) 350 (NS CA) [hyperlink not available]

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13. Both versions simultaneous and equally authoritative

13. Any journal, record, Act of Parliament, instrument, document, rule, order, regulation, treaty, convention, agreement, notice, advertisement or other matter referred to in this Part that is made, enacted, printed, published or tabled in both official languages shall be made, enacted, printed, published or tabled simultaneously in both languages, and both language versions are equally authoritative.

ANNOTATIONS

R. v. Daoust, [2004] 1 S.C.R. 217, 2004 SCC 6 (CanLII)

[26] The Court has on several occasions discussed how a bilingual statute should be interpreted in cases where there is a discrepancy between the two versions of the same text. […] I would also draw attention to the two-step analysis proposed by Professor Côté in *The Interpretation of*

Legislation in Canada (3rd ed. 2000), at p. 324, for resolving discordances resulting from divergences between the two versions of a statute:

> Unless otherwise provided, differences between two official versions of the same enactment are reconciled by educing [sic] the meaning common to both. Should this prove to be impossible, or if the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained.

[27] There is, therefore, a specific procedure to be followed when interpreting bilingual statutes. The first step is to determine whether there is discordance. If the two versions are irreconcilable, we must rely on other principles: see *Côté*, *supra*, at p. 327. A purposive and contextual approach is favoured: see, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33.

[28] We must determine whether there is an ambiguity, that is, whether one or both versions of the statute are "reasonably capable of more than one meaning": *Bell ExpressVu*, *supra*, at para. 29. If there is an ambiguity in one version but not the other, the two versions must be reconciled, that is, we must look for the meaning that is common to both versions: *Côté*, *supra*, at p. 327. The common meaning is the version that is plain and not ambiguous: *Côté*, *supra*, at p. 327; see *Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at p. 863.

[29] If neither version is ambiguous, or if they both are, the common meaning is normally the narrower version: *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 669; *Pfizer Co. v. Deputy Minister of National Revenue For Customs and Excise*, [1977] 1 S.C.R. 456, at pp. 464-65. Professor Côté illustrates this point as follows, at p. 327:

> There is a third possibility: one version may have a broader meaning than another, in which case the shared meaning is the more narrow of the two.

[30] The second step is to determine whether the common or dominant meaning is, according to the ordinary rules of statutory interpretation, consistent with Parliament's intent: *Côté*, *supra*, at pp. 328-329. At this stage, the words of Lamer J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1071, are instructive:

> First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

[31] Finally, we must also bear in mind that some principles of interpretation may only be applied in cases where there is an ambiguity in an enactment. As Iacobucci J. wrote in *Bell ExpressVu*, *supra*, at para. 28: "Other principles of interpretation — such as the strict construction of penal statutes and the '*Charter* values' presumption — only receive application where there is ambiguity as to the meaning of a provision."

Frankie v. Canada (Commissioner of Corrections), [1993] 3 FCR 3, 1993 CanLII 2962 (FCA)

[52] I would also add that unlike the case in English, it is a principle of legislative drafting in the French language that specific fore-references are the exception, rather than the rule and are only used when absolutely necessary. For example the *guide canadien de réduction législative française* (permanent edition), section "Références législatives", updated January, 1993 and published by the federal Department of Justice states at page 1:

> [Translation] To refer in legislation to all or part of some other provision, the Francophone drafter uses techniques quite different from those employed by the anglophone drafter, and generally more indirect than the latter.
>
> The tendency in English drafting, even in short sections, to multiply references whether internal or otherwise may be explained by the way in which drafting techniques originating in Britain have evolved. In French drafting, references are reserved only for cases in which it is important to avoid any ambiguity. [...]

[55] It is true that section 13 of the *Official Languages Act* provides that both versions of the Act are equally authoritative. But this provision co-exists with section 12 of the *Interpretation Act* which commands that a legislative enactment must be construed in a manner "as best ensures the attainment of its objects", and also with common law rule that "when construing the terms of any provision found in a statute [courts are bound] to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act.".

Nordlandsbanken v. Ship Nor-Fisk I et al. (1993), 1993 CarswellNat 411, 39 A.C.W.S. (3d) 307, 62 F.T.R. 103 [hyperlink not available]

[18] For purposes of defining "process", variously expressed as "the process" or "any process" or "other process" (of the Court) it would have been most helpful to be able to resort to a definition promulgated in the *Interpretation Act*, R.S.C. 1985, Chap. I-21. Alas, there is no definition of "process" in that statute. It is, however, not the only interpretation statute to which one can resort. The other is the *Official Languages Act*, R.S.C. 1985, Chap. 31 (4th Supp.). By its sections 6, 7 and 13 that Act provides not only that any Act of Parliament, instrument, rule or regulation be made in both official languages, but also that "both language versions are equally authoritative". That being so, each version is an interpretation statute for the other, if not a kind of dictionary for the other where specified documents, objects or materials, are mentioned by name or specific designation or description. They are usually nouns, in effect.

[19] Thus, in sections 55 and 56 of the *Federal Court Act* the equally authoritative French-language version expresses "process" as "moyens de contrainte". The French-language term is also of generic nature, although somewhat more specific and self-explaining than the English-language term. In section 56 (analogy to provincial process) the comparisons made therein illustrate the generic nature of "process/moyens de contrainte" by expressing the specifics as examples of the general: thus - "any writs of execution or other process/les brefs de saisie-exécution ou autres moyens de contrainte". Several bilingual dictionaries have been drawn to the Court's attention, such as: Cassell's *French-English Dictionary*, MacMillan Publishing Co., New York; Jules Jéraute's *Vocabulary of Legal Terms and Phrases*, Librairie Générale de Droit et de Jurisprudence, Paris; Larousse *Dictionnaire Moderne Français-Anglais*, Paris.

[20] The English-language meanings for "moyens" and "contrainte" expressed in the above cited sources are in juridical terms, these: […]

[21] This Court makes frequent use of the *Ontario English-French Legal Lexicon*, published by the Ministry of the Attorney General of that province. The November, 1984, edition translates "process" as an "acte de procédure émanant du tribunal". What is a unifying element here is that the process emanates from the Court. Process is not that which parties put into, or file with the Court: it is that which the Court issues, or addresses, to either an enforcement officer - a sheriff, marshal or bailiff - or to the person or party who is commanded to comply with the Court's order or command. The same meaning inheres in the non-exclusive definition of "process" enacted in section 1 of the *Sheriff Act*, RSBC 1979, Chap. 386:

"process" *includes* a writ, petition, warrant or order issued under the seal of the court, a judge's summons or order, a notice, subpoena and other proceeding at law or otherwise.

(emphasis not in original text)

Although the definition ends curiously with "or otherwise" (instead, for example, with "or similar means, measures or instrumentalities", or words importing similitude, rather than difference) it surely illustrates coercive measures emanating from the Court or a judge thereof.

SEE ALSO:

R. v. S.A.C., [2008] 2 S.C.R. 675, 2008 SCC 47 (CanLII

Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539, 2005 SCC 51 (CanLII)

R. c. Mac, [2002] 1 S.C.R. 856, 2002 SCC 24 (CanLII)

Schreiber v. Canada (Attorney General), [2002] 3 S.C.R. 269, 2002 SCC 62 (CanLII)

Clarck v. Canadian National Railway Company, [1988] 2 S.C.R. 680, 1988 CanLII 18 (SCC)

The Queen v. Cie Imm. BCN Ltée, [1979] 1 S.C.R. 865, 1979 CanLII 12 (SCC)

Gravel v. Cité de St-Léonard, [1978] 1 S.C.R. 660, 1977 CanLII 9 (SCC)

The King v. Dubois, [1935] S.C.R. 378, 1935 CanLII 1 (SCC)

Canada (Attorney General) v. Trochimchuk, 2011 FCA 268 (CanLII)

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

Flota Cubana de Pesca (Cuban Fishing Fleet) v. Canada (Minister of Citizenship and Immigration), [1998] 2 FCR 303, 1997 CanLII 6387 (FCA)

Canada (Attorney General) v. Goguen, 1989 CanLII 158 (NB CA)

Motard v. Canada (Procureur général), 2016 QCCS 588 (CanLII)

Gilead Sciences, Inc. v. Canada (Health), 2016 FC 231 (CanLII)

Schmidt v. Canada (Attorney General), [2016] 3 FCR 477, 2016 FC 269 (CanLII)

Pembina County Water, Resource District v. Manitoba, 2016 FC 618 (CanLII)

Pinder v. Canada, 2015 FC 1376 (CanLII)

R. v. Trang, 2001 ABQB 106 (CanLII)

Nordlandsbanken v. Ship Nor-Fisk I et al. (1993), 62 F.T.R. 103 (FC) [hyperlink not available]

Goguen v. Revenue Canada, [1991] R.J.Q. 363 (QC SC) [hyperlink not available]

Nima v. McInnes (1988), 32 B.C.L.R. (2d) 197 (BC SC) [hyperlink not available]

R. v. Dollan (1980), 53 C.C.C. (2d) 146 (ON SC) [hyperlink not available]

A & G Inc. (Alstyle Apparel) v. Canada Border Services Agency, 2009 CanLII 28049 (CA CITT)

Laclede Chain Manufacturing Co. v. Canada (National Revenue), 1992 CanLII 4372 (CA CITT)

N.B. – This list is not exhaustive due to the great volume of decisions relating to the interpretation of bilingual legislation.

Part III – Administration of Justice

14. Official languages of federal courts

14. English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

ANNOTATIONS

Ewonde v. Canada, 2017 FCA 112 (CanLII)

[2] The appellant (or Mr. Ewonde) is an inmate serving a long sentence in a federal prison. He has commenced three actions in the Federal Court, all drafted in English. However, Mr. Ewonde is from Montreal, and French is his mother tongue.

[...]

[5] As a result, on January 25, 2016, the respondent filed motions to dismiss the appellant's actions for delay.

[6] Mr. Ewonde replied to these motions in French, claiming that he was no longer capable of adequately representing himself in English, his second language. His English skills had been supported in the past by both former counsel and his fellow inmates in his former institution in British Columbia, supports that were no longer available to him at his new institution in Ontario (see Appeal Book, Tab 6 at page 69—inmate's request dated February 6, 2016).

[7] Citing her objection under section 18 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA) to use English in the written proceedings once the actions had been commenced in that language, the respondent replied to Mr. Ewonde's request as follows:

> If the [appellant] wished for these proceedings to be conducted in French, he should have initiated these actions in that language or, at the very least, requested that they be changed for French at an earlier date. It is too late for the [appellant] to raise this issue and he should not be allowed to further delay these proceedings.
>
> (Appeal Book, Tab 7 at page 70)

[8] Following that exchange of correspondence, the Prothonotary issued Directions stating his agreement with the respondent's view. He also added that he was "not satisfied that the [appellant] is handicapped by language in responding to the [respondent's] motion" and that "[i]t is always open to him to seek assistance from other inmates." As a result, the Prothonotary directed the appellant to serve his reply to the motions within fourteen days (Appeal Book, Tab 8 at page 71).

[…]

[17] Bilingual people do not have weaker constitutional language rights than unilingual people. As this Court recently noted in Industrielle Alliance, Assurance et service financiers inc. v. Mazraani, 2017 FCA 80 (CanLII) at paragraph 10:

> Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in R. v. Beaulac, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [Beaulac]:
>
> > In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.

[18] Thus, an individual may elect to institute proceedings against the Crown in either official language, regardless of their mother tongue. An individual may also re-elect, during the course of proceedings, and the Crown will be obliged to switch languages as well, unless the Crown establishes that reasonable notice has not been given. Section 18 of the OLA reads as follows:
[…]

[23] This said, it was open to the Prothonotary to find that the respondent had not been reasonably notified that she would have to plead her motion in French—the language of the respondent's motion could not be retroactively changed by a subsequent request made by the appellant.

[24] However, it was an error to suggest that the appellant ought to continue pleading in English because he was capable of doing so alone or assisted by other inmates. The appellant's right to plead in either official language is enshrined in section 14 of the OLA, which states that "either [official language] may be used by any person in, or in any pleading in or process issuing from, any federal court." Failing to recognize a party's right to plead in the language that they have chosen amounts to an error of law.

[25] As stated above, the respondent argues that Mr. Ewonde was not prevented from filing his motion record in French (respondent's Memorandum of Fact and Law at paragraphs 25, 28). A reasonable reading of the Prothonotary's Directions does not support that assertion. On the contrary, I find that they rather discourage the appellant from filing documents in French. Once again, not only was he told that use of the English language does not constitute an impairment for him, but he was also invited to continue relying on the help of other inmates—obviously to draft his proceedings in English, as it appears quite clearly from the appellant's request (inmate's request) that he writes fluently in French.

[…]

[28] In my respectful view, here the Federal Court did not uphold its obligations under the OLA to the appellant as party or as potential affiant. This error of law requires our intervention.

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

[8] It is trite law that English and French are the official languages of Canada and have equality of status and equal rights and privileges in courts established by Parliament, including the TCC [Tax Court of Canada]. Hence, any person who appears before or submits written pleadings to a federal court has the constitutional right to use the official language of his or her choice: see section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional right is also reflected and confirmed in sections 16 and 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] The Supreme Court of Canada in *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460 at 483, 27 D.L.R. (4th) 321 recalled that the constitutional right to use the official language of one's choice in courts covered by section 133 of the *Constitution Act, 1867* applies broadly to "litigants, counsel, witnesses, judges and other judicial officers".

[10] Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. …

[11] The Supreme Court of Canada further observed:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. [Emphasis added.]
>
> *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712 at 748-749, 54 D.L.R. (4th) 577; cited in *Beaulac* at paras. 17, 34.

[12] The *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA), which falls under the privileged category of quasi-constitutional legislation (*Thibodeau v. Air Canada*, 2014 SCC 67 (CanLII), [2014] 3 S.C.R. 340 at para. 12) provides as follows at sections 14 and 15: [...]

[22] In each instance, the Judge coaxed counsel and the witnesses to use English. In conducting the proceedings, the Judge favoured English over French in order to accommodate Mr. Mazraani's limited understanding of French. This resulted in a violation of counsel Turgeon and the witnesses' official language rights. The Judge exerted subtle pressure on counsel Turgeon and the witnesses to forego their right to speak in the official language of their choice, in this case French (*Chiasson v. Chiasson*, 222 N.B.R. (2d) 233 (C.A.); [1999] N.B.J. No. 621 (QL)). Mr. Mazraani contends that the witnesses and counsel Turgeon freely consented to speak in English and that Industrielle Alliance's reliance on language rights is merely strategic. The transcript of the proceedings simply does not support such a conclusion.

[23] Mr. Mazraani also argues that no prejudice is suffered where an individual is capable of expressing him or herself in both official languages. This argument is ill-founded. A person

appearing before a federal court has the constitutional right to express him or herself in the official language of his or her choice regardless of whether he or she is bilingual. In other words, the fact of being bilingual does not extinguish one's right to speak the official language of his or her choice: *Beaulac* at paragraph 45.

[24] Moreover, despite the efforts of the Judge to have the witnesses testify in English, a significant portion of the testimony was in French due to the difficulty some witnesses had expressing themselves in English. Of particular note is the testimony of Éric Leclerc, whose testimony had significant French portions (see for example: Transcript, vol. 4 at pp. 1206, 1207 1222, 1228, 1266, 1323, 1324, 1332). Although the Judge translated some of the witnesses' French testimony into English for Mr. Mazraani, many exchanges were left untranslated. At times, Mr. Mazraani expressed his inability to understand what was happening, saying "I have to understand" (Transcript, vol. 4 at pp. 1249, 1320). Given Mr. Mazraani's earlier request for interpretation services should there be testimony in French, it follows that the fact that witnesses and counsel Turgeon addressed the Judge in French with little to no translation constituted a violation of Mr. Mazraani's official language rights (*Minister's Memorandum of Fact and Law* at para. 59).

[...]

[26] In the end, the efforts of the Judge to be "pragmatic" in finding ways around adjourning and securing interpretation services resulted not only in the violation of the official language rights of counsel Turgeon and witnesses, but also the violation of Mr. Mazraani's official language rights. It simply was not open to the Judge to seek a shortcut around the official language rights of all those involved in the proceedings. The Judge's failure to exercise his duty to ensure that the official language rights at issue were protected not only resulted in their violation, but further resulted in delays that could have otherwise been avoided by an adjournment to secure proper interpretation services. Pragmatism does not trump the duty to respect the official language rights of all in the course of judicial proceedings.

N.B. – This judgment is currently under appeal before the Supreme Court of Canada.

Szczecka v. Canada (Minister of Employment and Immigration), 1993 CanLII 9425 (FCA)

[8] [...] The documents in the disputed portfolio are in one or other of the official languages of this country. The applicant is represented by counsel acting on her behalf. It is for him to look at the evidence for or against which is available or submitted to the tribunal, to assess its impact and evidentiary force and to discuss it with his client. In this connection the rule that should be applied to the evidence contained in the portfolio is no different from that governing any other documentary evidence which counsel for the applicant may wish to present at the hearing: it will suffice if the document is in one or other of the two official languages of the country in accordance with s. 14 of the *Official Languages Act*, R.S.C. 1985, c. O-3.

[9] When during a hearing the tribunal or hearing officer refers to certain extracts or passages from a document, either for clarification or to confront a claimant with them, however, it will be necessary to have them translated by the interpreter so the claimant can participate fully in the discussions and assert his or her rights. [...]

[10] However, one certainly could not frame a rule that in order to avoid a breach of the rules of natural justice any document entered in evidence at the hearing, including information portfolios on a country, must necessarily be translated into the language of the claimant.

Beaudoin v. Canada (Minister of National Health and Welfare), [1993] 3 FCR 518, 1993 CanLII 2961 (FCA)

[22] An unrepresented party's *bona fide* request, on notice, for a hearing in the other official language must always be respected in full, and its denial amounts to a denial of natural justice, since it fetters the requesting party's ability to present a case in his or her own way.

Centre québécois du droit de l'environnement v. National Energy Board, 2015 FC 192 (CanLII)

There is no doubt that Part III of the *OLA* applies in the context of this dispute. That statute specifies the powers and duties of federal institutions with respect to official languages, and Part III concerns, more specifically, the administration of justice. Section 11 of the Act [*National Energy Board Act*, RSC 1985, c N-7] sets out that the [National Energy] Board is a court of record, and in that regard it is clearly a federal court under section 14 of the *OLA*. However, that provision stipulates that "English and French are the official languages of the federal courts", and that "either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court".

That provision is entirely consistent with section 133 of the *Constitution Act, 1867*, and sections 16 to 22 of the *Constitution Act, 1982*, which address language rights in the judicial system in Canada. Those provisions guarantee what is referred to as "optional unilingualism" at the option of the speaker: *MacDonald v City of Montréal*, 1986 CanLII 65 (SCC), [1986] 1 SCR 460, at page 496. Put differently, it is the right to use either official language in any court or in any pleading in or process issuing from any such court that is guaranteed, and not the right that the official language used will be understood by the person to whom the pleading or process is addressed: *Société des Acadiens v Association of Parents*, 1986 CanLII 66 (SCC), [1986] 1 SCR 549, pages 574-575.

Consequently, Energy East has the right to use either official language in a proceeding under section 52 of the Act, as do the moving parties. In addition, there is no Part III provision that requires the courts to translate the documents submitted in the records of that court into the other official language. Moreover, the Attorney General of Canada is required to use the official language chosen by the other party in any pleadings in the proceedings before the federal courts (*OLA*, section 18). Like this Court specified in *Lavigne v Canada (Human Resources Development)*, [1995] FCJ No 737 at paragraph 12, that obligation does not apply to the evidence:

> I am also unable to identify any legal basis for the contention that the Crown or a federal institution has an obligation to provide a party with a translation of the affidavits sworn to by its witnesses, when it is written in the official language other than that chosen by the other party. Such an obligation, insofar as it is said to arise under either the Constitution, the Charter, or the Official Languages Act, would have to result from a constitutionally enshrined guarantee, or from the wording of the Act. As noted earlier, the constitutional guarantee pertaining to the use of either official languages in court proceedings are those of the writers or issuers of written pleadings and not those of the readers thereof. There is therefore no constitutional right entitling a party to read affidavit evidence in the official language which he or she has chosen, and hence no corresponding obligation on the part of the governmental party to provide a translation.

In short, the moving parties' position seems to me to be without merit in law, and it is unsupported by Part III of the *OLA*, the case law flowing therefrom and constitutional statutes that those provisions intend to apply. In the absence of a clear legislative provision to that effect, there cannot be an obligation as onerous as that of requiring that all administrative tribunals and all courts subject to the *OLA* have all of the records submitted to them translated.

Taire v. Canada (Minister of Citizenship and Immigration), 2003 FC 877 (CanLII)

[51] With respect to language rights, the respondent points out that the rights under section 19 of the *Charter* are reiterated in the *OLA*, which provides that any person may use either English or French in, or in any pleading in or process issuing from, any federal court [see extract from the Act, attached as Schedule "A"]. The respondent also points out that the IRB [Immigration and Refugee Board] is a "federal court" within the meaning of subsection 3(2) of the *OLA*, and that the rights contained in Part III are available to individuals whether they choose to exercise them or not.

[52] The respondent notes that the hearing was conducted in English, and that pursuant to section 133 of the *Constitution Act, 1867*, subsection 19(1) of the *Charter* and section 14 of the *OLA*, counsel for the applicant chose to make his oral submissions in French. The respondent asserts that under section 15 of the *OLA*, the applicant could have requested simultaneous interpretation from French into English for this part of the hearing. The respondent notes that no such request was made, because the Refugee Division said: "If you say, well, I would prefer to hear it in English, then we may have to get a French/English interpreter in here for the purposes of submissions."

[53] In addition, the respondent stresses that the applicant could also have chosen to proceed in French and could have requested interpretation from French into English. But whatever the case, the applicant must assert her right before the proceedings are conducted so that the panel can make the necessary arrangements. In any event, the applicant clearly chose not to exercise her right to interpretation from French into English.

[54] I agree with the respondent's submissions. In my view, the applicant suffered no prejudice because of the fact that English was used at the hearing. The adverse credibility findings are due not to language, but to the content and form of the applicant's testimony. The Board members emphasized that if the applicant did not understand the questions, she should ask for clarification.

[55] Furthermore, I am satisfied that the language services guaranteed by the *OLA* and the *Constitution Act, 1982* were waived by counsel and his client. Accordingly, I reject the applicant's arguments about language rights.

SEE ALSO:

Frezza v. Lauzon, 1999 CanLII 7402 (FC)

Jonik Hospitality Group Ltd. c. Voyages et circuits touristiques Atlas Conti Inc., 1996 CarswellNat 552, 63 A.C.W.S. (3d) 16, 68 C.P.R. (3d) 99 [hyperlink not available]

Brenneur v. The Queen, 2010 TCC 610 (CanLII)

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15. (1) Hearing of witnesses in official language of choice

15. (1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

15. (2) Duty to provide simultaneous interpretation

15. (2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the

simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

15. (3) Federal court may provide simultaneous interpretation

15. (3) A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

ANNOTATIONS

Ewonde v. Canada, 2017 FCA 112 (CanLII)

[2] The appellant (or Mr. Ewonde) is an inmate serving a long sentence in a federal prison. He has commenced three actions in the Federal Court, all drafted in English. However, Mr. Ewonde is from Montreal, and French is his mother tongue.

[...]

[5] As a result, on January 25, 2016, the respondent filed motions to dismiss the appellant's actions for delay.

[6] Mr. Ewonde replied to these motions in French, claiming that he was no longer capable of adequately representing himself in English, his second language. His English skills had been supported in the past by both former counsel and his fellow inmates in his former institution in British Columbia, supports that were no longer available to him at his new institution in Ontario (see Appeal Book, Tab 6 at page 69—inmate's request dated February 6, 2016).

[7] Citing her objection under section 18 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA) to use English in the written proceedings once the actions had been commenced in that language, the respondent replied to Mr. Ewonde's request as follows:

> If the [appellant] wished for these proceedings to be conducted in French, he should have initiated these actions in that language or, at the very least, requested that they be changed for French at an earlier date. It is too late for the [appellant] to raise this issue and he should not be allowed to further delay these proceedings.
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> (Appeal Book, Tab 7 at page 70)

[8] Following that exchange of correspondence, the Prothonotary issued Directions stating his agreement with the respondent's view. He also added that he was "not satisfied that the [appellant] is handicapped by language in responding to the [respondent's] motion" and that "[i]t is always open to him to seek assistance from other inmates." As a result, the Prothonotary directed the appellant to serve his reply to the motions within fourteen days (Appeal Book, Tab 8 at page 71).

[...]

[26] It was an even more serious error on the part of the Prothonotary to suggest that the appellant ought to give evidence in a language other than the one he chose. Section 15(1) of the *OLA* imposes on the Court a positive duty "to ensure that any person giving evidence before it may be heard in the official language of his choice." Had the appellant filed a reply and motion record to the respondent's motion to dismiss, he would likely have filed an affidavit explaining his

delay. The jurisprudence is clear that he was entitled to file this affidavit in either official language, regardless of the language of the pleadings (see *Charlebois v. Saint John (City)*, 2005 SCC 74 (CanLII), [2005] 3 S.C.R. 563).

[27] The *OLA* requires more of the Courts than mere permission to appear in either official language. The *OLA* imposes positive duties on Courts to encourage and facilitate access to its services in either official language.

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

[8] It is trite law that English and French are the official languages of Canada and have equality of status and equal rights and privileges in courts established by Parliament, including the TCC [Tax Court of Canada]. Hence, any person who appears before or submits written pleadings to a federal court has the constitutional right to use the official language of his or her choice: see section 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. This constitutional right is also reflected and confirmed in sections 16 and 19 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[9] The Supreme Court of Canada in *MacDonald v. City of Montreal*, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460 at 483, 27 D.L.R. (4th) 321 recalled that the constitutional right to use the official language of one's choice in courts covered by section 133 of the *Constitution Act, 1867* applies broadly to "litigants, counsel, witnesses, judges and other judicial officers".

[10] Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. …

[11] The Supreme Court of Canada further observed:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity. [Emphasis added.]
>
> *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712 at 748-749, 54 D.L.R. (4th) 577; cited in *Beaulac* at paras. 17, 34.

[12] The *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA), which falls under the privileged category of quasi-constitutional legislation (*Thibodeau v. Air Canada*, 2014 SCC 67 (CanLII), [2014] 3 S.C.R. 340 at para. 12) provides as follows at sections 14 and 15: [...]

[13] Subsection 15(1) of the *OLA* thus establishes, *inter alia*, a positive duty on federal courts to ensure that any person giving evidence before them may be heard, without disadvantage, in the official language of his or her choice. Subsection 15(2) of the OLA further establishes a similar duty on the federal courts to ensure that simultaneous interpretation from one official language

into the other is made available for any proceeding before it where a party requests such services. In so doing, the OLA reflects that the “freedom to choose [between French and English] is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees” (*Beaulac* at para. 20).

[...]

[17] Language issues arose on the second day of the hearing when counsel Turgeon for Industrielle Alliance indicated that his first witness, being Mr. Michaud, would be testifying in French. In response, Mr. Mazraani clearly indicated that he would need an interpreter if Mr. Michaud was to testify in French (Transcript, vol. 1 at pp. 269-270):

> JUSTICE ARCHAMBAULT: Fine. So let’s start with Mr. Michaud. It’s Michaud. It’s not Comeau. It’s Michaud.
>
> MR. TURGEON: Bruno Michaud. Monsieur Bruno Michaud.
>
> JUSTICE ARCHAMBAULT: O.K. So ---
>
> MR. TURGEON: That will testify in French if you have no ---
>
> JUSTICE ARCHAMBAULT: I don’t have any problem except that the party – you don’t understand French very well?
>
> MR. MAZRAANI: No.
>
> JUSTICE ARCHAMBAULT: So ---
>
> MR. TURGEON: And I hesitate to impose the witness ---
>
> JUSTICE ARCHAMBAULT: Okay. Because ---
>
> MR. TURGEON: Well, yeah, my colleague is referring to the Exhibit E-4 – A-4 that is – that he’s speaking French.
>
> MR. JILWAN: His job application.
>
> --- (SHORT PAUSE)
>
> MR. TURGEON: And my client knows as a matter of fact that he’s speaking French.
>
> JUSTICE ARCHAMBAULT: He picked up the lowest ---
>
> MR. TURGEON: Yeah.
>
> JUSTICE ARCHAMBAULT: --- the lowest level of French.
>
> Are you uncomfortable with having this witness testify in French?
>
> MR. MAZRAANI: Of course.
>
> JUSTICE ARCHAMBAULT: Would you need -- would you need an interpreter?

MR. MAZRAANI: Of course.

JUSTICE ARCHAMBAULT: Of course what?

MR. MAZRAANI: I need an interpreter. I can't ---

JUSTICE ARCHAMBAULT: You need an interpreter.

MR. MAZRAANI: --- because this case is ---

MR. TURGEON: Okay. Let me ---

JUSTICE ARCHAMBAULT: Because I have to -- you know, I have to be fair to both parties. You know, I'm prepared to let him speak in French but then I would have to arrange for an interpreter for him.

[Emphasis added.]

[18] Upon being informed by counsel Turgeon that the witness Mr. Michaud wanted to testify in French and that one of the parties, being Mr. Mazraani, needed an interpreter, it was incumbent upon the Judge to adjourn the hearing in order to arrange for interpretation services. It was his duty to respect Mr. Michaud's choice to testify in French and Mr. Mazraani's request for an interpreter (*OLA*, subsections 15(1), (2)).

[19] Instead, the Judge granted a break for counsel Turgeon to devise a compromise. Counsel Turgeon proposed that Mr. Michaud testify in English but that he be permitted to express himself in French on technical issues, which could then be translated into English. The Judge accepted this "pragmatic" compromise. In doing so, the Judge failed to uphold his positive duty to ensure that witnesses are heard in the official language of their choice.

[20] Another violation of official language rights resulted from the Judge's treatment of another witness, Mr. Charbonneau, who had likewise expressed the desire to speak in French. Once counsel Turgeon began examining Mr. Charbonneau in French, the Judge interrupted the witness examination to request that it be conducted in English. Mr. Charbonneau replied by asking if he could respond in French. Rather than accede to this request, as required by subsection 15(1) of the *OLA,* the Judge focused on Mr. Mazraani's inability to understand French (Transcript, vol. 2 at pp. 608-609):

[Translation]

MR. TURGEON: MR. Charbonneau, can you tell us, since when are you connected to Industrielle Alliance...

JUSTICE ARCHAMBAULT: Is it possible to -- to do it in English?

MR. TURGEON: Oh, oh yeah, I'm sorry, I'm not sure ---

JUSTICE ARCHAMBAULT: Can you speak?

MR. CHARBONNEAU: Can I just say something?

JUSTICE ARCHAMBAULT: Yes.

MR. CHARBONNEAU: Yes, as a matter of fact, I am better in French …

JUSTICE ARCHAMBAULT: Yes.

MR. CHARBONNEAU: …and I am a little surprised because at work our meetings are, everything is done in French.

JUSTICE ARCHAMBAULT: M'hm.

MR. CHARBONNEAU: Can I answer in French?

JUSTICE ARCHAMBAULT: But the taxpayer …the person before us today [Mr. Mazraani] whose case…whose case is the subject of this appeal…

MR. CHARBONNEAU: Yes.

JUSTICE ARCHAMBAULT: …tells us that he has a hard time understanding French. So we are asking as much as possible to the witnesses to speak English. Are you relatively comfortable speaking English?

MR. CHARBONNEAU: Well I'll try …

[Emphasis added.]

[21] During the course of the proceedings before the TCC [Tax Court of Canada], counsel Turgeon and other witnesses were treated similarly and were denied their right to choose to speak in French because of their English language skills (see for example: Transcript, vol. 2 at p. 555 (Ms. Lambert) and Transcript, vol. 4 at pp. 1256, 1336-1337 (counsel Turgeon)). In turn, each request to speak in the official language of their choice was treated by the Judge as a request for accommodation, as opposed to the exercise of protected official language rights.

[22] In each instance, the Judge coaxed counsel and the witnesses to use English. In conducting the proceedings, the Judge favoured English over French in order to accommodate Mr. Mazraani's limited understanding of French. This resulted in a violation of counsel Turgeon and the witnesses' official language rights. The Judge exerted subtle pressure on counsel Turgeon and the witnesses to forego their right to speak in the official language of their choice, in this case French (*Chiasson v. Chiasson*, 222 N.B.R. (2d) 233 (C.A.); [1999] N.B.J. No. 621 (QL)). Mr. Mazraani contends that the witnesses and counsel Turgeon freely consented to speak in English and that Industrielle Alliance's reliance on language rights is merely strategic. The transcript of the proceedings simply does not support such a conclusion.

[23] Mr. Mazraani also argues that no prejudice is suffered where an individual is capable of expressing him or herself in both official languages. This argument is ill-founded. A person appearing before a federal court has the constitutional right to express him or herself in the official language of his or her choice regardless of whether he or she is bilingual. In other words, the fact of being bilingual does not extinguish one's right to speak the official language of his or her choice: *Beaulac* at paragraph 45.

[24] Moreover, despite the efforts of the Judge to have the witnesses testify in English, a significant portion of the testimony was in French due to the difficulty some witnesses had expressing themselves in English. Of particular note is the testimony of Éric Leclerc, whose testimony had significant French portions (see for example: Transcript, vol. 4 at pp. 1206, 1207 1222, 1228, 1266, 1323, 1324, 1332). Although the Judge translated some of the witnesses' French testimony into English for Mr. Mazraani, many exchanges were left untranslated. At times, Mr. Mazraani expressed his inability to understand what was happening, saying "I have to understand" (Transcript, vol. 4 at pp. 1249, 1320). Given Mr. Mazraani's earlier request for interpretation services should there be testimony in French, it follows that the fact that witnesses

and counsel Turgeon addressed the Judge in French with little to no translation constituted a violation of Mr. Mazraani's official language rights (*Minister's Memorandum of Fact and Law* at para. 59).

[...]

[26] In the end, the efforts of the Judge to be "pragmatic" in finding ways around adjourning and securing interpretation services resulted not only in the violation of the official language rights of counsel Turgeon and witnesses, but also the violation of Mr. Mazraani's official language rights. It simply was not open to the Judge to seek a shortcut around the official language rights of all those involved in the proceedings. The Judge's failure to exercise his duty to ensure that the official language rights at issue were protected not only resulted in their violation, but further resulted in delays that could have otherwise been avoided by an adjournment to secure proper interpretation services. Pragmatism does not trump the duty to respect the official language rights of all in the course of judicial proceedings.

N.B. – This judgment is currently under appeal before the Supreme Court of Canada.

Brahim v. Canada (Citizenship and Immigration), 2014 FC 734 (CanLII)

[7] The applicants allege that the RPD [Refugee Protection Division] made three significant errors in its decision rejecting their refugee protection claim:

a) It violated their right to a hearing in the language of their choice; […]

[10] The Court agrees with the respondent that the applicants' argumentation contains serious inaccuracies on this point. It is clear from the hearing transcript that it was the applicants' counsel himself who switched to English of his own volition, preferring to speak English during oral argument because that was the language in which his notes had been written (Certified Tribunal Record at page 712):

Perhaps I'll move straight into the… just a few references in the documentation which is, my notes, in English.

[11] The applicants were not in the least deprived of a hearing in French; rather, they waived their right to an interpreter when they consented to their counsel making his submissions in English for that part of his oral argument. The RPD was under no obligation to ask the applicants whether they wanted an interpreter at that time or to elicit from them a specific waiver of their right to an interpreter. This Cour has made it clear that a party may implicitly waive the language rights provided to it under the *Official Languages Act*, (RS (1985), c 31 (4th Supp.)) (see *Taire v Canada (Minister of Citizenship and Immigration)*, 2003 FC 877).

Taire v. Canada (Minister of Citizenship and Immigration), 2003 FC 877 (CanLII)

[44] The applicant claims that once the choice is made, the Board has to ensure that she understands the language in which the proceedings are being conducted. The applicant asserts that the breach of her rights seriously undermined her credibility and the potential assistance of counsel in this case.

[45] The respondent states that the applicant's arguments confuse the right to an interpreter, guaranteed by section 14 of the *Charter*, with the language rights set out in section 19 of the *Constitution Act, 1982* and in Part III of the *Official Languages Act* (*OLA*). [...]

[51] With respect to language rights, the respondent points out that the rights under section 19 of the *Charter* are reiterated in the *OLA*, which provides that any person may use either English or

French in, or in any pleading in or process issuing from, any federal court [see extract from the Act, attached as Schedule "A"]. The respondent also points out that the IRB is a "federal court" within the meaning of subsection 3(2) of the *OLA*, and that the rights contained in Part III are available to individuals whether they choose to exercise them or not.

[52] The respondent notes that the hearing was conducted in English, and that pursuant to section 133 of the *Constitution Act, 1867*, subsection 19(1) of the *Charter* and section 14 of the *OLA*, counsel for the applicant chose to make his oral submissions in French. The respondent asserts that under section 15 of the *OLA*, the applicant could have requested simultaneous interpretation from French into English for this part of the hearing. The respondent notes that no such request was made, because the Refugee Division said: "If you say, well, I would prefer to hear it in English, then we may have to get a French/English interpreter in here for the purposes of submissions."

[53] In addition, the respondent stresses that the applicant could also have chosen to proceed in French and could have requested interpretation from French into English. But whatever the case, the applicant must assert her right before the proceedings are conducted so that the panel can make the necessary arrangements. In any event, the applicant clearly chose not to exercise her right to interpretation from French into English.

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 1272, [1995] F.C.J. No. 1629, 106 F.T.R. 308, 59 A.C.W.S. (3d) 1074 [hyperlink not available]

[7] Federal Court Rule 302.1 deals with the language of documents for Court purposes. It states that no document shall be used for court purposes unless it is in French or English or it has been translated and is accompanied by an affidavit attesting to the accuracy of the translation. This rule applies to pleadings, applications, affidavits, and documents introduced into evidence. Federal Court Rule 356 provides for simultaneous translation of hearings in Court. This is in accordance with subsection 15(2) of the *Official Languages Act* which imposes a duty to provide simultaneous translation at the request of a party. The simultaneous interpretation from one official language to the other of hearings in Court, includes evidence given or taken or arguments presented at such hearing. The principle underlying the interests protected by the right to interpreter assistance is that of linguistic understanding.

[8] The *Official Languages Act* and the Rules do not require that this Court provide translations of documents in either official language used for court purposes. The applicant will be entitled to simultaneous interpretation of the hearing of his application for judicial review on filing a written request with the administrator of the Court.

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 239, [1995] F.C.J. No. 737, 55 A.C.W.S. (3d) 735, 6 W.D.C.P. (2d) 266, 96 F.T.R. 68 [hyperlink not available]

[12] I should also add that construing the *Official Languages Act* so as to compel Crown to adduce evidence in the official language chosen by the other party would give rise to a construction that is inconsistent with the rights of witnesses who also have the constitutionally guaranteed right to testify in the official language of their choice under both section 133 of the *Constitution Act, 1867*, and section 19 of the *Charter*. This right is reiterated and supplemented by subsection 15(1) of the *Official Languages Act*, and it seems clear that the legislator would not have given witnesses the right to testify in the official language of their choice while, at the same time, providing for the right of litigants to have this same testimony uttered in the official language of their choice.

SEE ALSO:

R. v. Singh, 2016 ONSC 3688 (CanLII)

Diallo v. Canada (Minister of Citizenship and Immigration), 2004 FC 1450 (CanLII)

Brenneur v. The Queen, 2010 TCC 610 (CanLII)

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16. (1) Duty to ensure understanding without an interpreter

16. (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

> **(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;**
>
> **(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and**
>
> **(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.**

16. (2) Adjudicative functions

16. (2) For greater certainty, subsection (1) applies to a federal court only in relation to its adjudicative functions.

16. (3) Limitation

16. (3) No federal court, other than the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, is required to comply with subsection (1) until five years after that subsection comes into force.

R.S., 1985, c. 31 (4th Supp.), s. 16; 2002, c. 8, s. 155.

ANNOTATIONS

Syndicat des travailleurs et travailleuses des postes v. Canada (Procureur Général), 2011 FC 1207 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[10] First, the Union intends to raise the argument that the ministerial decision to appoint a unilingual Anglophone judge, as arbitrator for final offer, is incorrect or unreasonable in that it completely disregards the quasi-constitutional requirement that every federal court, other than the Supreme Court of Canada, has a duty of bilingualism under the *Official Languages Act*, RSC 1985, c. 31 (4th supp.) (OLA). In fact, the Union intends to submit that the arbitrator appointed under section 8 of the Act [*Restoring Mail Delivery for Canadians Act*, SC 2011, c 17] is a "federal institution" and a "federal court" within the meaning of subsection 3(2) of the *OLA*. Subsection 16(1) of the *OLA* requires every federal court to hear proceedings in both official languages, without the assistance of an interpreter, where the parties have opted to have the proceedings conducted in both languages, which is the wish of the Union in this case, as it would like to have

some French-speaking witnesses testify and would like to be represented by counsel who is also French-speaking.

[…]

[18] From a language rights perspective, there is certainly an issue of irreparable harm in this case. The Union is in fact placed at a disadvantage by having to proceed with arbitration before Arbitrator Osborne, who is apparently a unilingual Anglophone, in a language that was clearly not of its choosing, especially given the fact that there will be no practical way for the parties and the Court to later verify whether the translation provided by the interpreter at the hearing had been accurate at all times. Thus, when the Union calls Francophone witnesses, the arbitrator will have to hear their testimony with the help of simultaneous translation, while the transcript will be written in French. In addition, the Union's lead counsel argues that although he can speak English, the Union is placed at a disadvantage by the fact that he must argue the case before an arbitrator in a language that is not his own. In the event that the Court was to allow the application for judicial review, I am of the opinion that it would then result in a harm that is not quantifiable. We would then be looking at a violation of language rights, therefore of fundamental rights, for which no accommodation exists if, as the Union argues, section 16 of the *OLA* applies.

SEE ALSO:

Arrachch v. Canada (Minister of Citizenship and Immigration), 2006 FC 999 (CanLII)

Taire v. Canada (Minister of Citizenship and Immigration), 2003 FC 877 (CanLII)

Belair v. Canada (Solicitor General), 2000 CanLII 14967 (FC)

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17. (1) Authority to make implementing rules

17. (1) The Governor in Council may make such rules governing the procedure in proceedings before any federal court, other than the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, including rules respecting the giving of notice, that the Governor in Council deems necessary to enable that federal court to comply with sections 15 and 16 in the exercise of any of its powers or duties.

17. (2) Supreme Court, Federal Court of Appeal, Federal Court and Tax Court

17. (2) Subject to the approval of the Governor in Council, the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada may make any rules governing the procedure in their own proceedings, including rules respecting the giving of notice, that they deem necessary to enable themselves to comply with sections 15 and 16 in the exercise of any of their powers or duties.

R.S., 1985, c. 31 (4th Supp.), s. 17; 2002, c. 8, s. 156.

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18. Language of civil proceedings where Her Majesty is a party

18. Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,

(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and

(b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

ANNOTATIONS

Charlebois v. Saint John (City), [2005] 3 SCR 563, 2005 SCC 74 (CanLII)

[4] Mr. Charlebois's objection raised two issues:

[...]

> [2] What is the scope of the obligation under s. 22 [of the *Official Languages Act* of New Brunswick]? Must the party provide a translation of quotes from legal decisions included in its pleadings? Must the party provide a translation of the evidence?

[7] The second issue can be readily disposed of. I agree with Bastarache J. that the Court of Appeal was correct in holding that "oral or written pleadings" do not include evidence tendered in the course of the proceeding. Nor does s. 22 create an obligation to translate case law cited or incorporated in a book of authorities.

N.B. – Although this judgment deals with the scope of s. 22 of the New Brunswick *Official Languages Act*, the above excerpt is reproduced due to the similar wording of s. 18 of the *Official Languages Act* of Canada.

Ewonde v. Canada, 2017 FCA 112 (CanLII)

[2] The appellant (or Mr. Ewonde) is an inmate serving a long sentence in a federal prison. He has commenced three actions in the Federal Court, all drafted in English. However, Mr. Ewonde is from Montreal, and French is his mother tongue.

[...]

[5] As a result, on January 25, 2016, the respondent filed motions to dismiss the appellant's actions for delay.

[6] Mr. Ewonde replied to these motions in French, claiming that he was no longer capable of adequately representing himself in English, his second language. His English skills had been supported in the past by both former counsel and his fellow inmates in his former institution in British Columbia, supports that were no longer available to him at his new institution in Ontario (see Appeal Book, Tab 6 at page 69—inmate's request dated February 6, 2016).

[7] Citing her objection under section 18 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA) to use English in the written proceedings once the actions had been commenced in that language, the respondent replied to Mr. Ewonde's request as follows:

> If the [appellant] wished for these proceedings to be conducted in French, he should have initiated these actions in that language or, at the very least, requested that they be changed for French at an earlier date. It is too late for the [appellant] to raise this issue and he should not be allowed to further delay these proceedings.

(Appeal Book, Tab 7 at page 70)

[8] Following that exchange of correspondence, the Prothonotary issued Directions stating his agreement with the respondent's view. He also added that he was "not satisfied that the [appellant] is handicapped by language in responding to the [respondent's] motion" and that "[i]t is always open to him to seek assistance from other inmates." As a result, the Prothonotary directed the appellant to serve his reply to the motions within fourteen days (Appeal Book, Tab 8 at page 71).

[…]

[17] Bilingual people do not have weaker constitutional language rights than unilingual people. As this Court recently noted in *Industrielle Alliance, Assurance et service financiers inc. v. Mazraani*, 2017 FCA 80 (CanLII) at paragraph 10:

> Significantly, a person's ability to express him or herself in both official languages does not impact such person's constitutional right to choose either French or English in the context of court proceedings. One's ability to speak both official languages is "irrelevant". In the words of the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193 at paragraph 45 [*Beaulac*]:
>
> > In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity.

[18] Thus, an individual may elect to institute proceedings against the Crown in either official language, regardless of their mother tongue. An individual may also re-elect, during the course of proceedings, and the Crown will be obliged to switch languages as well, unless the Crown establishes that reasonable notice has not been given. Section 18 of the OLA reads as follows:
[…]

[20] As I am of the view that the official language issue was in front of the Judge, I now turn my mind to the Prothonotary's Directions.

[21] The Directions, as drafted, lead me to the conclusion that the Prothonotary accepted Mr. Ewonde's letter of request to continue the proceedings in French as a proper motion. He could have instructed Mr. Ewonde to serve and file proper motions for orders disposing of the language issue that he was raising, but he did not.

[22] This observation leads to one particular comment: directions are not the proper form to dispose of motions (*Fabrikant v. Canada*, 2015 FCA 53 (CanLII), [2015] F.C.J. no. 243 (QL), at paragraph 9). Orders should have been issued. It appears from the wording of the Directions that the Prothonotary was in effect disposing of the language issue, opting to simply direct the appellant to file his motion records in reply to the respondent's motions to dismiss.

[23] This said, it was open to the Prothonotary to find that the respondent had not been reasonably notified that she would have to plead her motion in French—the language of the respondent's motion could not be retroactively changed by a subsequent request made by the appellant.

[...]

[28] In my respectful view, here the Federal Court did not uphold its obligations under the OLA to the appellant as party or as potential affiant. This error of law requires our intervention.

Industrielle Alliance, Assurance et services financiers inc. v. Mazraani, 2017 FCA 80 (CanLII)

[16] The appeal before the TCC [Tax Court of Canada] was conducted pursuant to subsection 18.15(3) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which directs the TCC to conduct the appeal "as informally and expeditiously as the circumstances and considerations of fairness permit". Mr. Mazraani, who was self-represented before the TCC, submitted his notice of appeal in English. The Minister, in accordance with section 18 of the OLA, submitted her reply in English. Industrielle Alliance, the employer and an intervenor before the TCC, submitted its notice of intervention in French.

N.B. – This judgment is currently under appeal before the Supreme Court of Canada.

Centre québécois du droit de l'environnement v. National Energy Board, 2015 FC 192 (CanLII)

Consequently, Energy East has the right to use either official language in a proceeding under section 52 of the Act [*National Energy Board Act*, RSC 1985, c N-7], as do the moving parties. In addition, there is no Part III provision that requires the courts to translate the documents submitted in the records of that court into the other official language. Moreover, the Attorney General of Canada is required to use the official language chosen by the other party in any pleadings in the proceedings before the federal courts (*OLA*, section 18). Like this Court specified in *Lavigne v Canada (Human Resources Development)*, [1995] FCJ No 737 at paragraph 12, that obligation does not apply to the evidence:

> I am also unable to identify any legal basis for the contention that the Crown or a federal institution has an obligation to provide a party with a translation of the affidavits sworn to by its witnesses, when it is written in the official language other than that chosen by the other party. Such an obligation, insofar as it is said to arise under either the Constitution, the Charter, or the Official Languages Act, would have to result from a constitutionally enshrined guarantee, or from the wording of the Act. As noted earlier, the constitutional guarantee pertaining to the use of either official languages in court proceedings are those of the writers or issuers of written pleadings and not those of the readers thereof. There is therefore no constitutional right entitling a party to read affidavit evidence in the official language which he or she has chosen, and hence no corresponding obligation on the part of the governmental party to provide a translation.

In short, the moving parties' position seems to me to be without merit in law, and it is unsupported by Part III of the *OLA*, the case law flowing therefrom and constitutional statutes that those provisions intend to apply. In the absence of a clear legislative provision to that effect, there cannot be an obligation as onerous as that of requiring that all administrative tribunals and all courts subject to the *OLA* have all of the records submitted to them translated. [...]

The Information Commissioner of Canada v. Public Works, 1995 CarswellNat 1900, [1995] F.C.J. No. 1796, 56 A.C.W.S. (3d) 240, 6 W.D.C.P. (2d) 318, 99 F.T.R. 269 [hyperlink not available]

I advised Mr. Brunet when he appeared before me that he was abusing his position and he replied that he relied on section 133 of the *Constitution Act, 1867* (*British North America Act, 1867*) R.S.C. 1985, No. 5. There is no doubt that both French and English are official languages of this country but the provisions of the *Official Languages Act* should prevail in circumstances such as these (p. 3). The applicable section of the Act reads as follows:

> 18. Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,

(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and

(b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

It is clear to me that Her Majesty's institutions are to be considered bilingual. In this particular case the official language chosen by the complainant was English. The Information Commissioner as well as ministerial departments from which information was being sought had already chosen English to be the language of pleadings as well, I assume the language of as debate in these matters. May I underline most forcefully subsection 18(b) of the Act where it is written "the institution concerned shall use such official language as is reasonable having regard to the circumstances".

The Information Commissioner should be represented by counsel competent in the language chosen by the other party and in this case English would have been reasonable having regard to the circumstances. [...]

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 239, [1995] F.C.J. No. 737, 55 A.C.W.S. (3d) 735, 6 W.D.C.P. (2d) 266, 96 F.T.R. 68 [hyperlink not available]

[7] This provision is not ambiguous insofar as its application to the present matter is concerned. The respondent is required to use the official language used by the other party in oral or written pleadings in the proceedings; or in *les plaidoires ou les actes de la procédure*, as is stated in the French text of s. 18. Whatever construction one may wish to give to the term “pleadings” or “*plaidoiries*”, it does not include evidence tendered in the course of a proceeding. [...]

[8] It follows that testimony by way of affidavit does not form part of the “pleadings” or “*les plaidoiries*” or “*les actes de procédure*” within the meaning of s. 18 of the *Official Languages Act* and hence the respondents are subjected to no linguistic obligations with regard thereto. By parity of reasoning, the same extends to the documents annexed to these affidavits by way of exhibits.

[9] This conclusion otherwise derived from the clear and unambiguous wording of section 18 is entirely consistent with the constitutional linguistic guarantees pertaining to the use of either official languages in judicial proceedings. Section 133 of the *Constitution Act, 1867*, and subsection 19(1) of the *Charter* both guarantee the right of a litigant to use either official languages in proceedings in any courts established by Parliament. [...]

[11] Section 18 of the *Official Languages Act* enhances this constitutionally enshrined right to express oneself in the official language of one’s choice in court proceedings by casting upon federal institutions the further obligation to use, in oral or written pleadings, the official language chosen by the other party, thereby creating a right for the opposing party not only to speak or write in the official language of his choice, but to hear and read the pleadings emanating from the governmental party in that language. While this enhancement is substantial, it does not go beyond what is stated in s. 18, and there is no constitutional basis upon which the term “pleadings” or its French equivalents could be given a meaning contrary to what is commonly and juridically understood.

[...]

[14] As to the *Official Languages Act*, while it enhances the constitutionally guaranteed right of a party to the extent noted above, it does not do so with respect to documents drafted in the other

official language to which section 18 does not apply. The only exception is that specifically provided for in section 19 pertaining to preprinted judicial forms used in proceedings before the court. Those are required to be printed in both official languages and the details added to such forms, when in an official language other than that chosen by the party, are to be translated forthwith upon request. Otherwise, there is no obligation under the *Official Languages Act* for the respondents to translate written material.

[15] I would note before concluding this aspect of the analysis that there is no suggestion here that the respondents have chosen their witnesses by reference to their language with the view of impeding the advancement of the applicant's case. The witnesses are either persons against whom specific allegations have been made by the applicant in support of his application, or persons who are the most knowledgeable of the facts being deposed to. Courts would obviously take a dim view on any attempt on the part of the Crown or a federal institution to gain a strategic advantage by purposefully using evidence in the other official language when equally adequate or better evidence was available in the official language chosen by the private litigant.

SEE ALSO:

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74 (CanLII)

Lavigne v. Canada Post Corporation, 2009 QCCA 776 (CanLII)

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC SC)

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 1272, [1995] F.C.J. No. 1629, 106 F.T.R. 308, 59 A.C.W.S. (3d) 1074 [hyperlink not available]

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19. (1) Bilingual forms

19. (1) The pre-printed portion of any form that is used in proceedings before a federal court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages.

19. (2) Particular details

19. (2) The particular details that are added to a form referred to in subsection (1) may be set out in either official language but, where the details are set out in only one official language, it shall be clearly indicated on the form that a translation of the details into the other official language may be obtained, and, if a request for a translation is made, a translation shall be made available forthwith by the party that served the form.

ANNOTATIONS

Lavigne v. Canada (Human Resources Development), 1995 CarswellNat 239, [1995] F.C.J. No. 737, 55 A.C.W.S. (3d) 735, 6 W.D.C.P. (2d) 266, 96 F.T.R. 68 [hyperlink not available]

[14] As to the *Official Languages Act*, while it enhances the constitutionally guaranteed right of a party to the extent noted above, it does not do so with respect to documents drafted in the other official language to which section 18 does not apply. The only exception is that specifically provided for in section 19 pertaining to preprinted judicial forms used in proceedings before the court. Those are required to be printed in both official languages and the details added to such forms, when in an official language other than that chosen by the party, are to be translated

forthwith upon request. Otherwise, there is no obligation under the *Official Languages Act* for the respondents to translate written material.

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20. (1) Decisions, orders and judgments that must be made available simultaneously

20. (1) Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where

> **(a) the decision, order or judgment determines a question of law of general public interest or importance; or**
>
> **(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.**

20. (2) Other decisions, orders and judgments

20. (2) Where

> **(a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or**
>
> **(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance, the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.**

20. (3) Oral rendition of decisions not affected

20. (3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in only one of the official languages, of any decision, order or judgment or any reasons given therefor.

20. (4) Decisions not invalidated

20. (4) No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.

ANNOTATIONS

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 FCR 212, 1999 CanLII 9386 (FCA)

[1] This appeal from a judgment of the Trial Division has to do with the scope of the duty imposed on a "federal board, commission or other tribunal", such as the Immigration Appeal Board (the Board or the respondent) to translate its decisions into either of Canada's two official languages.

The case turns on section 20 of the *Official Languages Act* (the *OLA*); but it assumes that the Court will first rule on the scope of the provisions of Part X [sections 76 to 81] of the *OLA* and on this Court's jurisdiction to hear the application for judicial review filed by the appellant. […].

[57] The Motions Judge then concluded [at page 613]:

> In my view, the terms of section 20 of the *OLA* are clear. They require all federal courts, including the respondent, to issue their decisions, orders and judgments in both official languages at the earliest possible time in most cases or simultaneously in the cases provided for in paragraph 20(1)(a), unless this would be seriously prejudicial to the public or result in injustice or hardship to any party, and in paragraph 20(1)(b).

[58] The Motions Judge then considered whether the Board had performed its duty under section 20 of the *OLA*. He concluded [at page 614]:

> In my view, the respondent is not discharging the duty provided for in section 20 of the *OLA*. The on-request translation policy does not meet the "earliest possible time" requirement, since it means that most decisions will never be issued in the other official language. If Parliament had wanted federal courts to have an on-request translation policy, it could have so specified.

[59] The analysis of section 20 of the *OLA* and the conclusion reached by it appear to the Court to be beyond question.

[…]

[61] The Court has no hesitation in answering the first three conditions in the affirmative. Section 20 of the *OLA* requires the Board to render its decisions in both official languages according to the procedure laid down in that section. The appellant asked to be given the Board's decisions by applying to the Board's translation section. His request was denied on the ground that the decisions were not available in the other official language.

[...]

[70] In his report titled *The Equitable Use of English and French Before Federal Courts and Administrative Tribunals Exercising Quasi-judicial Powers* mentioned above the Commissioner of Official Languages dealt with decisions rendered in the past by administrative tribunals. He acknowledged the scope of section 20 of the *OLA*, but also noted that some of the earlier decisions rendered by the respondent could have no value as precedents. It is worth setting out a part of the comments and recommendations of the Commissioner regarding the language of decisions:

(D) Language of Decisions

As our study has pointed out, it is clearly important that judgments and decisions of federal courts and quasi-judicial tribunals which have jurisprudential value or policy significance be routinely available to the public in both official languages. The present scope of Section 20 of the Act is more than sufficient to meet this requirement. Indeed, Section 20 appears so broad as to require the issuance in both official languages of decisions which simply apply well-established law to a set of established facts, in other words, decisions of no particular significance with respect to evolving policy or legal principles.

The present scope of Section 20 seems to place an onerous burden upon some quasi-judicial tribunals without advancing any recognizable policy objective. Even a court of record, such as the Tax Court of Canada, appears to be currently unable to issue every decision of the court in both official languages, although all judgments of policy and legal significance are routinely available in

both official languages, as well as those arising out of proceedings where both official languages were used. It seems reasonable that a review take place of the policy reasons which may support the necessity to issue, in the other official language, the purely factually bound decisions arising out of strictly unilingual proceedings. Of course, requests by an individual with a relevant interest for a specific decision should continue to be accommodated, as would appear to be the present policy of the various tribunals reviewed in the course of this study.

Recommendation number six

The Commissioner therefore recommends that the federal Department of Justice review the appropriateness of the current scope of Subsection 20(2)(a) of the Official Languages Act, insofar as it requires the routine issuance in both official languages of decisions of no jurisprudential value or policy significance.

Recommendation number seven

The Commissioner further recommends that, should no significant policy justify the current scope of Subsection 20(2)(a) of the Official Languages Act, the federal Department of Justice consider the possibility of amending the Official Languages Act in order to accord a power of regulation to the Governor in Council to determine which tribunals, if any, should be exempted from the duty to issue in both official languages factually bound decisions of no jurisprudential or policy significance arising out of strictly unilingual proceedings and to establish appropriate categories of decisions accordingly. The criteria for such an exemption should be clearly defined.

[71]The appellant further acknowledged that the earlier decisions rendered by the respondent from its creation to the date the originating motion was filed, September 17, 1996, do not all have value as precedents. The issuing of a *mandamus* order that would apply to all earlier decisions would therefore not satisfy the appellant's objectives, as he would only be concerned with consulting those which have such value. Issuing a *mandamus* order covering the entire scope of section 20 of the *OLA* would thus not be justified, since the money spent on translation services would have no practical result. Further, as indicated in the record, there is no question as to the respondent's good faith. From the outset, it has made every effort to co-operate in the investigation by the Commissioner of Official Languages and has complied promptly with the latter's recommendations.

[72] The difficulty in the case at bar is to determine which of the decisions rendered by the respondent have value as precedents and to ensure that those which do are available to researchers and the public in both official languages. That is the true purpose of the proceedings at bar, and this can ultimately only be achieved if the respondent develops relevant administrative standards, subject to approval by the intervener, to resolve this dispute in keeping with the aims of the *OLA*.

[73] In the circumstances, in view of the practical effect which the granting of a *mandamus* would have, especially on the thousands of decisions which there is no interest in translating, and bearing in mind the balance of convenience, we feel that it would not be advisable to make a mandamus order for the past.

Farah v. Canada (Citizenship and Immigration), 2017 FC 292 (CanLII)

[38] Following the hearing in this matter, I issued a Direction to the parties, informing them that the Court was considering the application of s. 20(1)(a) of the *Official Languages Act*, RSC 1985, c. 31 (4th Supp) [the Act] to the issuance of the decision in this matter. I directed that each of the parties serve and file any submissions the party may wish to make on the potential application of s. 20(2)(b) of the Act. The Respondent did not make any such submissions. The Applicant did make submissions, which are addressed below.

[39] Section 20(1)(a) of the Act provides that any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where the decision, order or judgment determines a question of law of general public interest or importance. However, pursuant to s. 20(2)(b) of the Act, where the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance, it shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.

[40] While I consider the question certified in this matter to be a question of law of general public interest or importance, I am persuaded by the Applicant's submissions that he would suffer hardship or injustice if the issuance of this decision was delayed to allow for translation. Mr. Farah explains that he is now in the process of meeting with the Canada Border Services Agency to prepare for removal, that he is preparing his Application Record in an application for leave and judicial review of the negative PRRA [Pre-Removal Risk Assessment] decision, and that he may imminently be moving for a stay of his removal. He refers to stress and psychological hardship due to the uncertainty of his situation, which would be relieved somewhat by knowing the outcome of this matter. I find that it would represent an injustice and hardship to require Mr. Farah to pursue the remedies to which he refers, without knowing the result of the present application for judicial review, when the Court has made its decision in this matter. Therefore, this decision is being released in English, with the French translation to follow, in accordance with s. 20(2)(b) of the Act.

Canada (Information Commissioner) v. Canada (Attorney General), 2015 FC 405 (CanLII)

[67] Finally, given the importance of the *Access to Information Act*, it could be said that these reasons should be delivered simultaneously in both English and French in accordance with s 20 of the *Official Languages Act*. However, the parties all asked that one version be delivered first, in whichever language that might be, rather than having to wait for the translation. The reason is that a delay would be prejudicial to the public interest as there is a backlog of complaints.

Y.Z. v. Canada (Citizenship and Immigration), [2016] 1 FCR 575, 2015 FC 892 (CanLII)

[173] In view of the foregoing reasons, I am prepared to grant the Applicants some of the relief they have requested. In particular:

1. The Court declares that paragraph 110(2)(d.1) of the *IRPA* [*Immigration and Refugee Protection Act*, SC 2001, c 27] is inconsistent with subsection 15(1) of the *Charter* and has no force and effect pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; and

2. The decisions of the RAD [Refugee Appeal Division] in RAD File Nos. TB3-02838, TB4-00950 and TB4-00951 are set aside, and G.S.'s and C.S.'s appeals are returned to the RAD for re‑determination.

[...]

[175] I will also not suspend the declaration of invalidity as requested by the Respondents. In *Schachter v Canada*, 1992 CanLII 74 (SCC), [1992] 2 SCR 679 at 719, 93 DLR (4th) 1 [*Schachter*], the Supreme Court suggested that suspending a declaration of invalidity is appropriate when an immediate declaration would pose a danger to the public, threaten the rule of law, or deprive deserving individuals of benefits without actually helping the people whose rights were violated. None of those criteria apply in the present case.

[176] Occasionally though, the Supreme Court has suspended a declaration of invalidity where the *Schachter* conditions were arguably not present in order to give the legislature time to design an appropriate remedy (see, e.g., *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 at paragraphs 116-121, 173 DLR (4th) 1, L'Heureux-Dubé J, concurring; Peter W Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Toronto: Thomson Reuters, 2007) (loose-leaf updated to 2014), ch 40 at 40.1(d)). That rationale is most persuasive, however, when there are many ways the legislature could conceivably fix the problem. That is not the case here. An immediate declaration of invalidity may put some increased pressure on the resources of the RAD and may delay some removals, but every day that paragraph 110(2)(d.1) is in force is a day that claimants from DCOs [designated countries of origin] are not "equal before and under the law" and will be deprived of their rights "to the equal protection and equal benefit of the law without discrimination." Anyone deported in the meantime may be returned to a persecutory situation because they could not appeal an erroneous RPD decision to the RAD. Rectifying that inequality as soon as possible outweighs any administrative burdens to the government.

[177] For the same reason, releasing this decision simultaneously in both official languages would "occasion a delay prejudicial to the public interest" (*Official Languages Act*, RSC 1985, c 31 (4th Supp), s 20(2)(b) [*OLA*]). I recognize, however, that insofar as this decision "determines a question of law of general public interest or importance" (*OLA*, s 20(1)(a)), it will be translated at the earliest possible time.

Hussein v. Canada (Minister of Citizenship and Immigration), IMM-10939-12 (March 20, 2013) [hyperlink not available]

[1] The Applicants are failed refugee claimants. They are seeking leave and judicial review of the decision of the RPD [Refugee Protection Division] dated September 21, 2013. At the specific request of the Applicants, the RPD hearing was conducted and its decision thus rendered in the French language. Their counsel before the RPD was fluent in the French language.

[2] The Applicants have now retained Mr. Hamalengwa and have filed an affidavit swearing that "for appeal purposes, we have decided to use an English speaking lawyer and we instructed him to get the decision in the English language so that we could fairly prosecute the appeal in English." In the Notice of Application they have requested that the hearing in this court, should leave be granted, be in the English language. It is noted that nowhere is there any evidence that Mr. Hamalengwa cannot read and understand the RPD decision. It is further noted that Mr. Hamalengwa has filed a memorandum of argument on his clients' behalf setting out the alleged errors and alleged unreasonable aspects of the decision notwithstanding the suggestion that an English language translation is required in order to "fairly prosecute" the application.

[3] It is the Applicants' choice and right to have the application heard in the English language if leave is granted. That will occur. This court often hears matters in one of Canada's official languages when the decision under review is in the other official language. A bilingual judge is assigned to hear the application and a bilingual judge will determine whether leave is to be granted.

[4] If the counsel for the Applicants requires that the decision or any other material in the Application Record be in English then the burden to obtain a translation is upon the Applicants and their counsel, it is not on the RPD or this court given that the Applicants chose to have their refugee hearing in the French language.

Pelaez v. Canada (Citizenship and Immigration), 2007 FC 35 (CanLII)

[18] In my opinion it is also important to note that the *Official Languages Act*, R.S.C. 1985, c. 31, explicitly permits any federal court to render oral decisions in either official language. Section 20 of the *Official Languages Act* reads as follows: […]

Although the IRB [Immigration and Refugee Board] is a federal tribunal and not a federal court, in my opinion the *Official Languages Act* is still persuasive in determining the IRB's obligations in what concerns Canada's official languages. This being said, as the RPD complied with the *Official Languages Act* it cannot be said to have erred in law by rendering its decision orally in French with an English decision to follow, even though the Applicant requested his proceeding be conducted in English. In any event, it must be reiterated that, in the case at hand, counsel for the Applicant agreed to have the RPD [Refugee Protection Division] render its decision orally in French with an English version to follow.

SEE ALSO:

Alani v. Canada (Prime Minister), 2016 FC 1139 (CanLII)

Sztern v. Canada (Attorney General), 2010 FC 181 (CanLII)

Chanel S. de R.L. v. Genève accessoires Inc., 2008 FC 87 (CanLII) [judgment available in French only]

Frezza v. Lauzon, 1999 CanLII 7402 (FC)

Part IV – Communications with and Services to the Public

Communications and Services

21. Rights relating to language of communication

21. Any member of the public in Canada has the right to communicate with and to receive available services from federal institutions in accordance with this Part.

ANNOTATIONS

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[2] It is common ground in this appeal that the rights being claimed are of constitutional origin, since the relevant provisions of the *OLA* implement the constitutional right of any member of the public to be served by federal institutions in the official language of his or her choice *(Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773). The Chief Justice stated the following constitutional question:

> Do s. 20(1) of the *Canadian Charter of Rights and Freedoms* and Part IV of the *Official Languages Act*, R.S.C. 1985, c. 31, read in light of the principle of equality set out in s. 16(1) of the *Charter*, require Industry Canada to provide services of equal quality in both official languages?

[3] The parties agree, correctly so in my opinion, that the provisions referred to in this constitutional question create a constitutional duty to make services "of equal quality in both official languages" available to the public. The answer to the constitutional question is therefore clearly yes. What is in issue in this appeal is the scope of this concept of "services of equal quality".

[...]

[23] It is clear simply from the wording of the enactment that the distinction between Part IV and Part VII is important. It is also clear from the evidence that what the appellants DesRochers and CALDECH sought in their application was in essence, first, to show that there was a real need for economic development services in the French-speaking community and, second, to convince the court that the government had a positive duty to take concrete measures to support the development of the French-speaking community in Simcoe County in order to counter the increasing rate of assimilation. As we will see, the question whether the duties under Part IV were fulfilled is much narrower than the question before the Federal Court in the original application. What must be done to answer it is essentially to conduct a comparative analysis in order to determine whether the services *provided* by the federal institution in each official language community are of equal quality. I will now review the decisions of the courts below in this case.

[...]

[45] As I stated in the introduction to these reasons, the parties agree that as a general rule, the principle — provided for in s. 20(1) of the *Charter* and implemented in Part IV of the *OLA* — that members of the public are entitled to linguistic equality when receiving services entails an obligation to make services "of equal quality in both official languages" available to the public. The parties disagree, however, on what is meant by "equal quality".

[...]

[51] It seems clear to me that the respondents are correct to say that the principle under s. 20(1) of the *Charter* and Part IV of the *OLA* of linguistic equality in the provision of government services involves a guarantee in relation to the services provided by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question.

[…]

[54] Given the nature of the services at issue here, I therefore disagree with Létourneau J.A.'s view that the principle of linguistic equality does not entail a right to "access to equal regional economic development services" (at para. 33), or that the respondents did not have a duty under Part IV of the *OLA* to "take the necessary steps to ensure that Francophones are considered equal partners with Anglophones" (at para. 38) in the definition and provision of economic development services. With respect, it seems to me that Létourneau J.A. did not fully consider the nature and objectives of the program in question in so defining the scope of the duties resulting from the guarantee of linguistic equality. What matters is that the services provided be of equal quality in both languages. The analysis is necessarily comparative. Thus, insofar as North Simcoe, in accordance with the programs' objectives, made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community.

[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of

neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA* [*Department of Industry Act*], as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

[56] Second, nor does the principle of linguistic equality in the provision of services mean that there must be equal results for each of the two language communities. Inequality of results may be a valid indication that the quality of the services provided to the language communities is unequal. However, the results of a community economic development program for either official language community may depend on a large number of factors that can be difficult to identify precisely.

[...]

[62] There is no doubt that disparity in results can be a sign that the quality of services is unequal, but the inquiry must not end there. Several factors may come into play that have nothing to do with the comparative quality of the services provided by the federal institution in each official language. In the instant case, to support their contention that the services were not of equal quality, the appellants place great emphasis on the success of CALDECH, which implemented more than 50 projects for the French-speaking community. The extent to which this provides a basis for comparing the quality of North Simcoe's services in each official language is debatable. It seems to me that the very existence of CALDECH may explain why so few Francophones chose to use North Simcoe's services, whatever their quality may have been. In any event, the apparent disparity in results between the two language communities does not support a conclusion that the services were of unequal quality.

[63] Although the parties disagree about the number of CALDECH's projects that Industry Canada would actually have supported, one thing is certain: CALDECH's ability to reach the linguistic minority community and involve it in many community economic development projects shows that there is a real need for such services in Huronia's French-speaking community and that that need can be met. However, I cannot conclude that the failure to remedy this shortcoming relates to the principle of linguistic equality in communications and the provision of services as implemented in Part IV of the *OLA*. Like Harrington J. at trial, I believe that the appellants' arguments essentially relate to alleged violations of Part VII of the *OLA*. It is noteworthy that in each of her three reports, the Commissioner drew a clear distinction between duties related to the principle of equality in communications and the provision of services under Part IV and duties resulting from the government's commitment, stated in Part VII, to enhancing the vitality and development of linguistic minority communities. In all her reports, she identified *Part VII* as the source of the duty to consider and meet the special needs and concerns of Simcoe County's French-speaking business community with regard to economic development.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[1] Subsection 58(2) of the *Official Languages Act* [R.S.C., 1985 (4th supp.), c. 31] (the Act) allows any "group" to bring a complaint before the Commissioner of Official Languages (the Commissioner). Relying on this provision, the Forum des maires de la Péninsule acadienne (the Forum or respondent), in October 1999, complained to the Commissioner that an administrative reorganization in New Brunswick by the Canadian Food Inspection Agency (the Agency) had been carried out to the detriment of the Francophone areas in the north of the province. The Forum specifically criticized the Agency for transferring four inspectors from the Shippagan office, in the Acadian peninsula, to the Shediac office located in the southeastern portion of the province, assigning the supervision of the food inspection office for the Acadian peninsula to a unilingual Anglophone manager in the Blacks Harbour office and having constantly, since the early 1990s, reduced the number of employees in the Shippagan inspection division. The Forum

argued that the decisions made by the Agency had an impact not only on the service to the public and the Agency's ability to comply with the right of the employees in the Shippagan office to work in French, but also on the economy of the region. The Forum also contended that the Agency's decisions reflected a trend toward the gradual erosion of the existing services that had developed in the region (A.B., Vol. 1, at page 46).

[...]

[48] The right involved, in this Part IV, is that of the public "to communicate with and to receive available services from federal institutions in accordance with this Part" (section 21). This right of the public prevails, under section 31, over the right conferred by Part V "Language of Work" to officers of federal institutions to work in either of the two official languages.

[...]

[52] Like the Commissioner and the Judge, I think it is possible to conclude, from the evidence, that the Agency reduced its services at Shippagan without concerning itself with the effect of this reduction on the right of the Francophone minority to receive these services in French and that the effect of the reduction in the services was to infringe the right that section 21 of the Act gives that minority. It is clear, in my view, that at the time the complaint was filed, it was justified.

Ayangma v. Canada, 2003 FCA 149 (CanLII)

[31] [...] Section 21, 22 and 28 of the *OLA* are found within Part IV of the Act entitled "Communications With and Services to the Public". Although the phrase "Services to the Public" is not defined in the *OLA*, it clearly does not apply to a competition under the *PSEA* [*Public Service Employment Act*, R.S.C. 1985, c-P-33], an Act which relates to staffing within the Public Service and which has its own code of language provisions.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (FCA) [hyperlink not available]

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

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

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

[...]

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

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[76] Coming back to the nature of the rights conferred on the public by Part IV of the *OLA*, it must be understood that the right to communicate, which is already guaranteed by section 20 of the *Charter*, implies a right to be heard and understood by the institution in either official language. Moreover, the concept of public "services", which is also guaranteed by section 20 of the *Charter*, is broader than the term "communications". Simultaneous or consecutive translation is impractical in the case of oral communication, and diminishes the quality of service. Therefore, the opportunity to be served in the official language of one's choice in the cases contemplated by the law can only be assured by the presence of bilingual personnel. Lip service does not satisfy the letter and spirit of provisions found in Part IV of the OLA which require an "active offer". See Nicole Vaz and Pierre Foucher, *Language Rights in Canada*, *Second Edition*, Edited by Michel Bastarache (Les Editions Yvon Blais, 2004), chapter 4.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and 16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

[…]

[129] As indicated previously, sections 21 and 34 of the *Official Languages Act* recognize, respectively, the right of a member of the public to communicate with and receive available services from federal institutions and the right of an employee to use either official language at work, as English and French are the languages of work in all federal institutions. The corresponding statutory duties in section 22 and sections 35 and 36 respectively require a federal institution to ensure that a member of the public can communicate with and receive available

services from it in either official language within the National Capital Region and other prescribed areas, and that it provide work environments conducive to the effective use of both official languages. Those duties, imposed on federal institutions by the *Official Languages Act*, conform to the principle of substantive equality which requires positive government action to implement the recognized language rights. In other words, the purpose of the legislative duties imposed on federal institutions in sections 22, 35 and 36 is to implement and to give substantive effect and meaning to the rights recognized in sections 21 and 34. […]

SEE ALSO:

Moore v. Canada (Attorney General), 2007 FC 1127 (CanLII)

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

R. v. Jervis, 1984 CarswellMan 294, 11 C.R.R. 373, 12 W.C.B. 195, 27 Man. R. (2d) 217 [1984] M.J. No. 359 (Man. Co. ct.) [hyperlink not available]

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

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22. Where communications and services must be in both official languages

22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities

> **(a) within the National Capital Region; or**
>
> **(b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.**

ANNOTATIONS

Thibodeau v. Air Canada, [2014] 3 SCR 340, 2014 SCC 67 (CanLII)

[13] Air Canada and its affiliate Jazz are subject to the *OLA*: see *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.), s. 10. (For convenience, I will refer to either or both of them as “Air Canada” in these reasons.) The *OLA* requires Air Canada to supply services in French or English where there is “significant demand” for them: see s. 22(b).

[...]

[15] On three international flights on Air Canada and in an airport, over the course of roughly four months in 2009, Mr. and Ms. Thibodeau did not receive services in the French language. On some flights, there was no flight attendant able to provide services in French and in some cases passenger announcements on board and in the terminal were made only in English.

[16] On January 23, 2009, while on board a flight from Toronto to Atlanta, Georgia, Mr. and Ms. Thibodeau did not receive services in French because there was no bilingual flight attendant on the aircraft. A few days later, coming back from Atlanta, there was no French announcement

made by the pilot or translation of it. On May 12, 2009, the Thibodeaus again did not receive services in French, this time on a flight from Charlotte, North Carolina, to Toronto. Upon arrival in Toronto, an announcement concerning baggage collection was made only in English.

[17] There is no longer any dispute that Air Canada breached its obligations under s. 22 of the *OLA* on these occasions.

[...]

[136] There is no dispute that Air Canada breached its obligations under s. 22 of the *Official Languages Act* by failing to provide services and announcements in French. [...]

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[1] This appeal requires the Court to determine the nature and scope of the principle of linguistic equality in communications and the provision of services as implemented in Part IV of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) ("*OLA*"). In particular, it concerns the community economic development services provided in Huronia, a region of Ontario where there is "significant demand", within the meaning of s. 22 of the *OLA*, for communications and services in the minority official language. The services in question are provided by the Department of Industry Canada pursuant to its powers, duties and functions under the *Department of Industry Act*, S.C. 1995, c. 1 ("*DIA*"), and are implemented by various community futures development corporations ("CFDCs").

[...]

[17] Part IV of the *OLA* is entitled "Communications With and Services to the Public". The specific issue in this appeal is whether the respondents breached their duty under s. 22 to ensure that any member of the public can "communicate" with and "obtain available services" from the federal institution "in either official language".

[...]

[23] It is clear simply from the wording of the enactment that the distinction between Part IV and Part VII is important. It is also clear from the evidence that what the appellants DesRochers and CALDECH sought in their application was in essence, first, to show that there was a real need for economic development services in the French-speaking community and, second, to convince the court that the government had a positive duty to take concrete measures to support the development of the French-speaking community in Simcoe County in order to counter the increasing rate of assimilation. As we will see, the question whether the duties under Part IV were fulfilled is much narrower than the question before the Federal Court in the original application. What must be done to answer it is essentially to conduct a comparative analysis in order to determine whether the services *provided* by the federal institution in each official language community are of equal quality. I will now review the decisions of the courts below in this case.

[...]

[40] It is common ground that Huronia is a region where there is "significant demand", within the meaning of s. 22, for communications and services in the minority official language. As well, it is no longer in dispute in this Court that, as the courts below concluded, s. 25 applies in this case. The issue is whether the respondents have fulfilled their duties under s. 22.

[41] The scope of s. 22 must be assessed in light, inter alia, of the purpose of the *OLA*. The appellants rely in particular on s. 2(a), which reads as follows:

2. The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

[...]

[45] As I stated in the introduction to these reasons, the parties agree that as a general rule, the principle — provided for in s. 20(1) of the *Charter* and implemented in Part IV of the *OLA* — that members of the public are entitled to linguistic equality when receiving services entails an obligation to make services "of equal quality in both official languages" available to the public. The parties disagree, however, on what is meant by "equal quality".

[...]

[51] It seems clear to me that the respondents are correct to say that the principle under s. 20(1) of the *Charter* and Part IV of the *OLA* of linguistic equality in the provision of government services involves a guarantee in relation to the services provided by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services with distinct content. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must be defined in light of the nature and purpose of the service in question. Let us consider the community economic development program in the case at bar.

[...]

[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA*, as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

[56] Second, nor does the principle of linguistic equality in the provision of services mean that there must be equal results for each of the two language communities. Inequality of results may be a valid indication that the quality of the services provided to the language communities is unequal. However, the results of a community economic development program for either official language community may depend on a large number of factors that can be difficult to identify precisely.

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

[39] However, in some other language rights provisions, such as subsection 20(1) of the *Charter* and section 25 of the Act, the legislator chose the term "to communicate" (communiquer). In my opinion, this is not accidental.

[40] To "communicate" presupposes interactions, bilateral actions between the parties. The verb "to use" does not encompass such interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr. Knopf made

his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the Act.

Ayangma v. Canada, 2003 FCA 149 (CanLII)

[31] Section 21, 22 and 28 of the *OLA* are found within Part IV of the Act entitled "Communications With and Services to the Public". Although the phrase "Services to the Public" is not defined in the *OLA*, it clearly does not apply to a competition under the *PSEA* [*Public Service Employment Act*, R.S.C. 1985, c-P-33], an Act which relates to staffing within the Public Service and which has its own code of language provisions.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[23] We feel it is important to note that section 22 of the Act essentially reproduces paragraph 20(1)(a) of the *Canadian Charter of Rights and Freedoms*, which suggests that the Court should interpret it in the same way as this provision of the *Charter* would be interpreted.

[24] Further, it appears from section 31 of the Act that the provisions of Part IV, dealing with the language of communications with and services to the public (including sections 22 and 27), prevail over inconsistent provisions of Part V, dealing with the language of work.

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[54] I agree with the respondents that publication of certain components of patents on the Patent Office web site is not a distinct “service” that, in itself, must be provided in both official languages. The Office merely reproduces (in part) the text of the patents, as they exist. The question of a violation of section 22 of the *Official Languages Act* that is distinct from a violation of section 12 would arise if the patents were bilingual but the Office published only one of the two versions of the patents on its web site. That is not the case, and accordingly I am of the opinion that the Office is not in violation either of section 22 of the *Official Languages Act* or of the *Charter*.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[98] What constitutes under the *Charter* or the *OLA* “significant demand” or in what circumstances it is reasonable, due to the “nature of the office”, to provide bilingual services, is subject to differing interpretations. Regulatory criteria provide greater certainty and uniformity in the application of such opened concepts. For this purpose, regulations established by the Governor in Council under Part IV of the *OLA* enumerate specific cases where railway stations or train routes are “deemed” to meet the “significant demand” or the “nature of the office” criteria: sections 7, 9, 11 and 12. Thus, the Regulations establish a legal presumption facilitating the proof that the *Charter* or *OLA* criteria are met. This is their basic purpose but they are not exhaustive and should not be rigidly interpreted and applied. Indeed, it must be accepted by the Court that neither the *Regulations* nor Burolis can supersede or restrain the *OLA* or the *Charter*, but must always be interpreted and applied in a manner consistent with the general objectives of the preamble of the *OLA* and a recognition of the fundamental values of the *Charter* and Canadian policy in the matter of bilingualism.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[113] Part IV of the *Official Languages Act*, entitled "Communications with and Services to the Public", creates certain rights and corresponding duties in relation to communications and the provision of services in the official languages. In particular, section 21 accords to any member of

the public the right to communicate with and to receive available services from federal institutions in either official language in accordance with the provisions in Part IV. To implement and give practical effect to that general right, sections 22 to 26 inclusive impose various duties on federal institutions. For the purposes of the present proceeding, only section 22 is relevant, requiring that the communications and services of federal institutions must be in both official languages in certain areas of the country, including the National Capital Region. Section 22 imposes the following duty on federal institutions: [...]

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and 16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

[...]

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

[...]

[132] In the present case, given the integrated nature of the air traffic control operations and the importance of all controllers being aware of the level of activity and the events transpiring in the area, the Department chose to comply with its statutory duties and obligations under the *Official Languages Act* to give effect to the language rights in sections 21 and 34 by implementing a fully bilingual work environment for the safe and effective delivery of bilingual air traffic services. Indeed, since the inception of bilingual air traffic services in Quebec in 1978, the Department has consistently taken the position that all air traffic controllers working in an area offering such services must be bilingual. The Department also believed that a fully bilingual work environment was necessary to foster cohesiveness in the group effort required in the complex air traffic control environment, and that the presence of a unilingual air traffic controller would "force everyone to operate in his language", thereby frustrating its goal. Furthermore, the Canadian Air Traffic Control Association consistently opposed the implementation of bilingual air traffic control services at the Ottawa Control Tower unless it could be "safely implemented with a full staff of competent and fully qualified bilingual controllers". Even Mr. Schreiber, during his cross-examination, admitted that it was "better" for all of the air traffic controllers to be bilingual. The

Department therefore sought to create a fully bilingual work environment in order to facilitate the section 21 right of a member of the public to communicate with and to receive services in either official language, and to comply with the section 34 right of its employees to use either official language. Indeed, given the unique nature of air traffic control operations, only a fully bilingual work environment could be "... conducive to the effective use of both official languages and accommodate the use of either official language by officers and employees", as required by paragraph 35(1)(a) of the *Official Languages Act*. Finally, a fully bilingual work environment was also consistent, on a long term basis, with the Department's high safety requirements for the provision of air traffic control services.

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[32] Part IV of the Act is relevant to the issue before me. It speaks of communications with and responses from government services in either official language. Paragraph 22(b) repeats the principle laid down in section 20 of the *Charter* concerning the "significant demand" for communications and services and later, in section 24 of the Act, provides by regulation the institutions of government in which it would "be reasonable" that communications and services be available in both official languages.

[...]

[57] In the case before me, it is obvious that there exists under the *Official Languages Act* a broad picture and a narrower one. The object of the Act is not only to permit the use of our official languages and give citizens the right to deal with federal institutions in the language of their choice. It is more than that. It is to promote the use of both languages or, as expressed in the Act's preamble, "enhancing the vitality and supporting the development of English and French linguistic minority communities". Such a policy commitment by the Government of Canada imposes a double duty which must sooner or later be exercised in concrete terms.

[58] The first duty is to assure that federal institutions are in a position to respond to a citizen's right to communicate with or to be provided services from them in either language. Admittedly, there are variables in the extent or depth of meeting need and availability. One must never lose sight of the main issue, namely that it is only with respect to minority language rights in any given community that the purposes and objectives of the Act are put to the test. The majority language rights in any such community are dynamically respected and pose no problems.

[59] These variables are the product of many basic considerations. I need not list them all, but they do include demographic factors, the size of the minority constituency, the exposure of particular federal agencies to citizen relationships, the proper functioning of these agencies to meet their operational requirements, the significant demand for minority language services, as well as the other considerations which are outlined in section 32 and section 33 of the Act.

R. v. Brewer, 2009 NBPC 5 (CanLII)

[23] Putting aside the issue of whether the provincial official languages legislation applies to the CRA [Canada Revenue Agency], and the extent of any obligation to inform a member of the public of language rights and choices, it is clear that the CRA in this fact situation proceeded to honor a choice of language for communication made by the defendant and also the company of which he was the sole director.

[24] In my opinion, the CRA is entitled and perhaps bound to respect the choice of language indicated by a taxpayer, personal or corporate, on the last filed return.

[25] The defendant filed his last personal return indicating his choice. Common sense would dictate that CRA could refer to this in deciding as to the language to be used to communicate with him regarding the Income Tax Legislation.

[26] Further, the defendant was being notified in his capacity as a director of the company. The company had given its own choice of language for correspondence. In my opinion that indication can be relied upon for any correspondence with the company and any officer or director of that company unless and until the CRA receives an indication to the contrary. That indication may well be made explicitly by an election of language choice filed by an individual on a tax return, or filing correspondence indicating a different language choice, or requesting bilingual correspondence, or verbal notice. It may also be done implicitly by any other conduct.

Marchessault v. Canada Post Corp., 2002 FCT 1202 (CanLII)

[6] What factual basis was applied in reaching the 1992 decision? In reaching the decision, Canada Post established its own criteria for determining "significant demand"; if there was a minority official languages population of 500 or 10% of the total population of a given community or area, Canada Post deemed this area to have a "significant demand" requiring bilingual services.

[7] In fact, Canada Post used the 1991 census as its factual basis for reaching its conclusion; by the 1991 census, 33.8 % of the population of Coderre claimed French as their official language and, thus, this was decided to be a "significant demand". In my opinion, this is a most reasonable conclusion reached properly on the legislation cited above.

[8] The question of the applicability of the *Official Languages Act Regulations* (SOR/92-48) ("the Regulations") has played a prominent part in the arguments presented in the present case. The pertinent sections of the *Regulations* are as follows:

[...]

[9] Indeed, it appears that the 1991 census figures were applied by Canada Post in a belief that this was required by virtue of the *Regulations*. Mr. Marchessault argues that, on a correct interpretation of the *Regulations*, by application of s.3(a)(i), the 1986 rather than the 1991 census figures should have been used, which would have resulted in the postmaster position not being designated as bilingual.

[10] I must dismiss Mr. Marchessault's argument on the applicability of the *Regulations* since I find that they were not in force at the time the classification decision was made by Canada Post being before December 1, 1992; the *Regulations* were registered on December 16, 1991 but did not come into effect until December 16, 1992.

[11] Even if the *Regulations* can be said to apply, on the evidence filed at the hearing of the present case (Exhibit 2), I find that the release date of the language counts of the 1991 census was September 15, 1992. As a result, I find that s.5 (1)(p) of the *Regulations* is the correct provision to apply. On this basis, I must also dismiss Mr. Marchessault's argument that the 1986 census figures apply.

SEE ALSO:

Air Canada v. Thibodeau, 2007 FCA 115 (CanLII)

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

Poulin v. Canada (Attorney General), 2004 FC 1132 (CanLII)

Paulin-Kaïré v. Canada, 2004 FC 296 (CanLII)

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23. (1) Travelling public

23. (1) For greater certainty, every federal institution that provides services or makes them available to the travelling public has the duty to ensure that any member of the travelling public can communicate with and obtain those services in either official language from any office or facility of the institution in Canada or elsewhere where there is significant demand for those services in that language.

23. (2) Services provided pursuant to a contract

23. (2) Every federal institution has the duty to ensure that such services to the travelling public as may be prescribed by regulation of the Governor in Council that are provided or made available by another person or organization pursuant to a contract with the federal institution for the provision of those services at an office or facility referred to in subsection (1) are provided or made available, in both official languages, in the manner prescribed by regulation of the Governor in Council.

ANNOTATIONS

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[8] Notably, both as a Crown corporation and a “federal institution” to which the *OLA* applies, VIA has the constitutional or quasi-constitutional duty to ensure that members of the travelling public can communicate with and obtain its services in their official language at its head office as well as in any local office, railway station or train where there is a “significant demand” or where it is reasonable, due to the “nature of the office”. This duty flows directly from subsection 20(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*), and sections 23 or 24 of the *OLA*, which are found in Part IV of same.

[...]

[74] Part IV of the *OLA*, where sections, 22, 23 and 24 are found, repeats the constitutional rights and guarantees of the *Charter* afforded to the public with respect to communications with and services from the government of Canada in either official language.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[75] […] The choice of offering services in both official languages in accordance with a "significant demand" or "the mandate of the office" is, in my opinion, an eminently political one. Parliament has mandated the Governor in Council to choose which institutions will be covered by the notion of "mandate of the office", and it is not for the judiciary to make that choice.

[76] I cannot, however, disregard a significant demand that is not recognized by the authorities, but which clearly exists. The RCMP [Royal Canadian Mounted Police] is a federal institution, whose central office is required by law to offer services in both official languages. An RCMP detachment is regarded as an "office" for the purposes of the *Charter* and the *OLA*. When an

RCMP detachment provides policing services in Canada, it is important to consider the function it is charged with in the community in which it is located. In the case at bar, one of the RCMP's important duties is to patrol a busy highway, where there is undoubtedly a demand for services in French.

[77] The Regulations should, therefore, be amended to take into account circumstances such as those present in this case: a major highway, used significantly by people of a minority official language, and patrolled by a police force under the authority of the Canadian government. Under such circumstances, defining the "significant demand" in terms of the demographics of the detachment's location is clearly inadequate, since the RCMP is expected not only to deal with residents of the area, but also to serve all non-residents who use the highway. Given the geographic location of Amherst, Nova Scotia, bordering New Brunswick, and the large French population nearby, it is clear that the RCMP must take into account the need to offer services in French, the minority official language.

[78] It is the responsibility of the Governor in Council to find the appropriate language to resolve this problem. It is clear that the expression "travelling public" under section 23 of the *OLA* must be defined more broadly than to include only travellers using airports, railway stations or ferry terminals, and that travellers using major highways must also be considered when they number in the millions.

[79] It seems clear to the Court as well that equal access to services in both official languages means equal treatment. In my opinion, the procedure established by the RCMP, described by Staff Sgt. Hastey, is totally inadequate for the Francophone minority driving in the Amherst area. Motorists should not have to go out of their way or use a telephone or radio when they want to address a member of the RCMP in French. Such a service, which leaves much to be desired, absolutely fails to meet the objectives stated in section 2 of the OLA and is contrary to section 16 of the *Charter*, which recognizes the equality of both official languages.

Canada (Commissioner of Official Languages) v. Air Canada, 1997 CanLII 5843 (FC)

[25] As mentioned *supra*, Air Canada submits that any documents relating to a complaint based on facts from before December 16, 1992, the coming into force date of the Regulations, have a retrospective aspect and are accordingly inadmissible.

[26] It is subsection 23(1) that the Commissioner must apply to determine whether there is "significant demand" for services in an official language. What "significant demand" means is defined by subsection 7(3) of the Regulations, which reads as follows: [...]

[27] I agree with the Commissioner that even though subsection 7(3) was not in force before December 16, 1992, subsection 23(1), which was in force before that date, states that every federal institution that provides services or makes them available to the travelling public has the duty to do so in the official language requested where "there is significant demand for those services in that language". Subsection 23(1) reads as follows: [...]

[28] The [Official Languages] Act itself dates back to 1988. The Regulations in question merely establish standards to ensure that the administration of the Act is sound, so Air Canada had a duty to provide French-language services to the travelling public, where there was a significant demand for those services in French even before the Regulations came into force. As a consequence, the Commissioner may file complaints and information in evidence that relate to situations that occurred before the Regulations came into force.

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24. (1) Nature of the office

24. (1) Every federal institution has the duty to ensure that any member of the public can communicate in either official language with, and obtain available services in either official language from, any of its offices or facilities in Canada or elsewhere

> **(a) in any circumstances prescribed by regulation of the Governor in Council that relate to any of the following:**
>
> > **(i) the health, safety or security of members of the public,**
> >
> > **(ii) the location of the office or facility, or**
> >
> > **(iii) the national or international mandate of the office; or**
>
> **(b) in any other circumstances prescribed by regulation of the Governor in Council where, due to the nature of the office or facility, it is reasonable that communications with and services from that office or facility be available in both official languages.**

24. (2) Institutions reporting directly to Parliament

24. (2) Any federal institution that reports directly to Parliament on any of its activities has the duty to ensure that any member of the public can communicate with and obtain available services from all of its offices or facilities in Canada or elsewhere in either official language.

24. (3) Idem

24. (3) Without restricting the generality of subsection (2), the duty set out in that subsection applies in respect of

> **(a) the Office of the Commissioner of Official languages;**
>
> **(b) the Office of the Chief Electoral Officer;**
>
> **(c) the Office of the Auditor General;**
>
> **(d) the Office of the Information Commissioner; and**
>
> **(e) the Office of the Privacy Commissioner.**

ANNOTATIONS

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[98] What constitutes under the *Charter* or the *OLA* “significant demand” or in what circumstances it is reasonable, due to the “nature of the office”, to provide bilingual services, is subject to differing interpretations. Regulatory criteria provide greater certainty and uniformity in the application of such opened concepts. For this purpose, regulations established by the Governor in Council under Part IV of the *OLA* enumerate specific cases where railway stations or train routes are “deemed” to meet the “significant demand” or the “nature of the office” criteria: sections 7, 9, 11 and 12. Thus, the Regulations establish a legal presumption facilitating the proof that the *Charter* or *OLA* criteria are met. This is their basic purpose but they are not exhaustive and should not be rigidly interpreted and applied. Indeed, it must be accepted by the Court that neither the *Regulations* nor Burolis can supersede or restrain the *OLA* or the *Charter*, but must always be interpreted and applied in a manner consistent with the general objectives of the

preamble of the *OLA* and a recognition of the fundamental values of the *Charter* and Canadian policy in the matter of bilingualism.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[32] Part IV of the Act is relevant to the issue before me. It speaks of communications with and responses from government services in either official language. Paragraph 22(b) repeats the principle laid down in section 20 of the *Charter* concerning the "significant demand" for communications and services and later, in section 24 of the Act, provides by regulation the institutions of government in which it would "be reasonable" that communications and services be available in both official languages.

SEE ALSO:

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

Services Provided on behalf of Federal Institutions

25. Where services provided on behalf of federal institutions

25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

ANNOTATIONS

DesRochers v. Canada (Industry), [2007] 3 FCR 3, 2006 FCA 374 (CanLII)

[42] Section 25, contained in Part IV of the *OLA*, deals with the provision of services by third parties. Such provision of services to the public must be available in either official language when the third party is acting on behalf of a federal institution and when that institution would be subject to a similar obligation if it were offering those services itself. Members of the public also have the right to communicate with this third party in either official language.

[43] To act on behalf of another person is to act for that person or for the benefit or in the interest of that person: *Owners, Strata Plan No. VR368 v. Marathon Realty Co. Ltd. et al.* (1982), 141 D.L.R. (3d) 540 (B.C.C.A.); *Gilbert v. British Columbia (Forest Appeals Commission)*, 2002 BCSC 950; *Canadian Oxford Dictionary*, 2nd ed. (Toronto: Oxford University Press, 2004), at page 128; *The New Oxford Dictionary of English* (Oxford: Clarendon Press, 1998), at page 157; *Grand Larousse universel*, Vol. 4 (Paris: Larousse, 1995), at page 2467.

[44] Counsel for the respondents argued that the Judge erred in finding that North Simcoe was acting on behalf of the respondents within the meaning of section 25. This is because the expression “on behalf of/*pour le compte de*” implies a notion of prior authorization by the person on whose behalf the third party will act: see the respondents’ memorandum of fact and law at paragraphs 44 and 45. If services made available by a third party are to be subject to the obligations in Part IV of the *OLA*, it was argued that the third party must necessarily obtain the prior authorization of the federal institution to provide the services in question, which was not the case here.

[45] I think the respondents’ counsel adopted an excessively technical and restrictive view of the expression “on behalf of”. A third party may act in concert or in partnership with a federal institution for the provision of services even though there has not necessarily been a prior authorization in the formal sense given to it by the respondents’ counsel.

[46] Similarly, a third party may act on behalf of another person when he exercises powers that the other person has delegated to him: see *Canada (Commissioner of Official Languages) v. Canada (Minister of Justice)* (2001), 35 Admin. L.R. (3d) 46 (F.C.T.D.), at paragraph 138, where the Federal Court held that the Province of Ontario and the municipal governments that had signed an agreement with Justice were acting on behalf of the federal government in the implementation of the *Contraventions Act*, *S.C. 1992, c. 47*, when they exercised the powers that were delegated to them by the federal government.

[47] Finally, it is not inconceivable that a federal institution might decide to approve and accept responsibility for the provision of existing services; those services would then become subject to the obligations in Part IV of the *OLA*. In that case, one could not speak of a prior authorization in the sense that was understood by the respondents.

[48] Counsel for the respondents referred to *Lavigne v. Canada (Human Resources Development)* (2003), 308 N.R. 186 (F.C.A.), where this Court confirmed the decision of the Federal Court [[2002] 2 F.C. 164]. The latter had held that there was no delegation of powers in that case because Emploi-Québec had jurisdiction to act in the area of activities related to the labour market and “is not dependent upon federal authorization for its activities and owes nothing to it”.

[49] I note, firstly, that in this passage, the Federal Court refers to an authorization, and not a prior authorization. Secondly, this reference to a federal authorization was made in connection with the distribution of powers between the federal and provincial governments. The concept of authorization to which the Federal Court referred did not mean authorization or prior approval, but rather connoted an enabling power, since without this enabling power the provincial governments do not have the legal capacity to act where a field of exclusive federal jurisdiction is at stake—which was not so in that case. But the Federal Court recognized the possibility and validity of a delegation of powers from the federal government to some provincial agencies or governments.

[50] Thirdly, delegation, which both *Lavigne* and *Commissioner of Official Languages* accept as proof of acting on behalf of another, and ratification are both modes of authorization. The *Nouveau Petit Robert* defines “*ratification*” as a confirmation or approval (*homologation*) and “*delegation*” as a mandate or power of attorney (*procuration*). Synonyms of “*authorisation*”, or having the same meaning as the verb “to authorize”, are accreditation, confirmation, agreement, approval, consent, acceptance and permission. This applies as well to a partnership, which evokes the notion of agreement and hence of reciprocal authorization.

[51] At the end of the day, the issue is whether, given the facts and circumstances of the case, the third party is providing the services of a federal institution or a federal government program with the accreditation, agreement, confirmation, consent, acceptance or approval of the institution or the government. In the affirmative, it must be held that this third party is acting on behalf of a

federal institution within the meaning of section 25 of the *OLA*. And the third party is required to provide these services in both official languages if, I repeat, the federal institution or federal government were themselves subject to this obligation.

[52] In the case at bar, the program, as mentioned earlier, is a government program offering various services related to regional and community economic development, devised pursuant to, and in application of, the *DIA* [*Department of Industry Act,* S.C. 1995, c. 1]. If it were dispensing those services itself, the Department [of Industry] would be subject to the obligations set out in Part IV of the *OLA*

[…].

[54] Needless to say, there is no denying that a mere financial contribution by the federal government to a third person for services it is delivering, and which are not services provided by a federal institution or in the context of a federal government program, does not trigger the application of section 25 of the *OLA*. But in this case we have a government program emanating from a federal institution which, through the CFDC [Community Futures Development Corporations], including North Simcoe, provides a portion of the services referred to in the program. I think the relationship between the Department and North Simcoe in this case goes beyond the mere giving of financial support to some service agency. The fact that North Simcoe can look to funding sources other than the federal government does not, in my opinion, alter the nature of their relationship.

N.B. – The Supreme Court does not pronounce upon the above analysis of s. 25 of the OLA (DesRochers v. Canada (Industry), [2009] 1 SCR 194, 2009 SCC 8 (CanLII)): “As well, it is no longer in dispute in this Court that, as the courts below concluded, s. 25 applies in this case” (at para. 40).

Thibodeau v. Air Canada, 2005 FC 1156 (CanLII)

[41] In terms of communication with and services provided to the public, the OLA provides, in sections 23 and 25, that "every federal institution . . . has the duty" (in French, "qu'il incombe aux institutions fédérales"--"incombe" meaning that federal institutions "ont la responsabilité ou la charge de" [translation] "are responsible for", Le Nouveau Petit Robert, 1993). I would liken this obligation to the one in subsection 10(2) of the *ACPPA* [*Air Canada Public Participation Act*]: "has the duty to ensure" (est tenue de veiller à). The Federal Court has previously interpreted section 25 of the *OLA* as imposing an obligation of result on these institutions. In Quigley v. Canada (House of Commons), 2002 FCT 645 (CanLII), [2003] 1 F.C. 132 (T.D.), it was held that the House of Commons had breached its duties under the *OLA* in failing to ensure that the debates are made available in both official languages.

[...]

[71] Subsection 10(2) of the *ACPPA* provides that the "Corporation" (Air Canada) has the duty to ensure that its subsidiaries provide services in both languages. It is therefore Air Canada that is accountable and not the subsidiaries, since the *OLA* does not directly apply to them. Subsection 10(2) is modelled on section 25 of the *OLA*, which provides that every federal institution has the duty to ensure that services provided or made available to the public by another person or organization on its behalf are provided in either official language as if the institution itself were providing the services.

[...]

[85] Section 25 of that Act provides that a federal institution that provides services through another person or organization on its behalf has a duty to ensure that this third party makes those

services available in either official language as if the federal institution was itself providing the services. The interpretation of this section has not been unanimous in the past. Air Canada did not consider its subsidiaries to be third parties, and did not think section 25 applied to its subsidiaries. But with the amendment to subsection 10(2) of the *ACPPA*, Parliament decided to impose the section 25 *OLA* obligation on Air Canada on its subsidiaries, using the parameters set out in section 7 of the Regulations.

[86] I do not think it is necessary to answer the question as posed, since in my opinion subsection 10(2) of the *ACPPA* is very clear and unambiguous. Nor do I need to question whether, in the past, Air Canada was under the same duty in regard to its subsidiaries as the one prescribed for third parties in section 25 of the *OLA*.

N.B. – This point is not addressed on appeal: Air Canada v. Thibodeau, 2007 FCA 115 (CanLII)

Quigley v. Canada (House of Commons), [2003] 1 FCR 132, 2002 FCT 645 (CanLII)

[54] I am of the view that the arrangements between the Speaker of the House [of Commons] and CPAC [Cable Public Affairs Channel] are caught by section 25 of the Act. The House delivers its signals to CPAC which, in turn, provides these signals to the BDUs [Broadcasting distribution undertakings] for distribution to the public. It is because the services are being provided by CPAC for the Speaker of the House that section 25 of the Act applies.

[55] Section 25 of the Act requires that every federal institution, and the House is defined as a federal institution by the Act, must, if it uses another person or organization to deliver services that are required to be provided in both official languages, ensure that the person or organization providing such service does so in both official languages. That has not happened in this case since CPAC, in its agreement with the House, did not undertake to ensure that its distribution contracts with various BDUs would guarantee that CPAC would broadcast in both official languages.

[56] In my opinion, section 25 of the Act requires that any agreement between the House and CPAC, based on the facts of this case, must "ensure" that the eventual broadcasting of the proceedings already provided by the House be in both official languages.

[57]The respondent House argues that BDUs would refuse to broadcast CPAC if such a clause were inserted. There is no evidence before me to establish this statement. In any event, if section 25 of the Act applies and I have found that it does, the mere fact that BDUs may refuse to air any proceedings of the House does not justify ignoring of section 25 of the Act.

[58]I am therefore of the view that the House is in breach of its linguistic obligations under the Act as it has failed to ensure that the proceedings of the House would be provided in both official languages through its agreements with CPAC.

Lavigne v. Canada (Human Resources Development), [2002] 2 FCR 165, 2001 FCT 1365 (CanLII)

[77] If there be delegation in this case, it must be a delegation of administrative functions under the Labour Market Agreement because neither the federal Parliament nor the provincial Legislatures can delegate to one another legislative powers (see the Nova-Scotia Interdelegation case known as *A.G. for Canada v. A. G. for Nova Scotia*, [1951] S.C.R. 31.

[78] Delegation of administrative functions from one level of government to another level of government is a well-accepted technique in Canadian constitutional law as is the appointment of federal or provincial functionaries to carry out the duties of another level of government. The

object of such delegations is to overcome the difficulties of divided jurisdiction (such as in agriculture), to avoid duplication and to ensure co-ordination to achieve desired results. […]

[79] These cases illustrate that the essence of delegation would be in this case, if it occurred, the conferring, vesting or transfer by the federal government including the CEIC [Canada Employment Insurance Commission] of federal functions in the labour market area to Emploi-Québec to be performed by it on behalf of the [Canada Employment Insurance] Commission in accordance with the Labour Market Agreement. However, that is not what happened and as a result, I do not accept the argument put forward by Mr. Lavigne that this case is one of delegation.

[80] It is clear that Emploi-Québec is carrying out its functions in the area of labour market activities under the LMIA [Labour Market Implementation Agreement] such as active employment measures pursuant to provincial legislative authority as its source; it does not carry out those functions pursuant to a mandate received either through the Labour Market Agreement, the Commission or the Minister of Human Resources Canada.

[81] In other words, Emploi-Québec is not dependent upon federal authorization for its activities and owes nothing to it. Its only source of authority is the National Assembly of Quebec.

[82]What happened here is that the federal government withdrew from the field and in lieu of carrying out those activities funded Emploi-Québec through the LMIA.

[83]Mr. Lavigne relies heavily upon Justice Blais' decision in the *Contraventions Act* case, supra. In my opinion, his reliance is misplaced.

[84] The *Contraventions Act* case (and the Act was amended in 1996 [S.C. 1996, c. 7]) involved the enactment by the federal Parliament of that Act which authorized provincial authorities to prosecute federal ticket offences and authorized the federal Minister of Justice to enter into agreements in respect of the prosecution, discharge and enforcement of fines.

[85] Justice Blais found the authority over federal contraventions was federal and that the federal authorities decided to streamline the procedure by the enactment of the *Contraventions Act*. He then specifically looked at section 25 of the *OLA* which he said simply confirms the constitutional principle that a government may not divest itself of the constitutional obligations to which it is bound by the *Charter* by delegating certain of its responsibilities. He said the duty that is incumbent on the Attorney General of Canada to offer administrative services relating to prosecutions for federal contraventions in both official languages is imposed not only by Part IV of the *OLA* but also by the *Charter*. He was of the view that in administering the *Contraventions Act*, the Government of Ontario was applying a federal statute within the territory of the province and that, in implementing the *Contraventions Act*, the Government of Ontario and the municipalities were acting on behalf of the Government of Canada.

[86] It is apparent why the *Contraventions Act* case, and I entirely agree with Justice Blais' decision, is completely different than the issue before me. As I read Justice Blais' decision, the key to his thinking was the existence of a federal law dealing with federal non-criminal offences which was being administered by provincial authorities. In other words, the provincial authorities derived their right to act not from the provincial statute and regulations but federal ones. Rightfully so, in that context, Justice Blais found a delegation of administrative authority from the federal government to provincial authorities.

[87] For the reasons already explained in these reasons, such is not the case here. There has been no delegation of functions from federal to provincial authorities.

N.B. – This judgment was confirmed on appeal ((Lavigne v. Canada (Minister of Human Resources Development), 2003 FCA 203 (CanLII)): “Hence the Canada-Quebec Labour Market Implementation Agreement (LMIA) does not constitute a delegation of functions from federal to provincial authorities and the Official Languages Act (R.S., 1985, c. 31 (4th Supp.)) does not apply to the services provided by Emploi-Québec” (at para. 2).

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[135] In the circumstances, it seems clear that the federal government has full power to delegate to the provincial government or to municipalities, the administration of prosecutions for violations of federal statutes and regulations. The Government of Ontario then chose to delegate this power to administer, by way of legislative regulation and specific agreements relating to the administration of certain contraventions by municipal authorities.

[136] Under this analysis, the authority that has received the delegated power still has a duty to comply with the language laws that were binding on the delegating authority, whether the Government of Canada or the Government of Ontario, as the case may be.

[137] It would therefore seem important to ensure that the legal obligations of the delegating authority, the federal government, or of the delegates, the Government of Ontario and municipal governments, particularly with regard to language rights, which were characterized earlier as constitutional rights, are delineated and specified sufficiently to ensure that the rights of every accused person will be respected, whether the legislation relating to contraventions is administered by the federal government, the Ontario Government or the municipal authorities.

[138] I therefore conclude that the province of Ontario and the municipalities that have been given the province's delegated powers are acting on behalf of the Government of Canada in implementing the *CA* and that the municipal governments that have signed an agreement with Justice Canada are also acting on behalf of the Government of Canada.

[139] In addition, even if it were agreed that in administering the *CA* [*Contraventions Act*, S.C. 1992, c. 47] the Government of Ontario was acting pursuant to the powers granted to it by section 92(14) of the *Constitution Act, 1867,* that government would still be obliged to respect the quasi-constitutional language rights set out in the *OLA* and in sections *530* and *530.1* of the *Criminal Code*.

[140] It must be recalled that in administering the *CA*, the Government of Ontario is applying a federal statute within the territory of the province. Accused persons are entitled to expect the same language rights guarantees as if it were the Attorney General of Canada administering the *CA*.

[141] A federal law of general application such as the *OLA* cannot be applied throughout Canada in a discriminatory manner, depending on who is responsible for applying the *CA*. The language guarantees set out in the *OLA* and in the *Criminal Code* must therefore apply regardless of whether the Attorney General of Canada, the Attorney General of Ontario or the municipalities are given the authority to administer the *CA*.

SEE ALSO:

Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada, [2008] 1 S.C.R. 383, 2008 SCC 15 (CanLII)

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games, 2009 BCCA 522 (CanLII)

Regulatory Activities of Federal Institutions

26. Regulatory activities relating to health, safety and security of public

26. Every federal institution that regulates persons or organizations with respect to any of their activities that relate to the health, safety or security of members of the public has the duty to ensure, through its regulation of those persons or organizations, wherever it is reasonable to do so in the circumstances, that members of the public can communicate with and obtain available services from those persons or organizations in relation to those activities in both official languages.

SEE ALSO:

R. c. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

General

27. Obligations relating to communications and services

27. Wherever in this Part there is a duty in respect of communications and services in both official languages, the duty applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services.

ANNOTATIONS

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[9] In this court, the appellant relied primarily on the part of his complaint that concerned the difficulty he had in obtaining oral communication in French when he first contacted the [Public Service] Commission [of Canada]'s offices in Toronto. He told the court that it was not until after he had been obliged to speak in English to several employees that he was finally put through to the Director General of the Commission's office, with whom he was able to speak in French.

[10] The appellant cited s. 27 of the *Act*, which comes under the heading "Communications with and Services to the Public" and which reads as follows:

> 27. Wherever in this Part there is a duty in respect of communications and services in both official languages, the duty applies *in respect of oral and written communications* and in respect of any documents or activities that relate to those communications or services.
>
> (Emphasis added.)

[...]

[14] Further, it appears from s. 31 of the *Act* that the provisions of Part IV, dealing with the language of communications with and services to the public (including ss. 22 and 27), prevail

over inconsistent provisions of Part V, dealing with the language of work. It follows, in our opinion, that under Part IV the rights of the public in an area such as Toronto where demand is considered to be significant are not diminished by the fact that that area has not been "designated" bilingual with respect to the language of work under ss. 35 and 36 of the *Act*. In other words, the appellant's rights to receive service in French in Toronto are not lessened merely by the fact that the appellant would have to work in English if he were to obtain the employment sought.

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

[...]

[18] The Commissioner's investigation noted, inter alia, that the CRA was basing its position on section 27 of the *OLA*, which provides that the duty in respect of communications and services in both official languages applies in respect of oral and written communications and in respect of any documents or activities that relate to those communications or services. In addition, the Commissioner's investigation noted that the CRA also cited section 31 of the *OLA*, which states that Part IV prevails over any inconsistency in Part V on language of work and therefore gives precedence to the rights of members of the public to communicate and receive their services in their preferred official language. Lastly, the Commissioner observed that the CRA had unsuccessfully tried to reconcile the public's right with its agents' rights:

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

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

SEE ALSO:

R. c. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

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28. Active offer

28. Every federal institution that is required under this Part to ensure that any member of the public can communicate with and obtain available services from an office or facility of that institution, or of another person or organization on behalf of that institution, in either official language shall ensure that appropriate measures are taken, including the provision of signs, notices and other information on services and the initiation of communication with the public, to make it known to members of the public that those services are available in either official language at the choice of any member of the public.

ANNOTATIONS

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[139] An active offer is a greeting that informs the member of the public that they may communicate in either French or English. Its purpose, as described by Mr. Wissell, an investigator with the Office of the COLC [Commissioner of Official Languages of Canada], is to ensure that an individual feels comfortable requesting a service. It is a sign of respect. An active offer can take the form of a sign, a personal greeting or a message.

[140] The trial judge found that the active offer was an integral part of the substantive equality contemplated by s. 5 of the *OLA* [of the Northwest Territories], whether mentioned or not: at para. 693. The appellants submit that if the legislature intended to make active offer an essential part of s. 11(1), it would have said so (as in the case of ss. 28-30 of the *OLAC* [*Official Languages Act* of Canada] and s. 28.1 of the *Official Languages Act*, S.N.B. 2002, c.O-0.5 ("*OLANB*")). They contend that, absent similar provisions in the *OLA*, the legislature is free to enact regulations to provide for active offer.

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[33] Section 28 might be termed the proactive clause. It imposes on federal institutions the duty to ensure that appropriate measures are taken to make it known to the public that services in either official language are available. Likewise, under section 30, these institutions are obliged to use communications media which will effectively reach both language groups.

SEE ALSO:

Ayangma v. Canada, 2003 FCA 149 (CanLII)

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29. Signs identifying offices

29. Where a federal institution identifies any of its offices or facilities with signs, each sign shall include both official languages or be placed together with a similar sign of equal prominence in the other official language.

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30. Manner of communicating

30. Subject to Part II, where a federal institution is engaged in communications with members of the public in both official languages as required in this Part, it shall communicate by using such media of communication as will reach members of the public in the official language of their choice in an effective and efficient manner that is consistent with the purposes of this Act.

ANNOTATIONS

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[33] Section 28 might be termed the proactive clause. It imposes on federal institutions the duty to ensure that appropriate measures are taken to make it known to the public that services in either official language are available. Likewise, under section 30, these institutions are obliged to use communications media which will effectively reach both language groups.

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31. Relationship to Part V

31. In the event of any inconsistency between this Part and Part V, this Part prevails to the extent of the inconsistency.

ANNOTATIONS

Forum des maires de la Péninsule acadienne c. Canada (Agence d'inspection des aliments), [2004] 4 RCF 276, 2004 CAF 263 (CanLII)

[48] Le droit dont il s'agit, dans cette partie IV, est celui du public « de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie » (article 21). Ce droit du public l'emporte, selon l'article 31, sur le droit conféré par la partie V « Langue de travail » aux agents des institutions fédérales de travailler dans l'une ou l'autre des deux langues officielles.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[14] Further, it appears from s. 31 of the Act that the provisions of Part IV, dealing with the language of communications with and services to the public (including ss. 22 and 27), prevail over inconsistent provisions of Part V, dealing with the language of work. It follows, in our opinion, that under Part IV the rights of the public in an area such as Toronto where demand is considered to be significant are not diminished by the fact that that area has not been "designated" bilingual with respect to the language of work under ss. 35 and 36 of the Act. In other words, the appellant's rights to receive service in French in Toronto are not lessened merely by the fact that the appellant would have to work in English if he were to obtain the employment sought.

Tailleur v. Canada (Attorney General), 2015 FC 1230 (CanLII)

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

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

[...]

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

[...]

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

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

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

(a) Impact of section 31

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

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

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

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

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

[…]

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

[…]

[94] Accordingly, the Court is satisfied that, in order to ensure equal, immediate service for all taxpayers, it is objectively necessary that the notes be entered in taxpayers' files in the official language of their choice. This involves something other than mere administrative convenience (*Singh v Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177 at para 70). It should be noted that, with the telephone system in place at the CRA, calls from Anglophone taxpayers may be routed to a bilingual agent or a unilingual Anglophone agent and that those taxpayers have the right to receive the same quality of service, irrespective of the language proficiency of the call centre agent who answers their call.

[...]

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

[...]

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

[...]

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

[...]

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

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[77] Thus, the right of the public under Part IV of the *OLA* to communicate with and receive services in the official language of its choice will prevail over any incompatible work rule found in a collective agreement (e.g. seniority) preventing members of the public from communicating with and receiving services from the concerned federal institution in the official language of their choice. Whether the obligation under Part IV is one of result or one of means, there is very little room for compromise (*Thibodeau v. Air Canada*, 2007 FCA 115 (CanLII), [2007] F.C.J. No. 404 (QL) (*Thibodeau*)).

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

Regulations

32. (1) Regulations

32. (1) The Governor in Council may make regulations

(a) prescribing the circumstances in which there is significant demand for the purpose of paragraph 22(b) or subsection 23(1);

(b) prescribing circumstances not otherwise provided for under this Part in which federal institutions have the duty to ensure that any member of the public can communicate with and obtain available services from offices of the institution in either official language;

(c) prescribing services, and the manner in which those services are to be provided or made available, for the purpose of subsection 23(2);

(d) prescribing circumstances, in relation to the public or the travelling public, for the purpose of paragraph 24(1)(a) or (b); and

(e) defining the expression "English or French linguistic minority population" for the purpose of paragraph (2)(a).

32. (2) Where circumstances prescribed under paragraph (1)(a) or (b)

32. (2) In prescribing circumstances under paragraph (1)(a) or (b), the Governor in Council may have regard to

(a) the number of persons composing the English or French linguistic minority population of the area served by an office or facility, the particular characteristics of that population and the proportion of that population to the total population of that area;

(b) the volume of communications or services between an office or facility and members of the public using each official language; and

(c) any other factors that the Governor in Council considers appropriate.

ANNOTATIONS

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[10] Although based on the same facts, the issue now before the Court is quite different. The summons and the plaintiff's conviction for speeding are no longer the issue. The issue is rather to determine whether the plaintiff's rights as a Francophone were infringed because, contrary to the right guaranteed in section 20 of the *Charter*, he did not receive services in French and could not communicate in French when he addressed a member of the RCMP who was patrolling Highway 104 near Amherst. [...]

[11] Under the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48 (the Regulations), adopted pursuant to section 32 of the *OLA*, to determine whether a "significant demand" exists for services in the minority official language in a rural area, the minority population must attain the level of 500 persons or 5% of the population in the service area. Consequently, the RCMP detachment at Amherst, Nova Scotia, as an office of a federal institution subject to the *Charter* and the *OLA*, does not have to offer bilingual services in the Amherst area because there is no "significant demand" in that area within the meaning of the Regulations. The 1991 census shows a Francophone population of 255 persons living in the service area of the Amherst detachment, and this is 1.1% of the population in the detachment's service area. In Amherst itself, the Francophone population makes up 2.1% of the population.

[...]

[80] I allow the plaintiff's claim in part. I declare subparagraph 5(1)(h)(i) of the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, adopted pursuant to section 32 of the *OLA*, inconsistent with paragraph 20(1)(a) of the *Charter* in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of Francophones in the census district. Consideration must also be given to the number of Francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia. In my view, it is reasonable to give the Governor in Council 18 months to correct the problem identified in the *Regulations*.

Canada (Attorney General) v. Green, [2000] 4 FCR 629, 2000 CanLII 17146 (FC)

(d) The Official Languages (Communications with and Services to the Public) Regulations [SOR/92-48]

[47] These Regulations made by the Governor in Council under section 32 of the *OLA* were adopted in 1991. They define the concept of English and French linguistic minority population, significant demand and contain other provisions which need not be reproduced here.

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[34] Subsection 32(1), in turn, prescribes in more detail the regulatory authority of the Governor in Council with respect to "significant demand", to circumstances not otherwise provided, and with respect to the services and the manner of providing them. It also authorizes the Governor in Council to have regard to: the French and English linguistic minority population served by the government; the proportion of that population and its characteristics; the volume of business in either language; and finally, any other factors the Governor in Council considers appropriate.

[...]

[57] In the case before me, it is obvious that there exists under the *Official Languages Act* a broad picture and a narrower one. The object of the Act is not only to permit the use of our official languages and give citizens the right to deal with federal institutions in the language of their choice. It is more than that. It is to promote the use of both languages or, as expressed in the Act's preamble, "enhancing the vitality and supporting the development of English and French linguistic minority communities". Such a policy commitment by the Government of Canada imposes a double duty which must sooner or later be exercised in concrete terms.

[58] The first duty is to assure that federal institutions are in a position to respond to a citizen's right to communicate with or to be provided services from them in either language. Admittedly, there are variables in the extent or depth of meeting need and availability. One must never lose sight of the main issue, namely that it is only with respect to minority language rights in any given community that the purposes and objectives of the Act are put to the test. The majority language rights in any such community are dynamically respected and pose no problems.

[59] These variables are the product of many basic considerations. I need not list them all, but they do include demographic factors, the size of the minority constituency, the exposure of particular federal agencies to citizen relationships, the proper functioning of these agencies to meet their operational requirements, the significant demand for minority language services, as well as the other considerations which are outlined in section 32 and section 33 of the Act.

SEE ALSO:

Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48

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33. Regulations

33. The Governor in Council may make any regulations that the Governor in Council considers necessary to foster actively communications with and services from offices or facilities of federal institutions — other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer — in both official languages, if those communications and services are required under this Part to be provided in both official languages.

R.S., 1985, c. 31 (4th Supp.), s. 33; 2004, c. 7, s. 27; 2006, c. 9, s. 21; 2015, c. 36, s. 145; 2017, c. 20, s. 180.

ANNOTATIONS

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

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[59] These variables are the product of many basic considerations. I need not list them all, but they do include demographic factors, the size of the minority constituency, the exposure of particular federal agencies to citizen relationships, the proper functioning of these agencies to meet their operational requirements, the significant demand for minority language services, as well as the other considerations which are outlined in section 32 and section 33 of the Act.

SEE ALSO:

Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48

Part V – Language of Work

34. Rights relating to language of work

34. English and French are the languages of work in all federal institutions, and officers and employees of all federal institutions have the right to use either official language in accordance with this Part.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53 (CanLII)

[64] In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate context in which the Commissioner carries out his functions.

Gingras v. Canada, [1994] 2 FCR 734, 1994 CanLII 3475 (FCA)

[7] The *Official Languages Act* of 1969 and 1988 contain no provision regarding the introduction of a bilingualism bonus plan. In other words, there was nothing in those Acts to require the Government to set up such a plan, if it did so there was nothing to require it to make the plan applicable to all eligible employees in the federal Public Service and nothing prevented it from abolishing or modifying any plan it created, which the Official Languages Commissioner in fact urged it to do year after year in his annual report.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (QL) (FCA) [hyperlink not available]

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

François v. Canada (Attorney General), 2017 FC 154 (CanLII)

[39] My review of the CDS [Chief of Defence Staff] Decision and of the evidence on the record first persuades me that, contrary to what Capt. François alleges, the CDS reasonably found that the CAF [Canadian Armed Forces] had met its obligations under the *OLA* and the CAF language policy. In other words, Capt. François' language rights were not breached.

[40] The CDS indicated in his decision that he fully agreed with the Committee's findings with regard to the obligations under the *OLA*, and to the fact that the CAF complied with its obligations. The Committee, in its report, mentioned that even though Capt. François received extensive language training, the evidence demonstrated that he was placed in a bilingual working

environment which provided him with the opportunity to communicate in the language of his choice. Moreover, the Committee's report emphasized that Capt. François "received numerous and ample tools, training, counselling and support in the language of his choice", which was often English, and that Capt. François' choices, such as receiving counselling, training and documents in English, as well as filing his grievance in English, weakened his *OLA* argument. As a result, the CDS completely agreed with the Committee that no breach of the *OLA* or of the CAF language policy occurred.

[41] Indeed, the record contains ample evidence showing that the CAF met its obligations described in the DAOD [Defence Administrative Orders and Directive] 5039, to ensure that "in bilingual units, the work environment is conducive to the effective use of both languages" and that "Francophones and Anglophone have equal opportunity for employment and career advancement" within the CAF. To support its conclusions, the CDS extensively canvassed the facts and the law and provided a detailed analysis in his decision. In particular, he noted the following facts:

A. Capt. François initially received full-time English training for 948 hours in 2003, and graduated with a "BBB" second language profile;

B. Capt. François benefited from two other 60-hours courses in English writing in 2009;

C. Capt. François' second language profile improved to "CBB" in 2011;

D. Capt. François was employed in sections supervised by several levels of bilingual Francophones for the four years prior to his release;

E. Capt. François' sole employment in the year leading up to the AR [Administrative Review] process was as an assistant to a Francophone, supporting a Francophone company in Mirabel, Québec;

F. Capt. François was always able to speak and brief in the language of his choice;

G. Capt. François had to work with some technical materials provided by the United States that were only available in English, but he possessed the necessary tools to overcome this, considering that his second language profile rated his English written comprehension as a "C";

H. Capt. François' challenges associated with communication skills were only one of several areas of noted weakness.

[42] In light of this evidence, I agree with the Attorney General that the CDS reasonably concluded that Capt. François was provided with the necessary tools to perform and to be effective in an environment conducive to the effective use of both official languages. It bears underscoring that the CDS did address the issue of Capt. François' linguistic rights in detail in his decision, adopting the Committee's view on the issue and explaining how the CAF fulfilled its obligations under the OLA and the DAOD 5039.

[...]

[50] Moreover, the CDS found that Capt. François' assertion that he was working in an Anglophone environment was incorrect and not borne by the evidence. True, the technical materials that Capt. François was working with were only available in English, but it was reasonable to find, given the evidence and the circumstances, that Capt. François possessed the necessary tools and skills to overcome that challenge. Also, his supervisors were Francophones and Capt. François could always brief in the language of his choice. Once again, these findings of fact are reasonable.

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

[...]

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

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[115] Part V of the *Official Languages Act* creates rights and duties in relation to the language of work. The general right in relation to the language of work is embodied in section 34 which provides that "English and French are the languages of work in all federal institutions, and officers and employees of all federal institutions have the right to use either official language in accordance with this Part". […]

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and 16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

[…]

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

[…]

[132] In the present case, given the integrated nature of the air traffic control operations and the importance of all controllers being aware of the level of activity and the events transpiring in the area, the Department chose to comply with its statutory duties and obligations under the *Official Languages Act* to give effect to the language rights in sections 21 and 34 by implementing a fully bilingual work environment for the safe and effective delivery of bilingual air traffic services. Indeed, since the inception of bilingual air traffic services in Quebec in 1978, the Department has consistently taken the position that all air traffic controllers working in an area offering such services must be bilingual. The Department also believed that a fully bilingual work environment was necessary to foster cohesiveness in the group effort required in the complex air traffic control environment, and that the presence of a unilingual air traffic controller would "force everyone to operate in his language", thereby frustrating its goal. Furthermore, the Canadian Air Traffic Control Association consistently opposed the implementation of bilingual air traffic control services at the Ottawa Control Tower unless it could be "safely implemented with a full staff of competent and fully qualified bilingual controllers". Even Mr. Schreiber, during his cross-examination, admitted that it was "better" for all of the air traffic controllers to be bilingual. The Department therefore sought to create a fully bilingual work environment in order to facilitate the section 21 right of a member of the public to communicate with and to receive services in either official language, and to comply with the section 34 right of its employees to use either official language. Indeed, given the unique nature of air traffic control operations, only a fully bilingual work environment could be "... conducive to the effective use of both official languages and accommodate the use of either official language by officers and employees", as required by paragraph 35(1)(a) of the *Official Languages Act*. Finally, a fully bilingual work environment was also consistent, on a long term basis, with the Department's high safety requirements for the provision of air traffic control services.

Lavigne v. Canada, 1997 CanLII 4800 (FC)

During his employ at NHW [National Health and Welfare], the applicant made four complaints to the Commissioner of Official Languages (COL). The report prepared by the COL sets them out as follows:

" his supervisor requires that correspondence addressed to the regional office in Quebec City be written in French (OCOL file 1950-92-H2);

" memorandums sent to the Montreal District Office from the Quebec Regional Office are unilingual French (OCOL file 0174-93-H2);

" most of the job-related training courses are offered in French only at the Montreal District Office (OCOL file 0175-93-H2);

" various unilingual English messages sent by electronic mail from the Montreal District Office to the Quebec Regional Office are returned with the notation "en français s.v.p." [in French, please] (OCOL file 0357-93-H2).

In a letter dated July 4, 1993, the complainant added further elements to his initial allegations, namely:

" the linguistic climate that prevailed at the Montreal office reflected the fact that the institution had not created an environment conducive to the use of English;

" his employer had done nothing to promote the use of English and refused him the right to work in English;

" the fact that he had been denied training and work instruments in English had an unfavourable impact on the acquisition of knowledge and on his performance, and, consequently, on the evaluation of these done by his supervisor; the employer used this evaluation in deciding not to rehire him for another specified period (term).

The COL identified the issue as having to do with "language of work and with equal opportunities for employment and advancement in federal institutions" pursuant to the provisions of Part V of the Act. The Montréal work region is designated as bilingual, and accordingly, employees have the right to use the language of their choice in carrying out their work functions. The Québec Regional Office is not designated as bilingual. The Québec office has jurisdiction over the Montréal office. The report set out that "the Quebec office must accommodate the employees of the Montreal office as regards their right to work in the official language of their choice. Thus, in the internal handling of the files of NHW clients, the employees of the Montreal office may communicate with the Quebec office in the language of their choice."

The conclusions of the COL, rendered in his report which came out in June 1994, were as follows:

" the management of the Montreal office did not identify in advance the linguistic preference of the complainant (nor of the other term clerks) when he took up his duties;

" the management of the Montreal office did not ensure that the complainant and other English-speaking staff received the documentation produced at the regional and local levels in their official language;

" the complainant's opportunities to demonstrate his abilities and potential were affected due to the fact that he was obliged, during approximately half his term of employment, to work in French; and

" the complainant was put at a disadvantage in terms of his opportunity to acquire and master work-related knowledge because he did not receive his initial training in his official language and did not have work instruments available in his language. The complainant was thereby placed at a disadvantage in the selection process compared to his French-speaking peers. This situation could have had a negative impact on his opportunities for employment in the Department.

As the COL concluded that the applicant's language of work complaints were founded, he made the following recommendations to the respondent HRD [Human Resources Development]:

1. review, without delay, the complainant's performance evaluation (the one prepared within the context of the selection process of persons recalled for another term), taking into account the fact that the complainant was placed at a disadvantage in demonstrating his knowledge and abilities; and, if possible, review its decision not to renew his term.

2. organize, by June 30, 1994, information sessions for the managers of the Montreal office to make them more aware of their linguistic obligations;

3. ensure that the managers of the Montreal office take, by June 30, 1994, all the measures required to provide English-speaking employees with work instruments in their official language and to create a climate conducive to the use of both official languages in the work environment;

4. ensure immediately that staff training in bilingual regions in Quebec is offered in the official language of the employees; and

5. put in place, by June 30, 1994, the corrective measures contemplated in July 1993 by the Regional Director, Human Resources, with regard to central services at the Quebec office.

[...]

As the respondent HRD has admitted to infringements under Part V of the Act, the only remaining issue is the appropriate remedy to be granted by this Court.

N.B. – The appeal of this decision was dismissed: Lavigne v. Canada (Human Resources Development), 1998 CanLII 7820 (FCA).

SEE ALSO:

Air Canada v. Joyal, 1982 CanLII 3079 (QC CA)

Association des Gens de L'Air du Quebec Inc. et al. v. Lang et al., [1978] 2 FC 371, 1978 CanLII 2029 (FCA)

McNeill v. Canada, [1987] 1 F.C. 119 (FC) [hyperlink not available]

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35. (1) Duties of government

35. (1) Every federal institution has the duty to ensure that

> **(a) within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed, work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees; and**
>
> **(b) in all parts or regions of Canada not prescribed for the purpose of paragraph (a), the treatment of both official languages in the work environments of the institution in parts or regions of Canada where one official language predominates is reasonably comparable to the treatment of both official languages in the work environments of the institution in parts or regions of Canada where the other official language predominates.**

35. (2) Regions of Canada prescribed

35. (2) The regions of Canada set out in Annex B of the part of the Treasury Board and Public Service Commission Circular No. 1977-46 of September 30, 1977 that is entitled "Official languages in the Public Service of Canada: A Statement of Policies" are prescribed for the purpose of paragraph (1)(a).

ANNOTATIONS

Patanguli v. Canada (Citizenship and Immigration), 2015 FCA 291 (CanLII)

[45] With regard to an infringement of the appellant's language rights, the final investigation report dated January 26, 2010, signed by Mr. Ferguson and Pirt Horodyski, states that:

> At the beginning of Mr. Balikwisha-Patanguli's first interview with the investigating committee on August 31, 2009, Mr. Balikwisha-Patanguli expressed two concerns to the committee.
>
> …

> Secondly, Mr. Balikwisha-Patanguli requested that the interview be conducted in French as this is his first official language. The committee explained that due to the fact that Mr. Balikwisha-Patanguli's work location, CIC [Citizenship and Immigration Canada] Calgary, is not designated a bilingual region for language of work and that he has been deemed to meet the English Essential language requirements of his current position, the interview would be conducted in English. Mr. Balikwisha-Patanguli was, however, advised that the committee would take extra care to ensure clarity of the questions being posed and understanding of Mr. Balikwisha-Patanguli's responses. Mr. Balikwisha-Patanguli was encouraged to seek additional clarification if and when he did not understand a question being asked or if and when he felt that a response was not totally understood by the committee. The committee also offered that should Mr. Balikwisha-Patanguli feel the need to provide additional follow-up to the interview, he could do so in writing. Mr. Balikwisha-Patanguli was in agreement to proceed with the interview on this basis. Mr. Balikwisha-Patanguli did not indicate any concerns related to his ability to express himself or understand the questions posed during the interview and at the conclusion of the interview, he declined the offer to provide a written follow-up to the interview. Neither Mr. Balikwisha-Patanguli nor his union representative raised any further concerns regarding the use of the English language at the second interview with the investigating committee [September 1, 2009] or at any other time during the investigation process.

[46] It is far from clear to me that the appellant actually had the language rights he alleges to have had under the *Charter* and the Act, which enforces sections 16 to 20 of the *Charter* (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 (CanLII), [2002] 2 S.C.R. 773). The appellant cites section 16 of the *Charter* and the purpose of the Act (section 2), without demonstrating that these provisions imposed an obligation on his employer to ensure that the interviews on August 31 and September 1, 2009, took place in French. If there was such an obligation, it would likely result from Part V of the Act entitled "Language of Work." That part of the Act distinguishes between different regions of the country. As Calgary is not a "prescribed region" under Part V, an employer's linguistic obligations respecting employees are more limited in that region.

[47] Mr. Patanguli did not file a grievance regarding this so-called violation of his language rights and nothing indicates that he filed a complaint about it under the Act. In the absence of arguments demonstrating that the purpose of the Act may be the source of the obligation that the appellant says he benefits from, I cannot conclude that his language rights were violated in this case. Therefore, it is not useful to examine the impact that the *de novo* process before the adjudicator could have had in this regard.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[14] Further, it appears from s. 31 of the [Official Languages] Act that the provisions of Part IV, dealing with the language of communications with and services to the public (including ss. 22 and 27), prevail over inconsistent provisions of Part V, dealing with the language of work. It follows, in our opinion, that under Part IV the rights of the public in an area such as Toronto where demand is considered to be significant are not diminished by the fact that that area has not been "designated" bilingual with respect to the language of work under ss. 35 and 36 of the Act. In other words, the appellant's rights to receive service in French in Toronto are not lessened merely by the fact that the appellant would have to work in English if he were to obtain the employment sought.

François v. Canada (Attorney General), 2017 FC 154 (CanLII)

[39] My review of the CDS [Chief of Defence Staff] Decision and of the evidence on the record first persuades me that, contrary to what Capt. François alleges, the CDS reasonably found that

the CAF [Canadian Armed Forces] had met its obligations under the *OLA* and the CAF language policy. In other words, Capt. François' language rights were not breached.

[40] The CDS indicated in his decision that he fully agreed with the Committee's findings with regard to the obligations under the *OLA*, and to the fact that the CAF complied with its obligations. The Committee, in its report, mentioned that even though Capt. François received extensive language training, the evidence demonstrated that he was placed in a bilingual working environment which provided him with the opportunity to communicate in the language of his choice. Moreover, the Committee's report emphasized that Capt. François "received numerous and ample tools, training, counselling and support in the language of his choice", which was often English, and that Capt. François' choices, such as receiving counselling, training and documents in English, as well as filing his grievance in English, weakened his *OLA* argument. As a result, the CDS completely agreed with the Committee that no breach of the *OLA* or of the CAF language policy occurred.

[41] Indeed, the record contains ample evidence showing that the CAF met its obligations described in the DAOD [Defence Administrative Orders and Directive] 5039, to ensure that "in bilingual units, the work environment is conducive to the effective use of both languages" and that "Francophones and Anglophone have equal opportunity for employment and career advancement" within the CAF. To support its conclusions, the CDS extensively canvassed the facts and the law and provided a detailed analysis in his decision. In particular, he noted the following facts:

A. Capt. François initially received full-time English training for 948 hours in 2003, and graduated with a "BBB" second language profile;

B. Capt. François benefited from two other 60-hours courses in English writing in 2009;

C. Capt. François' second language profile improved to "CBB" in 2011;

D. Capt. François was employed in sections supervised by several levels of bilingual Francophones for the four years prior to his release;

E. Capt. François' sole employment in the year leading up to the AR [Administrative Review] process was as an assistant to a Francophone, supporting a Francophone company in Mirabel, Québec;

F. Capt. François was always able to speak and brief in the language of his choice;

G. Capt. François had to work with some technical materials provided by the United States that were only available in English, but he possessed the necessary tools to overcome this, considering that his second language profile rated his English written comprehension as a "C";

H. Capt. François' challenges associated with communication skills were only one of several areas of noted weakness.

[42] In light of this evidence, I agree with the Attorney General that the CDS reasonably concluded that Capt. François was provided with the necessary tools to perform and to be effective in an environment conducive to the effective use of both official languages. It bears underscoring that the CDS did address the issue of Capt. François' linguistic rights in detail in his decision, adopting the Committee's view on the issue and explaining how the CAF fulfilled its obligations under the OLA and the DAOD 5039.

[...]

[50] Moreover, the CDS found that Capt. François' assertion that he was working in an Anglophone environment was incorrect and not borne by the evidence. True, the technical materials that Capt. François was working with were only available in English, but it was reasonable to find, given the evidence and the circumstances, that Capt. François possessed the necessary tools and skills to overcome that challenge. Also, his supervisors were Francophones and Capt. François could always brief in the language of his choice. Once again, these findings of fact are reasonable.

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

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

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[115] Part V of the *Official Languages Act* creates rights and duties in relation to the language of work. The general right in relation to the language of work is embodied in section 34 which provides that "English and French are the languages of work in all federal institutions, and officers and employees of all federal institutions have the right to use either official language in accordance with this Part". In order to give effect to the right relating to the language of work, sections 35 and 36 impose certain duties on federal institutions in relation to various matters, including the work environment. In that regard, paragraph 35(1)(a) imposes a duty on every federal institution to ensure that, within the National Capital Region and other prescribed areas, "...work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees...". The importance ascribed to the existence of a bilingual work environment is reinforced by paragraphs 36(1)(a) and (b) which require a federal institution to provide the necessary tools, including services, work instruments and automated systems for the processing and communication of data, in both official languages to assist officers and employees in the performance of their duties. By virtue of subparagraph 36(c)(i), supervisors must be able to communicate in both official languages "where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages". Under subparagraph 36(1)(c)(ii), any management group with responsibility for the general direction of the institution must have "the capacity to function in both official languages". Finally, subsection 36(2) imposes a further duty on federal institutions to take reasonable measures "...to establish and maintain work environments of the institution that are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees".

[116] For ease of reference, paragraph 35(1)(a) and section 36 provide as follows: […]

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and

16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

[…]

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

[…]

[132] In the present case, given the integrated nature of the air traffic control operations and the importance of all controllers being aware of the level of activity and the events transpiring in the area, the Department chose to comply with its statutory duties and obligations under the *Official Languages Act* to give effect to the language rights in sections 21 and 34 by implementing a fully bilingual work environment for the safe and effective delivery of bilingual air traffic services. Indeed, since the inception of bilingual air traffic services in Quebec in 1978, the Department has consistently taken the position that all air traffic controllers working in an area offering such services must be bilingual. The Department also believed that a fully bilingual work environment was necessary to foster cohesiveness in the group effort required in the complex air traffic control environment, and that the presence of a unilingual air traffic controller would "force everyone to operate in his language", thereby frustrating its goal. Furthermore, the Canadian Air Traffic Control Association consistently opposed the implementation of bilingual air traffic control services at the Ottawa Control Tower unless it could be "safely implemented with a full staff of competent and fully qualified bilingual controllers". Even Mr. Schreiber, during his cross-examination, admitted that it was "better" for all of the air traffic controllers to be bilingual. The Department therefore sought to create a fully bilingual work environment in order to facilitate the section 21 right of a member of the public to communicate with and to receive services in either official language, and to comply with the section 34 right of its employees to use either official language. Indeed, given the unique nature of air traffic control operations, only a fully bilingual work environment could be "... conducive to the effective use of both official languages and accommodate the use of either official language by officers and employees", as required by paragraph 35(1)(a) of the *Official Languages Act*. Finally, a fully bilingual work environment was also consistent, on a long term basis, with the Department's high safety requirements for the provision of air traffic control services.

SEE ALSO:

Canada (Attorney General) v. Green, [2000] 4 FCR 629, 2000 CanLII 17146 (FC)

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36. (1) Minimum duties in relation to prescribed regions

36. (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(a), to

> **(a) make available in both official languages to officers and employees of the institution**
>
> > **(i) services that are provided to officers and employees, including services that are provided to them as individuals and services that are centrally provided by the institution to support them in the performance of their duties, and**
> >
> > **(ii) regularly and widely used work instruments produced by or on behalf of that or any other federal institution;**
>
> **(b) ensure that regularly and widely used automated systems for the processing and communication of data acquired or produced by the institution on or after January 1, 1991 can be used in either official language; and**
>
> **(c) ensure that,**
>
> > **(i) where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility, and**
> >
> > **(ii) any management group that is responsible for the general direction of the institution as a whole has the capacity to function in both official languages.**

36. (2) Additional duties in prescribed regions

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

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St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[14] Further, it appears from s. 31 of the [Official Languages] Act that the provisions of Part IV, dealing with the language of communications with and services to the public (including ss. 22 and 27), prevail over inconsistent provisions of Part V, dealing with the language of work. It follows, in our opinion, that under Part IV the rights of the public in an area such as Toronto where demand is considered to be significant are not diminished by the fact that that area has not been "designated" bilingual with respect to the language of work under ss. 35 and 36 of the Act. In other words, the appellant's rights to receive service in French in Toronto are not lessened merely

by the fact that the appellant would have to work in English if he were to obtain the employment sought.

Shakov v. Canada (Attorney General), 2015 FC 1416 (CanLII)

[59] The evidence shows that the departure of the previous Director left the International Programs with no proper management and jeopardized on-going projects and future financing. It also establishes that the FJA [Federal Judicial Affairs] could not afford to wait for a new Director. This is the context surrounding the operational requirements at the time when the language profile was established. The evidence also demonstrates that the appointment of Mr. Shakov did not benefit from any personal favouritism. To the contrary, Mr. Shakov accepted this appointment in order to ensure the viability of the International Programs Division, to the detriment of his financial and professional interests. He was hired in exceptional circumstances because he was, on short notice, the only person capable of saving the International Programs in light of his unique experience in this area. An invitation to apply for the one-year contract was sent to public servants who had priority to be hired but no one had the required qualifications.

[60] Section 36(c)(i) of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) states that: [...]

[61] There was no legislative requirement that the position be bilingual because in the short term there was no concern regarding the ability to supervise employees in the language of their choice. While the other Director positions in the FJA have an imperative bilingual profile in order to allow bilingual employees to address their Director in the official language of their choice, at the time of the Appointment Process none of the International Programs Division employees required supervision in French. At the hearing, counsel for the FJA acknowledged that one of the employees was not an Anglophone but noted that this person held a bilingual position. There is no indication that this employee ever needed or asked to communicate with Mr. Shakov in French.

[62] In sum, the investigator failed to consider the critical situation in coming to her conclusions. The evidence of the exceptional circumstances requiring the immediate appointment of a Director in order to ensure the viability of the International Programs was completely overlooked. The decision to establish the linguistic profile as English Essential was designed solely for the best interest of the FJA and not tailored to benefit Mr. Shakov.

[63] Should the Acting Commissioner have put the projects and financing in jeopardy because of a language requirement with no practical necessity in the immediate future? I do not think so. I am satisfied that this managerial decision falls within a range of reasonable outcomes and that the investigator should not have substituted her own opinion of what the FJA required.

N.B. – This judgment is currently under appeal before the Federal Court of Appeal.

Tailleur v. Canada (Attorney General), 2015 FC 1230 (CanLII)

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

[...]

[43] Section 36 of the *OLA* further clarifies the rights of employees in prescribed regions, including prescribed bilingual regions like the Montréal region where Mr. Talleur works. The minimum duties of federal institutions are set out at subsection 36(1) while additional duties are

contained in subsection 36(2). These provisions, which it is necessary to reproduce in this case, read as follows: [...]

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

[…]

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

[…]

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

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

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

(b) Scope of subsection 36(2)

[61] What remains to be determined now is the scope of subsection 36(2). The French version of this subsection requires federal institutions to take “toutes autres mesures possibles” to establish and maintain work environments that are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees. The English version of this subsection uses the expression “such measures . . . as can reasonably be taken”.

[62] We will first analyze the scope of the words “toutes autres mesures possibles”. At the hearing, Mr. Tailleur agreed with the Commissioner’s position that subsection 36(2) requires federal institutions to take [translation] “any other measures that it is reasonable to take” to establish and maintain work environments that are conducive to the effective use of both official languages. The Attorney General submits, for his part, that the *OLA* requires only that [translation] “reasonable” measures in the circumstances be taken and that there is no real difference between the two linguistic versions of the *OLA*. He notes that the term “reasonable” is used a number of times in the *OLA* and that it is translated in various ways in French (sometimes as “raisonnable”, “justifié. dans les circonstances” or “indiqué”). Consequently, the expression

“mesures possibles” in the French version of subsection 36(2) should be interpreted in the same way and would correspond more closely to the concept of [translation] “reasonable measures”.

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

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

[…]

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

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

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

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

[71] Moreover, considering the concrete, substantive dimension of the measures that is apparent from Parliament’s intent, the duty in subsection 36(2) cannot reasonably mean that a federal institution must look at everything that could be imagined in terms of measures. On the contrary, subsection 36(2) only requires federal institutions to consider all reasonable measures. It is difficult for the Court to see how, in the interpretation and practical application of the *OLA*, the reading of this section can be divided by separating the component “toutes” from the concept of “raisonnables”.

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

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

(c) Whether measures are [translation] "reasonable"

[74] Lastly, it remains to be determined what is [translation] "reasonable" and how, in each circumstance, a federal institution can fulfil its duty and justify why an alternative measure would not be acceptable because it is unreasonable. The Commissioner notes that this a positive duty imposed on federal institutions: it is not just an obligation of means, and a federal institution has the burden of explaining why an accommodation measure would not be reasonable. The Commissioner takes the position that three relevant criteria must be looked at to determine whether the implementation of a measure by a federal institution satisfied this condition. The Court concurs with this opinion while specifying, however, that these criteria are not necessarily exhaustive.

[75] A liberal and purposive interpretation, consistent with the preservation and development of official languages in Canada, identifies a list of factors that may be considered in determining whether a measure taken by a federal institution to satisfy the requirements of the *OLA* is reasonable. These criteria are not exhaustive, but they certainly include the following: (i) the significant, serious operational difficulties that the measures may create, (ii) a demonstrable conflict with Part IV of the *OLA* and the federal institution's duties to the public and (iii) the fact that the implementation must not create a conflict with the institution's mandate.

[…]

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

[…]

[81] For the reasons stated above, the Court is of the opinion that subsection 36(2) does not require a proactive universal approach that would oblige a federal institution to first consider all possible measures and then isolate those that are reasonable. Rather, the Court concludes that to comply with the requirements of subsection 36(2) of the *OLA* a federal institution must, in the same vein, consider and adopt all measures that it is reasonable to take to establish a work environment conducive to the use of both official languages. Whether the measures are reasonable will depend on the circumstances of each case, but a specific measure will not be reasonable if it imposes significant or serious operational difficulties on a federal institution or if

implementing it would cause a demonstrable conflict with Part IV of the *OLA* on language of service or with a federal institution's mandate. This in an interpretation of the *OLA* that is in harmony with the meaning common to the English and French versions of the Act and that reflects the objectives of Parts IV and V.

[82] The Court adds the following observation. The Attorney General contends that, in determining whether a federal institution has taken reasonable measures, consideration must be given to the bilingual nature of the position of an employee whose duties and tasks require the use of French and English. The Court cannot accept this argument. This is not a factor to consider in determining whether a measure taken by a federal institution to meet the requirements of subsection 36(2) of the *OLA* is reasonable. First, both Part IV and Part V must be given a liberal and purposive interpretation consistent with the preservation and development of Canada's official languages. Second, a federal institution cannot circumvent its language of work duties under Part V of the *OLA* simply by resorting to bilingual employees. The language proficiency of individuals should not be a factor in determining language rights. Moreover, the Court notes in this regard the Supreme Court's comments in *Beaulac* at para 45:

> [45] In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist.

[…]

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

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

[100] The Court does not agree. The evidence clearly establishes that Mr. Tailleur's alternative is not reasonable because it would invariably lead to unequal service between Anglophone and Francophone taxpayers. In fact, the CRA has already adopted a number of measures that it was reasonable to take to respect the rights of its call centre agents to work in the language of their choice. However, the transfer of calls proposed by Mr. Tailleur is not, in the Court's view, a measure that can reasonably be taken within the meaning of subsection 36(2) of the *OLA*.

[…]

[108] Pursuant to subsection 36(2) and the interpretation proposed above, a measure will not be reasonable if its implementation would be in conflict with a federal institution's duties under Part

IV of the *OLA*. This factor is determinative in this case. The CRA's duty is to provide equal service (meaning substantive equality) to Canadian taxpayers. When taxpayers call the CRA, they choose the French or English line and exercise at that point their choice of official language in which they wish to be served. The alternative measure proposed by Mr. Tailleur would create inequality in that some Anglophone taxpayers would experience additional delays waiting until a bilingual agent is available to deal with their file. Considering the CRA's duty to ensure that members of the public receive service of equal quality in either official language (sections 22 and 24 of the *OLA*), the transfer of calls proposed by Mr. Tailleur is inconsistent with Part IV.

[...]

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

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[115] Part V of the *Official Languages Act* creates rights and duties in relation to the language of work. The general right in relation to the language of work is embodied in section 34 which provides that "English and French are the languages of work in all federal institutions, and officers and employees of all federal institutions have the right to use either official language in accordance with this Part". In order to give effect to the right relating to the language of work, sections 35 and 36 impose certain duties on federal institutions in relation to various matters, including the work environment. In that regard, paragraph 35(1)(a) imposes a duty on every federal institution to ensure that, within the National Capital Region and other prescribed areas, "...work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees...". The importance ascribed to the existence of a bilingual work environment is reinforced by paragraphs 36(1)(a) and (b) which require a federal institution to provide the necessary tools, including services, work instruments and automated systems for the processing and communication of data, in both official languages to assist officers and employees in the performance of their duties. By virtue of subparagraph 36(c)(i), supervisors must be able to communicate in both official languages "where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages". Under subparagraph 36(1)(c)(ii), any management group with responsibility for the general direction of the institution must have "the capacity to function in both official languages". Finally, subsection 36(2) imposes a further duty on federal institutions to take reasonable measures "...to establish and maintain work environments of the institution that are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees".

[116] For ease of reference, paragraph 35(1)(a) and section 36 provide as follows: […]

[125] From a constitutional perspective, the language rights entrenched in subsections 16(1) and 20(1) of the *Charter* are engaged in the present proceeding. With respect to the *Official Languages Act*, the language rights in issue are the section 21 right to communicate with and to receive services from a federal institution and the section 34 right that English and French are the languages of work in all federal institutions, with employees having the right to use either official language in accordance with the provisions in Part V. The language rights in sections 21 and 34 of the *Official Languages Act* mirror the rights guaranteed respectively in subsections 20(1) and 16(1) of the *Charter*. The corresponding duties imposed on federal institutions in sections 22, 35 and 36 of the *Official Languages Act* are also relevant.

[…]

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

Lavigne v. Canada, 1997 CanLII 4800 (FC)

During his employ at NHW [National Health and Welfare], the applicant made four complaints to the Commissioner of Official Languages (COL). The report prepared by the COL sets them out as follows:

" his supervisor requires that correspondence addressed to the regional office in Quebec City be written in French (OCOL file 1950-92-H2);

" memorandums sent to the Montreal District Office from the Quebec Regional Office are unilingual French (OCOL file 0174-93-H2);

" most of the job-related training courses are offered in French only at the Montreal District Office (OCOL file 0175-93-H2);

" various unilingual English messages sent by electronic mail from the Montreal District Office to the Quebec Regional Office are returned with the notation "en français s.v.p." [in French, please] (OCOL file 0357-93-H2).

In a letter dated July 4, 1993, the complainant added further elements to his initial allegations, namely:

" the linguistic climate that prevailed at the Montreal office reflected the fact that the institution had not created an environment conducive to the use of English;

" his employer had done nothing to promote the use of English and refused him the right to work in English;

" the fact that he had been denied training and work instruments in English had an unfavourable impact on the acquisition of knowledge and on his performance, and, consequently, on the evaluation of these done by his supervisor; the employer used this evaluation in deciding not to rehire him for another specified period (term).

The COL identified the issue as having to do with "language of work and with equal opportunities for employment and advancement in federal institutions" pursuant to the provisions of Part V of

the Act. The Montréal work region is designated as bilingual, and accordingly, employees have the right to use the language of their choice in carrying out their work functions. The Québec Regional Office is not designated as bilingual. The Québec office has jurisdiction over the Montréal office. The report set out that "the Quebec office must accommodate the employees of the Montreal office as regards their right to work in the official language of their choice. Thus, in the internal handling of the files of NHW clients, the employees of the Montreal office may communicate with the Quebec office in the language of their choice."

The conclusions of the COL, rendered in his report which came out in June 1994, were as follows:

" the management of the Montreal office did not identify in advance the linguistic preference of the complainant (nor of the other term clerks) when he took up his duties;

" the management of the Montreal office did not ensure that the complainant and other English-speaking staff received the documentation produced at the regional and local levels in their official language;

" the complainant's opportunities to demonstrate his abilities and potential were affected due to the fact that he was obliged, during approximately half his term of employment, to work in French; and

" the complainant was put at a disadvantage in terms of his opportunity to acquire and master work-related knowledge because he did not receive his initial training in his official language and did not have work instruments available in his language. The complainant was thereby placed at a disadvantage in the selection process compared to his French-speaking peers. This situation could have had a negative impact on his opportunities for employment in the Department.

As the COL concluded that the applicant's language of work complaints were founded, he made the following recommendations to the respondent HRD [Human Resources Development]:

1. review, without delay, the complainant's performance evaluation (the one prepared within the context of the selection process of persons recalled for another term), taking into account the fact that the complainant was placed at a disadvantage in demonstrating his knowledge and abilities; and, if possible, review its decision not to renew his term.

2. organize, by June 30, 1994, information sessions for the managers of the Montreal office to make them more aware of their linguistic obligations;

3. ensure that the managers of the Montreal office take, by June 30, 1994, all the measures required to provide English-speaking employees with work instruments in their official language and to create a climate conducive to the use of both official languages in the work environment;

4. ensure immediately that staff training in bilingual regions in Quebec is offered in the official language of the employees; and

5. put in place, by June 30, 1994, the corrective measures contemplated in July 1993 by the Regional Director, Human Resources, with regard to central services at the Quebec office.

[...]

As the respondent HRD has admitted to infringements under Part V of the Act, the only remaining issue is the appropriate remedy to be granted by this Court.

N.B. – The appeal of this decision was dismissed: Lavigne v. Canada (Human Resources Development), 1998 CanLII 7820 (FCA).

SEE ALSO:

Leduc v. Canada, 2000 CanLII 15454 (FC)

Duguay v. Canada, 1999 CanLII 8653 (FC)

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37. Special duties for institutions directing or providing services to others

37. Every federal institution that has authority to direct, or provides services to, other federal institutions has the duty to ensure that it exercises its powers and carries out its duties in relation to those other institutions in a manner that accommodates the use of either official language by officers and employees of those institutions.

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38. (1) Regulations

38. (1) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer,

(a) prescribing, in respect of any part or region of Canada or any place outside Canada,

(i) any services or work instruments that are to be made available by those institutions in both official languages to officers or employees of those institutions,

(ii) any automated systems for the processing and communication of data that must be available for use in both official languages, and

(iii) any supervisory or management functions that are to be carried out by those institutions in both official languages;

(b) prescribing any other measures that are to be taken, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(*a*), to establish and maintain work environments of those institutions that are conducive to the effective use of both official languages and accommodate the use of either official language by their officers and employees;

(c) requiring that either or both official languages be used in communications with offices of those institutions that are located in any part or region of Canada, or any place outside Canada, specified in the regulations;

(d) prescribing the manner in which any duties of those institutions under this Part or the regulations made under this Part in relation to the use of both official languages are to be carried out; and

(e) prescribing obligations of those institutions in relation to the use of the official languages of Canada by the institutions in respect of offices in parts or regions of Canada not prescribed for the purpose of paragraph 35(1)(*a*), having regard to the equality of status of both official languages.

38. (2) Idem

38. (2) The Governor in Council may make regulations

(a) adding to or deleting from the regions of Canada prescribed by subsection 35(2) or prescribing any other part or region of Canada, or any place outside Canada, for the purpose of paragraph 35(1)(*a*), having regard to

(i) the number and proportion of English-speaking and French-speaking officers and employees who constitute the work force of federal institutions based in the parts, regions or places prescribed,

(ii) the number and proportion of English-speaking and French-speaking persons resident in the parts or regions prescribed, and

(iii) any other factors that the Governor in Council considers appropriate; and

(b) substituting, with respect to any federal institution other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner or the Parliamentary Protective Service, a duty in relation to the use of the official languages of Canada in place of a duty under section 36 or the regulations made under subsection (1), having regard to the equality of status of both official languages, if there is a demonstrable conflict between the duty under section 36 or the regulations and the mandate of the institution.

R.S., 1985, c. 31 (4th Supp.), s. 38; 2004, c. 7, s. 28; 2006, c. 9, s. 22.

ANNOTATIONS

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

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

Part VI – Participation of English-Speaking and French-Speaking Canadians

39. (1) Commitment to equal opportunities and equitable participation

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) Employment opportunities

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.

39. (3) Merit principle

39. (3) Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit.

ANNOTATIONS

Ayangma v. Canada, 2003 FCA 149 (CanLII)

[31] Section 21, 22 and 28 of the *OLA* are found within Part IV of the Act entitled "Communications With and Services to the Public". Although the phrase "Services to the Public" is not defined in the *OLA*, it clearly does not apply to a competition under the *PSEA* [*Public Service Employment Act*], an Act which relates to staffing within the Public Service and which has its own code of language provisions. The appellant's submission (appellant's Memorandum of Fact and Law, para. 88) "that having bilingual individuals in the hiring board is not only a service to the appellant as an individual, but it is also rendering a great service to the public as required by section 10 of the *PSEA* to help hire the best qualified candidate...", is simply of no avail in this context. Section 39 of the *OLA* on the other hand is a statement of commitment by the Government of Canada. Since that provision is found in Part VI of the Act, it is excluded by virtue of subsection 77(1) of the Act from the application of Part X which is entitled "Court Remedy". The appellant invokes, to his benefit, subsection 77(4) of the Act. But that subsection only applies in proceedings under subsection 77(1).

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (FCA) [hyperlink not available]

[17] The constitutional entrenchment of language rights and their quasi-constitutional extension, qualified by the appeal for caution made to the courts by the Supreme Court, do not however imply, in the absence of specific indications to this effect, an alteration of the powers of the courts which have to interpret and apply these rights. Just as the *Canadian Charter of Rights and Freedoms* is not in itself a source of new jurisdictions, so the 1988 *Official Languages Act* does not create new jurisdictions other than those, vested in the Commissioner of Official Languages and the Federal Court Trial Division, which it creates expressly. As in the case at bar, the fact that the Department might be subject to more specific legal duties than in the past when it comes time to determine the language requirements of a position does not mean that an appeal board thereby acquires a jurisdiction which was heretofore beyond it. Unless the Act itself contains some indication that Parliament intended to give an appeal board a new jurisdiction affecting the department's managerial rights, the appeal board will have to resign itself to continuing to perform

the function it has until now exercised, and to leave to other jurisdictions the responsibility for deciding whether a department has complied with the provisions of the 1988 *Official Languages Act* in a given case.

[18] The respondent contended that this new jurisdiction was conferred on an appeal board as a consequence, inter alia, of the wording of part six of the preamble ("with due regard to the principle of selection of personnel according to merit"), subsection 39(3) ("Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit") and section 91 ("Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken").

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

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

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[25] Section 39 of the OLA, which is found in Part VI, addresses broad language rights while pursuing employment or advancement. More particularly, subsection 39(2) requires a federal institution “to ensure that employment opportunities are open to both English-speaking Canadians and French-speaking Canadians…” and to take into account “the purposes and provisions of Part IV and V” in appointing and advancing its officers and employees and in determining the terms and conditions of their employment. Part IV has already been mentioned above (see paragraph 8). Part V creates rights and duties in relation to the language of work. Section 91, which is found at Part XI, addresses particular staffing actions of a federal institution; it obliges the federal institution to use objective criteria in determining each position’s language requirements.

[...]

[117] While a breach of section 91 permits the Court to issue a remedy under subsection 77(4), there can be no Court remedy in the case of a breach to section 39. It must be remembered that the enabling provision for a court remedy, that is subsection 77(1), is an exhaustive list. Part VI where section 39 is found is not mentioned in subsection 77(1). Even if a section 39 breach were

established, this Court would have no jurisdiction to remedy that breach under the authority of subsection 77(4).

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Lavoie v. Canada (Attorney General), 2007 FC 1251 (CanLII)

[40] It seems important to note that in *Devinat* the issue was an application for mandamus made pursuant to section 18.l of the *Federal Courts Act* to ensure compliance with section 20 of the *OLA*, a section which, though it does not provide for the bringing of an action under section 77 of the *OLA*, does impose a duty on the government, unlike section 39, which simply consists of a commitment made by the government. In *Ayangma v. Her Majesty the Queen*, 2003 FCA 149 (CanLII), 2003 FCA 149, the Federal Court of Appeal held at paragraph 31 that section 39 of the *OLA* is “a statement of commitment by the Government of Canada”.

[…]

[42] I feel that for the purpose of the proceedings at bar two principles should be drawn from the Federal Court of Appeal judgments:

- section 77 of the *OLA* does not preclude an action for judicial review under section 18.1 of the *Federal Courts Act*; and

- an action under section 18.1 of the *Federal Courts Act* cannot be used to enforce the provisions of the *OLA* which do not create a duty or a right but simply consist of a commitment by the government..

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[117] Part VI of the *Official Languages Act*, entitled "Participation of English-speaking and French-speaking Canadians", deals with employment in federal institutions. Paragraph 39(1)(a) affirms the commitment of the government to ensuring that English-speaking and French-speaking Canadians have "equal opportunities to obtain employment and advancement in federal institutions...". In order to give substance to that commitment, subsection 39(2) requires federal institutions "to ensure that employment opportunities are open to both English-speaking Canadians and French-speaking Canadians...". Subsection 39(2) also requires a federal institution to take into account "the purposes and provisions of Part IV and V" in appointing and advancing its officers and employees and in determining the terms and conditions of their employment. In other words, in making its staffing decisions, a federal institution must consider the rights created and the corresponding duties imposed on it under Parts IV and V, respectively in relation to communications and the provision of services to the public, and the language of work, as well as the purposes for which those rights and duties were enacted. However, subsection 39(3) affirms the merit principle, which is the cornerstone of staffing actions in federal institutions, by stating that "[n]othing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit".

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[30] There is also provision of equal access to government appointments for both English-speaking and French-speaking Canadians, with due regard for the merit principle.

[...]

[35] Part VI of the Act declares that the government is committed to the policy of providing opportunities to members of both language groups to obtain employment and advancement. Under subsection 39(2), the government is to take due account of the purposes and provisions of Parts IV and V in so doing. Nevertheless, the government must walk a very tight line, as subsection 39(3) states that the principles of section 39 may not be construed as abrogating or derogating from the principle of selection according to merit.

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40. Regulations

40. The Governor in Council may make such regulations as the Governor in Council deems necessary to carry out the purposes and provisions of this Part.

Part VII – Advancement of English and French

41. (1) Government policy

41. (1) The Government of Canada is committed to

> **(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and**
>
> **(b) fostering the full recognition and use of both English and French in Canadian society.**

41. (2) Duty of federal institutions

41. (2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.

41. (3) Regulations

41. (3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

R.S., 1985, c. 31 (4th Supp.), s. 41; 2005, c. 41, s. 1; 2006, c. 9, s. 23; 2015, c. 36, s. 147; 2017, c. 20, s. 182.

ANNOTATIONS – SUBSECTION 41(1)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[18] At the time the appellants DesRochers and CALDECH filed their application, there was no enforceable provision to go along with the declaratory wording of s. 41. Moreover, the application provided for in s. 77(1) of the *OLA*, on which the application in this case is based, was limited to complaints under parts IV and V, as Part VII was not mentioned in s. 77(1) until 2005, when it

was added by means of a statutory amendment (*Act to amend the Official Languages Act (promotion of English and French*), S.C. 2005, c. 41).

[19] In July 2004, a few months before the application in this case was filed, the Federal Court of Appeal held in *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276, that an application for a court remedy could not be made on the basis of an alleged failure to meet the commitment set out in Part VII, in s. 41. In February 2005, this Court granted leave to appeal that decision ([2005] 1 S.C.R. ix). Harrington J. heard the application in the instant case in May 2005, and in accordance with the Federal Court of Appeal's holding in *Forum des maires*, his decision in July of that year was based solely on Part IV.

[20] Parliament subsequently amended the OLA to include a reference to Part VII in s. 77(1) and add enforceable provisions: see s. 41(2) and (3). The leave to appeal the Court had granted in *Forum des maires* was then withdrawn and declared to be of no effect: *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2005 SCC 85 (CanLII), [2005] 3 S.C.R. 906.

[21] In light of these developments, the Federal Court of Appeal determined that the scope of the application in the case at bar was as follows:

> At the time the appellants made their application, the statutory amendment had not yet been enacted. Moreover, it did not come into force until November 25, 2005, and then without retroactive effect. Therefore, the decision of this Court concerning the language of subsection 77(1), as it stood prior to the amendment, is the one that is applicable in this case: the section 77 application is therefore not available to the appellants for the alleged breaches of Part VII. [Emphasis added.]

(2006 FCA 374 (CanLII), [2007] 3 F.C.R. 3, at para. 74)

[22] The appellants agree that the issue in this appeal arises entirely under Part IV of the OLA and does not concern any duties that may result from Part VII.

[23] It is clear simply from the wording of the enactment that the distinction between Part IV and Part VII is important. [...]

[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA* [*Department of Industry Act*, S.C. 1995, c. 1], as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

[…]

[63] Although the parties disagree about the number of CALDECH's projects that Industry Canada would actually have supported, one thing is certain: CALDECH's ability to reach the linguistic minority community and involve it in many community economic development projects shows that there is a real need for such services in Huronia's French-speaking community and that that need can be met. However, I cannot conclude that the failure to remedy this shortcoming relates to the principle of linguistic equality in communications and the provision of services as implemented in Part IV of the *OLA*. Like Harrington J. at trial, I believe that the

appellants' arguments essentially relate to alleged violations of Part VII of the OLA. It is noteworthy that in each of her three reports, the Commissioner drew a clear distinction between duties related to the principle of equality in communications and the provision of services under Part IV and duties resulting from the government's commitment, stated in Part VII, to enhancing the vitality and development of linguistic minority communities. In all her reports, she identified Part VII as the source of the duty to consider and meet the special needs and concerns of Simcoe County's French-speaking business community with regard to economic development.

[64] Of course, as we saw above, the Commissioner's role is entirely separate from that of the court, which is not bound by her conclusions when it hears an application under s. 77. For example, the Commissioner does not have to be overly concerned about distinctions between the various parts of the *OLA*, since she prepares a report containing recommendations, not an order granting remedies. Also, the duties set out in Part IV may very well overlap those provided for in Part VII. Since questions about the nature and scope of the duties that may arise under Part VII of the *OLA* were not raised before this Court, I will express no opinion on the correctness of the Commissioner's observations concerning such duties. Having said this, however, I conclude, as the Commissioner seems to have done in her reports and as the trial judge noted, that the deficiencies at issue here clearly exceed the scope of Part IV.

Northwest Territories (Attorney General) v. Fédération Franco-Ténoise, 2008 NWTCA 6 (CanLII)

[343] The cross-appellants allege that the trial judge erred in law by failing to consider whether Part VII of the OLAC [*Official Languages Act*, R.C.S. 1985, c. 31 (4th Supp.)] (Advancement of English and French) required the GOC [Government of Canada] to actively promote French language services in the NWT [Northwest Territories]. They also argue that this obligation was never delegated to the GNWT [Government of the Northwest Territories], nor could it be delegated. They rely on s. 41 of the *OLAC*. Prior to its amendment coming into force on November 25, 2005, that section provided:

> 41. The Government of Canada is committed to
>
> (a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development; and
>
> (b) fostering the full recognition and use of both English and French in Canadian society.

[344] The November 25, 2005 amendment (*An Act to amend the Official Languages Act (promotion of English and French)*, S.C. 2005, c. 41) changed the numbering of s. 41 to 41(1) and added the following subsections:

> (2) Every federal institution has the duty to ensure that positive measures are taken for the implementation of the commitments under subsection (1). For greater certainty, this implementation shall be carried out while respecting the jurisdiction and powers of the provinces.
>
> (3) The Governor in Council may make regulations in respect of federal institutions, other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer or office of the Ethics Commissioner, prescribing the manner in which any duties of those institutions under this Part are to be carried out.

[345] This ground of appeal fails for several reasons.

[346] First, we adopt the reasoning of the Federal Court of Appeal that s. 41 of the *OLAC* (now s. 41(1)) is merely a declaration of principle and therefore not justiciable: *Forum des maires* FCA at para. 46. Although ss. (2) and (3) arguably place a duty on the GOC to actively promote minority

languages, those subsections did not become law until after this trial concluded and long after many of the relevant events occurred. Sections 6 and 10 of the *Interpretation Act*, R.S.C. 1985, c. I-21 require that the *OLAC* be interpreted as it was at the time of the events at issue.

[347] In *Forum des maires* FCA, the court referred to debates in Parliament and the Senate which disclosed that supporters (Senators and Members of Parliament) of the *OLAC* regarded s. 41 as declaratory only and not justiciable. This was evidenced by their attempts to amend the provision and make it executory (which it now is, by virtue of ss. (2) and (3)). The court also noted the similarity between the wording of s. 41 and the seventh "whereas" in the *OLAC*'s preamble (as distinguished from other obligatory provisions). As well, it commented on the marginal note accompanying the English text, "Government policy", which also indicates the declaratory nature of that provision. This supported its conclusion that s. 41 of the *OLAC* merely stated a principle and was not justiciable.

Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General), 2010 FC 999 (CanLII)

[20] In the case at bar, the issue concerns government administrative action with regard to a statute that has a quasi-constitutional status. Having been called upon to determine whether the August 12, 2010 Order in Council [which sets at ten (10) the number of questions that will be part of the 2011 census] violates Part VII of the Official Languages Act, the Court must interpret the Act, and specifically section 41. Since the Court is called upon to interpret a legislative provision, it must therefore do so on the correctness standard.

[...]

[37] At this point, we need to take a closer look at section 41 of the *Official Languages Act*.

[38] As mentioned above, the FCFA [Fédération des communautés francophones et acadienne du Canada] is relying on subsection 41(2) of the Act, which requires federal institutions to ensure that positive measures are taken to enhance the vitality of minority communities (subsection 41(1)). According to the FCFA, the mandatory long-form census is one of those positive measures that are mentioned in subsection 41(2) and, by adopting the August 12, 2010 Order in Council, the government therefore violated its duties under the Act.

[39] It should be specified that subsections 41(2) and 41(3) of the *Official Languages Act* made their way into the Act by means of an amendment in 2005 and are enforceable (*DesRochers*). As noted above, subsection 41(2) states that federal institutions have the duty to ensure that positive measures are taken for the implementation of subsection 41(1), which sets out the commitments to enhancing the vitality of English and French linguistic minority communities. Subsection 41(3) specifies that the Governor in Council may make regulations prescribing the manner in which federal institutions are to carry out their duties under subsection 41(2).

[40] However, Part VII of the Act – and specifically subsection 41(2) – does not in any way compel the government to collect any data whatsoever by means of the census. As a result, it does not, a fortiori, in any way require that data be collected by means of a mandatory long-form questionnaire. In fact, no provision of Part VII of the Act, or any other part of that Act – or, in fact, any part of the *Charter* – requires that data be collected by means of the census as the sine qua non of the rights it protects.

[41] Under these circumstances, the Court is of the opinion that there is no statutory basis for positive measures to be interpreted as including the duty to collect data through a mandatory long-form questionnaire. The only statutory basis in question is that of the *Statistics Act* concerning the duty to take a census (sections 19 and 21). The way in which the census is taken and the methodology are left to the government's discretion and the Court is of the opinion that neither Part VII of the *Official Languages Act* nor section 41 of that Act imposes on the Governor

in Council a specific methodology in this regard. In fact, nothing indicates that Parliament, in enacting subsection 41(2) of the Act, intended to limit the Governor in Council's power and discretion to exercise a delegated legislation function authorized by other federal statutes, namely, the *Statistics Act*.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[105] As decided in *Professional Institute of the Public Service*, the objectivity test mentioned at section 91 of the *OLA* must be studied not only in respect of an individual designation which might be required to meet a demand for bilingual services, but must also have regard for the "proactive" obligations imposed by section 41 of the *OLA* on federal institutions to promote the use of an official language in a minority setting. As Justice Joyal remarked in Professional Institute of the Public Service, the Court shares the view that:

> … a purposive or proactive component in language policies is not only in keeping with statutory obligations, but is conducive to effective practices. In other words, the respondent has to initiate a level of bilingual services and not simply respond to individual or group demands. Otherwise, the syndrome outlined in 1967 would continue indefinitely, and lip service only would increasingly be paid to the statutory duties Parliament has imposed on the respondent.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

SEE ALSO:

R. c. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

ANNOTATIONS – DECISIONS RENDERED PRIOR TO THE 2005 LEGISLATIVE AMENDMENTS

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[33] Section 41 of the Act refers to a commitment by the federal government ("s'engage" in French) that reproduces for all intents and purposes the seventh whereas in the preamble to the Act. The preamble, according to section 13 of the *Interpretation Act*, R.S.C., c. I-21, "shall be read as a part of the enactment intended to assist in explaining its purport and object" ("fait partie du texte et en constitue les motifs"). Section 41 likewise echoes, albeit not in identical language, the purpose defined in paragraph 2(b) of the Act.

[…]

[36] It is also interesting to note that section 41, like the seventh whereas and like the purpose defined in paragraph 2(b) of the Act, uses terms that do not evoke the notion of a legal obligation, in contrast to those used in other sections, in the purpose defined in paragraph 2(a) ("ensure", "assurer") and in other whereases. And insofar as one can draw on a marginal note to interpret a statute (see Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002), at pp. 309-11), I note that the marginal note accompanying the English text of section 41 reads "Government policy".

[37] It should also be noted that while the sections or parts of the Act mentioned in subsection 77(1) or subsection 82(1) refer to specific records, instruments or activities that are identified or identifiable (parliamentary debates, legislative instruments, court decisions, provision of services,

language of work or staffing), the sections and parts that are not mentioned in those subsections (such as Part VI, "participation of English-speaking and French-speaking Canadians") and Part VII ("Advancement of English and French") are addressed instead to long-term objectives the achievement of which depends on the existence of a political will.

[38] In short, the respondent and the interveners are asking that the Court amend section 41 of the Act and make mandatory what, on its face, is simply a policy commitment, and that the Court add to subsection 77(1) and section 82 the words "Part VII". This would do violence not only to the text of the Act but also to the express and implied intention of Parliament to exclude these areas from judicial intervention.

[…]

[44] Were we to adopt the interpretation of section 41 of the *Official Languages Act* proposed by the respondent and the interveners, it would in my opinion amount to defying the clearly expressed intention of Parliament and recognizing rights that not only has Parliament not recognized but that it has furthermore been careful not to recognize. The debate over section 41 must be conducted in Parliament, not in the courts. And that is the path that has been taken, so far without success, by Senator Jean-Robert Gauthier, one of the most fervent defenders of language rights in Canada. Senator Gauthier has tried again and again over the last three years to have section 41 amended to make it executory. His most recent attempt was made last March 11, when he proposed in these words the adoption on third reading of Bill S-4, Act to amend the *Official Languages Act* (promotion of English and French) (*Debates of the Senate*, 3rd Session, 37th Parliament, vol. 141, Issue 20, March 11, 2004, at page 541):

> At the present time, there are no regulations governing Part VII of the *Official Languages Act*. Consequently, there are none for section 41. Having legislation without regulations is like having a watchdog with no teeth, or such a tiny one that no one could take it seriously. The law must be enforceable, and of course must therefore have regulations. As well, the Commissioner of Official Languages must be able to intervene in any proceedings relating to Part VII, and this is also not allowed under subsection 77(1). She cannot help us, and the communities cannot go to court, because section 41 is not enforceable. The Commissioner of Official Languages is therefore shunted aside, not because she wants to be, since she is the one who has recommended that we put some teeth into the act so that she can help us. And that is what I have done.

[45] The Senate eventually did adopt this bill, on March 11, 2004, but Parliament was dissolved before it was submitted to the House of Commons.

[46] My reading of the Act thus leads me to the conclusion that section 41 is declaratory of a commitment and that it does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

Raîche v. Canada (Attorney General), [2005] 1 FCR 93, 2004 FC 679 (CanLII)

[16] In the report that the Commission presented to the Standing Committee on Procedure and House Affairs, the [Federal Electoral Boundaries] Commission maintained its recommendation that the parish of Allardville and part of the parishes of Saumarez and Bathurst be transferred from the federal electoral district of Acadie-Bathurst to the federal electoral district of Miramichi.

[17] In February 2003, after the Commission's report was submitted, the Commissioner of Official Languages (the Commissioner) received three complaints against the Commission. The complainants challenged the changes to the electoral boundaries proposed by the Commission for the electoral district of Acadie-Bathurst.

[18] The Commissioner determined the complaints to be admissible. The objective of the investigation was to determine the extent to which the Commission had had regard to section 41 of the Official Languages Act when it decided to redraw the boundaries of the electoral district of Acadie-Bathurst.

[19] The Commissioner concluded that the commitment set out in Part VII of the *OLA* required that the Commission assess the disadvantages and harmful consequences perceived by the official language minority community, having regard to the consequences of the changes made to the electoral district for the development and vitality of the francophone community. The Commissioner concluded:

> [TRANSLATION] The Commission's report has not persuaded me that it fully examined the impact of its recommendations on the development and vitality of the official language minority community in the electoral district of Acadie-Bathurst, and I cannot conclude from it that the Commission has discharged its responsibilities in that respect under section 41 of the *Official Languages Act*. . . .

[...]

[87] The Commissioner contends that the issue is not which of two laws takes precedence, since there is no inconsistency between the obligations imposed by the [*Electoral Boundaries*] *Readjustment Act* and the obligations imposed by the *OLA*. The Commissioner observed that the respondent made this point in his factum.

[88] The Court also agrees with that argument. The *Readjustment Act* imposes an obligation on the Commission to consider the community of interest, including a community of interest that is defined by the French language, and the *OLA* requires that government institutions enhance "the vitality of the . . . French linguistic minority communities in Canada". In fact, the two Acts have similar goals.

[89] The respondent submits that Part VII of the *OLA* is declaratory rather than executory and that neither the Government of Canada nor federal institutions are obliged always to give effect to Part VII of the *OLA*.

[90] On this point, the Court agrees with the respondent. The Court does not believe that the terminology used in section 41 is ambiguous. It is clear, as the Commissioner submits, that the Minister of Canadian Heritage should encourage government institutions to support the development of francophone minority communities. However, in the opinion of the Court, the *OLA* is to be interpreted in such a way that the legislation does not oblige government institutions to do this. If we refer to the English version, section 42 uses the word "shall" in reference to the Government's obligations, but does not use that word to describe the role of government institutions.

[91] Some other parts of the *OLA* use imperative language to describe the role of government institutions. The difference between the terminology used in Part VII and the terminology found in the other parts suggests that section 42 is declaratory, and not enforceable.

[92] Last, the respondent contends that Part X of the *OLA*, which describes the court remedies available, does not provide for any remedy under Part VII because Part X does not entitle an applicant to seek judicial review of a decision made under Part VII.

[93] However, the Commissioner submits that the Court has jurisdiction to intervene in respect of decisions made under Part VII of the *OLA*.

[94] The two parties cited different case law in support of their arguments. In fact, the Court of Appeal has made two conflicting rulings on this point. As the Commissioner contends, the Court concluded in *Devinat* that it has the authority to review a decision involving parts of the *OLA* that do not fall under Part X, pursuant to the general jurisdiction assigned to the Court to review decisions of courts and tribunals.

[95] On the other hand, the Court of Appeal has also concluded, in *Ayangma*, that Part X of the *OLA* denies the applicant judicial review in respect of matters involving the parts of the *OLA* that are not specified in Part X.

[96] The Court is of the opinion that the decision of the Court of Appeal in *Devinat* applies. In *Devinat*, the Court quoted the Judicial Committee of the Privy Council, as follows [*Board v. Board*, 1919 CanLII 546 (UK JCPC), [1919] A.C. 956, at page 962]:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

[97] Because that principle is so fundamental to the law, the Court will not interpret the law so as to grant a right but deny a remedy, unless the law expressly precludes that remedy.

[98] In the case of the *OLA*, the law does not expressly preclude a remedy. Accordingly, under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, the Court has jurisdiction to hear the application for judicial review.

Standard of Review

[99] The standard of review that applies to the decision of the Commission under Part VII of the *OLA* is similar to the standard of review that applies to decisions of the Commission under the *Readjustment Act*. Nonetheless, there are a few important differences.

[100] On the other hand, the Commission has discretion to decide whether it is appropriate to apply Part VII of the *OLA*.

[101] Given that Part VII is declaratory, the Court must show considerable deference to the Commission.

[102] The issue in this case is a question of fact. Having regard to the factors, the standard of review is the standard of the patently unreasonable decision.

[103] The finding made by the Court, that the Commission contravened the *Readjustment Act*, applies here as well. The Commission decided that, by transferring the parishes from the electoral district of Acadie-Bathurst to the electoral district of Miramichi, it was respecting the community of interest in the parishes. That decision was erroneous, however, because it was made without regard for the evidence before the Commission. As well, saying that the addition of Acadians to the electoral district of Miramichi was going to increase the percentage of Acadians, and would then increase the Acadian community's political power, was patently unreasonable, because the percentage of francophones was not going to rise by adding the parishes of Saumarez, Allardville and Bathurst to the electoral district of Miramichi.

[104] The Court is of the opinion that the Commission tried to apply Part VII of the *OLA* in a manner in keeping with the intention of Parliament, but that it failed to do so because its findings of fact were erroneous. Accordingly, the Court sets aside the decision of the Commission.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[84] It is clear, both from the wording of sections 2 and 41 of the Act and from section 16 of the Charter, that at that time, and still today, both the OLA and the Charter sent a clear message to all Canadians regarding the equality of status of the two official languages of Canada and the firm intention of the government to strive to achieve the ultimate goal of equality of status between the two languages.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[31] Finally, there is a commitment of the Government of Canada to enhance the vitality and support the development of English and French linguistic minority communities as an integral part of the two language communities in Canada.

[...]

[36] Part VII of the Act imposes further commitments on government, namely in regard to enhancing the vitality of French and English-speaking minority groups, in supporting and assisting their development, and in fostering the full recognition and use of both English and French in Canadian society.

[...]

[55] On review of the evidence, I should find that the case for the respondent meets the objectivity test under section 91 of the *Official Languages Act*. That objectivity test, in my respectful view, muse be studied not only in respect of an individual designation which might be required to meet a demand for bilingual services, but must have regard for the “proactive” obligations imposed on federal institutions to promote the use of an official language in a minority setting.

[56] In the case before me, it is obvious that there exists under the *Official Languages Act* a broad picture and a narrower one. The object of the Act is not only to permit the use of our official languages and give citizens the right to deal with federal institutions in the language of their choice. It is more than that. It is to promote the use of both languages or, as expressed in the Act’s preamble, “enhancing the vitality and supporting the development of English and French linguistic minority communities”. Such a policy commitment by the Government of Canada imposes a double duty which must sooner or later be exercised in concrete terms. [...]

[63] This brings me to comment on what I view is the second duty which the statute imposes on federal institutions. If there is imposed a tight line in designations of individual positions to protect the majority language group in the Public Service, the other duty is reflected in the preamble to the Act and in section 41 of the Act. My interpretation of section 41 gives credence to the

proposition that policy requires the respondent not only to react or respond to pressures for more or better bilingual services, but to initiate programmes to offer these services where there is a perceived need for them, a need which might not be fully reflected in a statistical analysis of the number of enquiries, the number of files, or the current incidence of French and English cases in any particular public office.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

ANNOTATIONS – SUBSECTION 41(2)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[18] At the time the appellants DesRochers and CALDECH filed their application, there was no enforceable provision to go along with the declaratory wording of s. 41. Moreover, the application provided for in s. 77(1) of the *OLA*, on which the application in this case is based, was limited to complaints under parts IV and V, as Part VII was not mentioned in s. 77(1) until 2005, when it was added by means of a statutory amendment (*Act to amend the Official Languages Act (promotion of English and French*), S.C. 2005, c. 41).

[19] In July 2004, a few months before the application in this case was filed, the Federal Court of Appeal held in *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276, that an application for a court remedy could not be made on the basis of an alleged failure to meet the commitment set out in Part VII, in s. 41. In February 2005, this Court granted leave to appeal that decision ([2005] 1 S.C.R. ix). Harrington J. heard the application in the instant case in May 2005, and in accordance with the Federal Court of Appeal's holding in *Forum des maires*, his decision in July of that year was based solely on Part IV.

[20] Parliament subsequently amended the OLA to include a reference to Part VII in s. 77(1) and add enforceable provisions: see s. 41(2) and (3). The leave to appeal the Court had granted in *Forum des maires* was then withdrawn and declared to be of no effect: *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2005 SCC 85 (CanLII), [2005] 3 S.C.R. 906.

[21] In light of these developments, the Federal Court of Appeal determined that the scope of the application in the case at bar was as follows:

> At the time the appellants made their application, the statutory amendment had not yet been enacted. Moreover, it did not come into force until November 25, 2005, and then without retroactive effect. Therefore, the decision of this Court concerning the language of subsection 77(1), as it stood prior to the amendment, is the one that is applicable in this case: the section 77 application is therefore not available to the appellants for the alleged breaches of Part VII. [Emphasis added.]

(2006 FCA 374 (CanLII), [2007] 3 F.C.R. 3, at para. 74)

[22] The appellants agree that the issue in this appeal arises entirely under Part IV of the OLA and does not concern any duties that may result from Part VII.

[23] It is clear simply from the wording of the enactment that the distinction between Part IV and Part VII is important. [...]

[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA* [*Department of Industry Act*, S.C. 1995, c. 1], as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

[…]

[63] Although the parties disagree about the number of CALDECH's projects that Industry Canada would actually have supported, one thing is certain: CALDECH's ability to reach the linguistic minority community and involve it in many community economic development projects shows that there is a real need for such services in Huronia's French-speaking community and that that need can be met. However, I cannot conclude that the failure to remedy this shortcoming relates to the principle of linguistic equality in communications and the provision of services as implemented in Part IV of the *OLA*. Like Harrington J. at trial, I believe that the appellants' arguments essentially relate to alleged violations of Part VII of the OLA. It is noteworthy that in each of her three reports, the Commissioner drew a clear distinction between duties related to the principle of equality in communications and the provision of services under Part IV and duties resulting from the government's commitment, stated in Part VII, to enhancing the vitality and development of linguistic minority communities. In all her reports, she identified Part VII as the source of the duty to consider and meet the special needs and concerns of Simcoe County's French-speaking business community with regard to economic development.

[64] Of course, as we saw above, the Commissioner's role is entirely separate from that of the court, which is not bound by her conclusions when it hears an application under s. 77. For example, the Commissioner does not have to be overly concerned about distinctions between the various parts of the *OLA*, since she prepares a report containing recommendations, not an order granting remedies. Also, the duties set out in Part IV may very well overlap those provided for in Part VII. Since questions about the nature and scope of the duties that may arise under Part VII of the *OLA* were not raised before this Court, I will express no opinion on the correctness of the Commissioner's observations concerning such duties. Having said this, however, I conclude, as the Commissioner seems to have done in her reports and as the trial judge noted, that the deficiencies at issue here clearly exceed the scope of Part IV.

CBC/Radio-Canada v. Canada (Commissioner of Official Languages), [2016] 3 FCR 55, 2015 FCA 251 (CanLII)

[4] In 2009, CBC [Canadian Broadcasting Corporation] was forced to make substantial nationwide budget cuts. In response, it adopted a recovery plan which, inter alia, involved financial cuts to the amount of local and regional content developed by CBEF Windsor, the only French-language radio station in southwestern Ontario. The cuts reduced CBEF Windsor's employees from ten to three, eliminated three programs produced locally and reduced the local and regional content in programming from 36.5 hours to 5 hours per week.

[5] The French-speaking OLMC [official language minority community] in southwestern Ontario (of which Dr. Amellal, one of the Respondents, is a member) objected to these cuts. They formed a volunteer association, the Comité SOS CBEF (the "Comité"), and lodged complaints with both the Commissioner and the CRTC [Canadian Radio-television and Telecommunications Commission] regarding the negative impact these cuts would have upon the French-speaking minority in this region. When the CRTC failed to act quickly enough, the Commissioner began an investigation pursuant to section 56 of the *OLA*.

[6] CBC refused to cooperate with the Commissioner's investigation. In its view, the Commissioner did not have jurisdiction to review its programming activities and those activities were not subject to OLA-related obligations. Instead, it argued that those matters were properly within the CRTC's jurisdiction.

[7] Nevertheless, the Commissioner wrote a report on this matter. He stated that CBC had failed to hold consultations with the OLMC in southwestern Ontario before the 2009 budget cuts and similarly that it had not conducted an impact analysis of these cuts. He denounced the negative impact of these cuts and found that CBC had not complied with its obligation to take "positive measures" to enhance the vitality of Canada's English and French linguistic minority communities and to assist in their development (OLA, section 41(2)). The Commissioner urged CBC to review its decision. When CBC refused to do so, the Commissioner began proceedings in the Federal Court.

[...]

[74] From the above, there can be no doubt that the true issue in these proceedings is whether the Commissioner [of Official Languages] has jurisdiction under the *OLA* to inquire into what CBC says are its programming activities. In that respect, CBC argues, as I have already indicated, that section 41 of the *OLA* is relevant to its programming activities insofar as the CRTC takes these considerations into account in exercising its jurisdiction under the *BA* [*Broadcasting Act,* S.C. 1991, c. 11]. Thus, in that light, it cannot be said that CBC objects to the application of section 41 to its programming activities, but that it objects to the Commissioner asserting jurisdiction to investigate programming-related complaints which pertain to *OLA* subject matter, i.e. official languages. In CBC's view, that sort of complaint is assigned exclusively to the CRTC by virtue of the *BA*.

[...]

[79] As I indicated earlier, the Judge's view was that the whole of the complaint made by Dr. Amellal and the Comité fell within the jurisdiction of both the Commissioner and the CRTC. In my view, that cannot be. I believe that I am on safe grounds in so saying because the Commissioner himself recognizes that he does not have jurisdiction over what are truly programming activities. The question therefore is whether all of CBC's activities at issue in this case are programming activities and, if so, do they necessarily fall within the CRTC's exclusive jurisdiction. If any of these activities were not programming activities, did they then fall within the Commissioner's realm?

[80] Consequently, were we to accept to determine the question of jurisdiction at issue in this appeal, it would be left to us to review the evidence and make the factual findings which must be made in order to determine the legal issues. This would have to be done without the benefit of the Judge's view on the questions which I have raised. In the circumstances of this case, I am of the opinion that it would be very unwise for us to proceed in such a way.

VI. Conclusion

[81] For these reasons, I would allow CBC's appeal, I would set aside the Federal Court's decision of September 8, 2014 and rendering the judgment which ought to have been rendered, I would dismiss the application brought by the Commissioner and Dr. Amellal pursuant to section 77 of the OLA. In the circumstances, I would make no order as to costs.

Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General), 2010 FC 999 (CanLII)

[26] As mentioned above, the main issue in this case is to determine whether the August 12, 2010 Order in Council [which sets at ten (10) the number of questions that will be part of the 2011

census] constitutes a violation of Part VII of the Official Languages Act and, more specifically, subsection 41(2) of that Act. At the outset, the Court notes that the parties acknowledge that language rights, whether constitutional or statutory, must be given a broad and liberal interpretation that is consistent with the preservation and development of the official language communities in Canada (see *R. v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768, [1999] SCJ No 25, at para 25; *DesRochers v Canada (Industry)*, 2009 SCC 8 (CanLII), [2009] 1 SCR 194).

[...]

[37] At this point, we need to take a closer look at section 41 of the *Official Languages Act*.

[38] As mentioned above, the FCFA [Fédération des communautés francophones et acadienne du Canada] is relying on subsection 41(2) of the Act, which requires federal institutions to ensure that positive measures are taken to enhance the vitality of minority communities (subsection 41(1)). According to the FCFA, the mandatory long-form census is one of those positive measures that are mentioned in subsection 41(2) and, by adopting the August 12, 2010 Order in Council, the government therefore violated its duties under the Act.

[39] It should be specified that subsections 41(2) and 41(3) of the *Official Languages Act* made their way into the Act by means of an amendment in 2005 and are enforceable (*DesRochers*). As noted above, subsection 41(2) states that federal institutions have the duty to ensure that positive measures are taken for the implementation of subsection 41(1), which sets out the commitments to enhancing the vitality of English and French linguistic minority communities. Subsection 41(3) specifies that the Governor in Council may make regulations prescribing the manner in which federal institutions are to carry out their duties under subsection 41(2).

[40] However, Part VII of the Act – and specifically subsection 41(2) – does not in any way compel the government to collect any data whatsoever by means of the census. As a result, it does not, a fortiori, in any way require that data be collected by means of a mandatory long-form questionnaire. In fact, no provision of Part VII of the Act, or any other part of that Act – or, in fact, any part of the *Charter* – requires that data be collected by means of the census as the *sine qua non* of the rights it protects.

[41] Under these circumstances, the Court is of the opinion that there is no statutory basis for positive measures to be interpreted as including the duty to collect data through a mandatory long-form questionnaire. The only statutory basis in question is that of the Statistics Act concerning the duty to take a census (sections 19 and 21). The way in which the census is taken and the methodology are left to the government's discretion and the Court is of the opinion that neither Part VII of the Official Languages Act nor section 41 of that Act imposes on the Governor in Council a specific methodology in this regard. In fact, nothing indicates that Parliament, in enacting subsection 41(2) of the Act, intended to limit the Governor in Council's power and discretion to exercise a delegated legislation function authorized by other federal statutes, namely, the Statistics Act.

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[63] As we saw earlier, public access to patents is important because all patents prohibit certain activities, even though they are not prohibited by any law, and thus restrict the freedom of action of everyone in Canada. In addition, one of the public policy considerations that justify that restriction is the dissemination of the scientific and technical knowledge on which patented inventions are based.

[64] Binnie J., dissenting but not on this point, explained in *Harvard College*, *supra*, at paragraph 64, that the effect of the *Patent Act* "is essentially to prevent others from practising an invention that, but for the patent monopoly, they would be permitted to practise. In exchange for

disclosure to the public, the patent protects the disclosed information from unauthorized use for a limited time." As Binnie J., writing for the Supreme Court, explained in *Free World*, *supra*, at paragraph 42, "[t]he patent system is designed to advance research and development and to encourage broader economic activity".

[65] That objective can only be impeded if the scientific and technical information in a patent is not available to the portion of the Canadian public who do not speak the language in which the patent in question was written. In short, therefore, the fact that patents exist only in one official language deprives Canadians who do not speak that language of information that is important in both legal and scientific terms.

[66] In *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276, at paragraph 17, the Federal Court of Appeal stressed that by creating the remedy in section 77 of the *Official Languages Act*, Parliament intended to ensure that the Act "has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone".

[67] For that reason, and with respect, I do not share the respondents' opinion that the fact that patents are not available in both official languages cannot be a violation of Part VII, having regard to the federal government's efforts in relation to language policy.

[68] However, I believe that the courts must limit themselves to the factual circumstances relating to a particular decision rather than examining the government's entire language policy every time an application under Part VII is brought before them. The courts are simply not equipped to assess the government's language policy as a whole: that assessment is political in nature. Parliament is in a better position than the courts to make that assessment. However, the courts are used to ruling concerning the factual circumstances relating to a particular decision, and it is logical to assume that by creating a legal remedy for violations of Part VII, Parliament intended precisely to call on their expertise in the matter.

[69] I therefore conclude that the measures proposed to date by the Patent Office are not sufficient to meet its obligation, as a federal institution, to promote the use of both languages. That being said, the consequences of a violation of Part VII of the *Official Languages Act* and of the other provisions of that Act are not the same.

[...]

[75] As I said earlier, in my opinion, a violation of Part VII of the *Official Languages Act* cannot result in the same remedies as violations of Parts I to V of that Act. Deciding otherwise would amount to eliminating the difference between those provisions and denying the effect of the precise limits that Parts I to V set on the government's obligations in respect of bilingualism. In addition, I agree with the respondents that the decisions of federal institutions to give effect to the government's commitment under Part VII are entitled to a certain deference on the part of the courts.

[76] However, they cannot be conclusive; otherwise, why would Parliament have made those provisions enforceable? Deciding that the courts do not have the power to make orders forcing the government to take specific measures to remedy violations of its obligations under Part VII would make Parliament's choice to "give it teeth" by making it enforceable pointless and ineffective.

[77] The remedies suggested by the applicant do not take into account the difference between Part VII of the *Official Languages Act* and the other provisions of that Act. Because I do not find that the Commissioner is required to issue bilingual patents under section 7, 12 or 22 of the

Official Languages Act, I cannot declare that he must do so in order to comply with his obligations under Part VII.

[78] In *DesRochers*, *supra*, at paragraph 37, the Supreme Court adopted the conclusion of the Federal Court of Appeal in *Forum des maires*, *supra*, at paragraph 20, which was that in an application under section 77 of the *Official Languages Act*, "[t]he remedy will vary according to whether or not the breach continues". In this case, the violation of Part VII is continuing, and the Court must therefore order a remedy accordingly.

[79] I would note that a patent is a document that is directed to or intended for the notice of, and is for the information of, the public. While it would be difficult to completely translate all patents, the Patent Office must at least make abstracts of patents available in both official languages, as the Office of the Commissioner of Official Languages proposed.

[80] Certainly, this will be an unofficial translation. However, making it available will be a remedy that is "appropriate and just in the circumstances", within the meaning given to that expression in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3 at paragraphs 55 to 58. It will therefore provide for the language rights of the applicant and all Canadians to be defended effectively, by giving them a good idea of the content of valid patents if they do a preliminary search in the official language of their choice. Requiring that the Commissioner make bilingual abstracts available does not overstep either the mandate of the Court in our constitutional system or the limits of its expertise. In addition, this measure does not impose great hardship on the Commissioner, because it essentially confirms the measures he himself said he intended to take.

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[53] I also agree with the respondent's submission that the provisions of the *Official Languages Act* stipulate that the Government of Canada undertakes to promote the full development of francophone and anglophone minorities in Canada and to support their development while fostering full recognition and use of French and English in Canadian society. The *Official Languages Act* imposes an obligation on federal institutions (Crown corporations amongst others) to ensure that positive measures be taken to follow through on this undertaking.

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

ANNOTATIONS – SUBSECTION 41(3)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[18] At the time the appellants DesRochers and CALDECH filed their application, there was no enforceable provision to go along with the declaratory wording of s. 41. Moreover, the application provided for in s. 77(1) of the *OLA*, on which the application in this case is based, was limited to complaints under parts IV and V, as Part VII was not mentioned in s. 77(1) until 2005, when it was added by means of a statutory amendment (*Act to amend the Official Languages Act (promotion of English and French*), S.C. 2005, c. 41).

[19] In July 2004, a few months before the application in this case was filed, the Federal Court of Appeal held in *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276, that an application for a court remedy could not be made on the basis of an alleged failure to meet the commitment set out in Part VII, in s. 41. In February 2005, this Court granted leave to appeal that decision ([2005] 1 S.C.R. ix). Harrington J. heard the application in the instant case in May 2005, and in accordance with the Federal Court of Appeal's holding in *Forum des maires*, his decision in July of that year was based solely on Part IV.

[20] Parliament subsequently amended the OLA to include a reference to Part VII in s. 77(1) and add enforceable provisions: see s. 41(2) and (3). The leave to appeal the Court had granted in *Forum des maires* was then withdrawn and declared to be of no effect: *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2005 SCC 85 (CanLII), [2005] 3 S.C.R. 906.

[21] In light of these developments, the Federal Court of Appeal determined that the scope of the application in the case at bar was as follows:

> At the time the appellants made their application, the statutory amendment had not yet been enacted. Moreover, it did not come into force until November 25, 2005, and then without retroactive effect. Therefore, the decision of this Court concerning the language of subsection 77(1), as it stood prior to the amendment, is the one that is applicable in this case: the section 77 application is therefore not available to the appellants for the alleged breaches of Part VII. [Emphasis added.]

(2006 FCA 374 (CanLII), [2007] 3 F.C.R. 3, at para. 74)

[22] The appellants agree that the issue in this appeal arises entirely under Part IV of the OLA and does not concern any duties that may result from Part VII.

Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General), 2010 FC 999 (CanLII)

[39] It should be specified that subsections 41(2) and 41(3) of the *Official Languages Act* made their way into the Act by means of an amendment in 2005 and are enforceable (*DesRochers*). As noted above, subsection 41(2) states that federal institutions have the duty to ensure that positive measures are taken for the implementation of subsection 41(1), which sets out the commitments to enhancing the vitality of English and French linguistic minority communities. Subsection 41(3) specifies that the Governor in Council may make regulations prescribing the manner in which federal institutions are to carry out their duties under subsection 41(2).

[40] However, Part VII of the Act – and specifically subsection 41(2) – does not in any way compel the government to collect any data whatsoever by means of the census. As a result, it does not, a fortiori, in any way require that data be collected by means of a mandatory long-form questionnaire. In fact, no provision of Part VII of the Act, or any other part of that Act – or, in fact, any part of the *Charter* – requires that data be collected by means of the census as the sine qua non of the rights it protects.

[41] Under these circumstances, the Court is of the opinion that there is no statutory basis for positive measures to be interpreted as including the duty to collect data through a mandatory long-form questionnaire. The only statutory basis in question is that of the *Statistics Act* concerning the duty to take a census (sections 19 and 21). The way in which the census is taken and the methodology are left to the government's discretion and the Court is of the opinion that neither Part VII of the *Official Languages Act* nor section 41 of that Act imposes on the Governor in Council a specific methodology in this regard. In fact, nothing indicates that Parliament, in enacting subsection 41(2) of the Act, intended to limit the Governor in Council's power and

discretion to exercise a delegated legislation function authorized by other federal statutes, namely, the *Statistics Act*.

[42] It must be noted that the *Official Languages Act* does not prescribe any obligations that require the government to use a specific methodology such as the mandatory long-form questionnaire census. In fact, when Parliament wishes to proceed in such a way, it does so by way of regulations. Such was the case with the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, which requires that a census be held as a tool to determine sufficient numbers for the purposes of implementing Part IV of the *Official Languages Act*.

[…]

[44] In the case at bar – Part IV of the Act not being at issue –, the evidence does not contain any regulations made under Part VII of the Act (subsection 41(3)) that would involve defining a specific methodology in relation to the census and no regulations of that type were brought to the Court's attention.

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

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42. Coordination

42. The Minister of Canadian Heritage, in consultation with other ministers of the Crown, shall encourage and promote a coordinated approach to the implementation by federal institutions of the commitments set out in section 41.

ANNOTATIONS – DECISIONS PRIOR TO 2005 LEGISLATIVE AMENDMENTS

Raîche v. Canada (Attorney General), [2005] 1 FCR 93, 2004 FC 679 (CanLII)

[83] The respondent submits that section 41 does not apply to the final report of the [Federal Electoral Boundaries] Commission because the commitment set out in Part VII of the *OLA* relates solely to the "Government of Canada". Because the federal electoral boundaries commissions are not part of the Government of Canada, they cannot be bound by the government commitment set out in Part VII of the *OLA*.

[84] The Commissioner, however, submits that section 42 [as am. by S.C. 1995, c. 11, s. *27*] of the *OLA* clearly and expressly commits federal institutions to implementing the commitment made by the federal government in section 41.

[85] [...] As the Commissioner observed, the role of the Minister of Heritage is to "encourage" and "promote" coordination with other ministers and institutions to develop and promote the use of English and French. However, it is the federal institutions that must put the commitment into practice, because the *OLA* expressly applies to both government institutions and the Government of Canada.

[…]

[90] […] The Court does not believe that the terminology used in section 41 is ambiguous. It is clear, as the Commissioner submits, that the Minister of Canadian Heritage should encourage government institutions to support the development of francophone minority communities. However, in the opinion of the Court, the OLA is to be interpreted in such a way that the legislation does not oblige government institutions to do this. If we refer to the English version, section 42 uses the word "shall" in reference to the Government's obligations, but does not use that word to describe the role of government institutions.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[34] Section 42 assigns to the Minister of Canadian Heritage the responsibility of encouraging and promoting "a coordinated approach to the implementation by federal institutions of the commitments set out in section 41". Paragraph 43(1)(a) gives the same Minister the responsibility to "take such measures as that Minister considers appropriate" to "enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development".

[35] The obligations--as we see by the use of the word "shall" in the English text--are found therefore in sections 42 and 43; they are not found in section 41. And they are as general and vague as can be and are ill-adapted to the exercise of the judicial power.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

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43. (1) Specific mandate of Minister of Canadian Heritage

43. (1) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society and, without restricting the generality of the foregoing, may take measures to

(a) enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development;

(b) encourage and support the learning of English and French in Canada;

(c) foster an acceptance and appreciation of both English and French by members of the public;

(d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

(e) encourage and assist provincial governments to provide opportunities for everyone in Canada to learn both English and French;

(f) encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages;

(g) encourage and assist organizations and institutions to project the bilingual character of Canada in their activities in Canada or elsewhere; and

(h) with the approval of the Governor in Council, enter into agreements or arrangements that recognize and advance the bilingual character of Canada with the governments of foreign states

43. (2) Public consultation

43. (2) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to ensure public consultation in the development of policies and review of programs relating to the advancement and the equality of status and use of English and French in Canadian society.

ANNOTATIONS

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[34] Section 42 assigns to the Minister of Canadian Heritage the responsibility of encouraging and promoting "a coordinated approach to the implementation by federal institutions of the commitments set out in section 41". Paragraph 43(1)(a) gives the same Minister the responsibility to "take such measures as that Minister considers appropriate" to "enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development".

[35] The obligations--as we see by the use of the word "shall" in the English text--are found therefore in sections 42 and 43; they are not found in section 41. And they are as general and vague as can be and are ill-adapted to the exercise of the judicial power.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

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44. Annual report to Parliament

44. The Minister of Canadian Heritage shall, within such time as is reasonably practicable after the termination of each financial year, submit an annual report to Parliament on the matters relating to official languages for which that Minister is responsible.

ANNOTATIONS

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[26] Subsection 82(1) is particularly revealing in this regard, since it establishes the paramountcy of certain parts only of the [Official Languages] Act over any other Act of Parliament, and Part VII is not one of those parts. Moreover, political accountability varies according to the parts of the Act that are at issue; the Treasury Board, for example, is responsible for the application of Parts IV, V and VI (see section 46) and the Minister of Canadian Heritage is responsible for the application of Part VII (see sections 42, 43 and 44 [as am. by S.C. 1995, c. 11, s. 29]). Under section 31, in the event of any inconsistency between Part IV and Part V, Part IV prevails to the extent of the inconsistency. Finally, section 91 of the Act provides that in particular staffing action, Parts IV and V of the Act do not apply in certain ways.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

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45. Consultation and negotiation with the provinces

45. Any minister of the Crown designated by the Governor in Council may consult and may negotiate agreements with the provincial governments to ensure, to the greatest practical extent but subject to Part IV, that the provision of federal, provincial, municipal and education services in both official languages is coordinated and that regard is had to the needs of the recipients of those services.

Part VIII – Responsibilities and Duties of Treasury Board in Relation to the Official Languages of Canada

46. (1) Responsibilities of Treasury Board

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 VI in all federal institutions other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer.

46. (2) Powers of Treasury Board

46. (2) In carrying out its responsibilities under subsection (1), the Treasury Board may

> **(a) establish policies, or recommend policies to the Governor in Council, to give effect to Parts IV, V and VI;**
>
> **(b) recommend regulations to the Governor in Council to give effect to Parts IV, V and VI;**
>
> **(c) issue directives to give effect to Parts IV, V and VI;**
>
> **(d) monitor and audit federal institutions in respect of which it has responsibility for their compliance with policies, directives and regulations of Treasury Board or the Governor in Council relating to the official languages of Canada;**

(e) evaluate the effectiveness and efficiency of policies and programs of federal institutions relating to the official languages of Canada;

(f) provide information to the public and to officers and employees of federal institutions relating to the policies and programs that give effect to Parts IV, V and VI; and

(g) delegate any of its powers under this section to the deputy heads or other administrative heads of other federal institutions.

R.S., 1985, c. 31 (4th Supp.), s. 46; 2004, c. 7, s. 29; 2006, c. 9, s. 24; 2015, c. 36, s. 148; 2017, c. 20, s. 183.

ANNOTATIONS

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[26] The Treasury Board may issue directive guidelines to give effect to Parts IV, V and VI and provide information to the public and to officers and employees of federal institutions relating to the policies and programs that give effect to Parts IV, V and VI (see paragraphs 46(2)(*c*) and (*f*) of the OLA. Although VIA, as a Crown corporation and thereby a separate employer, is not subject to TBS [Treasury Board Secretariat] policies and guidelines, the Commissioner considered that it was expected as a federal institution to abide by the underlying principles and purpose of the Secretariat's official language policies. Accordingly, the Commissioner examined the legality of VIA's bilingual requirements in light of the Treasury Board's directive for the use of imperative and non-imperative staffing of bilingual positions in the federal public service.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

Canada (Attorney General) v. Green, [2000] 4 FCR 629, 2000 CanLII 17146 (FC)

[46] Part IV of the *OLA* is entitled "Communications with and Services to the Public"; Part V concerns language of work; Part VIII confers upon Treasury Board responsibilities and duties in relation to the *OLA* and Part XI contains general provisions such as the primacy of the *OLA* over other statutes (section 82) and section 91 concerns staffing. The relevant sections of Part IV (sections 21 and 22); Part V (sections 34 and 35); Part VIII (section 46) and sections 82 and 91 of the OLA read: […]

Institut professionnel de la fonction publique c. Canada, [1993] 2 RCF 90, 1993 CanLII 2921 (CF)

[37] More specifically, however, Part VIII of the [Official Languages] Act, in sections 46 to 48, imposes responsibilities and duties on Treasury Board relating to the implementation of Part IV dealing with communications with and services from government, Part V dealing with language of work, and Part VI dealing with employment opportunities and advancement in the Public Service for both language groups.

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47. Audit reports to be made available to Commissioner

47. The Chief Human Resources Officer appointed under subsection 6(2.1) of the *Financial Administration Act* shall provide the Commissioner with any audit reports that are prepared pursuant to paragraph 46(2)(*d*).

R.S., 1985, c. 31 (4th Supp.), s. 47; 2005, c. 15, s. 3; 2010, c. 12, s. 1676.

ANNOTATIONS

Institut professionnel de la fonction publique c. Canada, [1993] 2 RCF 90, 1993 CanLII 2921 (CF)

[37] More specifically, however, Part VIII of the [Official Languages] Act, in sections 46 to 48, imposes responsibilities and duties on Treasury Board relating to the implementation of Part IV dealing with communications with and services from government, Part V dealing with language of work, and Part VI dealing with employment opportunities and advancement in the Public Service for both language groups.

48. Annual report to Parliament

48. The President of the Treasury Board shall, within such time as is reasonably practicable after the termination of each financial year, submit an annual report to Parliament on the status of programs relating to the official languages of Canada in the various federal institutions in respect of which it has responsibility under section 46.

ANNOTATIONS

Institut professionnel de la fonction publique c. Canada, [1993] 2 RCF 90, 1993 CanLII 2921 (CF)

[37] More specifically, however, Part VIII of the [Official Languages] Act, in sections 46 to 48, imposes responsibilities and duties on Treasury Board relating to the implementation of Part IV dealing with communications with and services from government, Part V dealing with language of work, and Part VI dealing with employment opportunities and advancement in the Public Service for both language groups.

Part IX – Commissioner of Official Languages

Office of the Commissioner

49. (1) Commissioner of Official languages, and appointment

49. (1) There shall be a Commissioner of Official languages for Canada who shall be appointed by commission under the Great Seal after approval of the appointment by resolution of the Senate and House of Commons.

49. (2) Tenure of office and removal

49. (2) Subject to this section, the Commissioner holds office during good behaviour for a term of seven years, but may be removed by the Governor in Council at any time on address of the Senate and House of Commons.

49. (3) Further terms

49. (3) The Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years.

49. (4) Absence or incapacity

49. (4) In the event of the absence or incapacity of the Commissioner, or if the office of Commissioner of Official languages for Canada is vacant, the Governor in Council, after consultation by the Prime Minister with the Speaker of the Senate and the Speaker of the House of Commons, may appoint another qualified person to hold office during the absence or incapacity of the Commissioner or while the office is vacant for a term not exceeding six months, and that person shall, while holding office, have all of the powers, duties and functions of the Commissioner under this Act and be paid such salary or other remuneration and expenses as may be fixed by the Governor in Council.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53 (CanLII)

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev*. 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

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50. (1) Rank, powers and duties generally

50. (1) The Commissioner shall rank as and have all the powers of a deputy head of a department, shall engage exclusively in the duties of the office of the Commissioner and shall not hold any other office under Her Majesty or engage in any other employment.

50. (2) Salary and expenses

50. (2) The Commissioner shall be paid a salary equal to the salary of a judge of the Federal Court, other than the Chief Justice of that Court, and is entitled to be paid reasonable travel and living expenses while absent from his or her ordinary place of residence in the course of his or her duties.

R.S., 1985, c. 31 (4th Supp.), s. 50; 2002, c. 8, s. 157.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 SCR 773, 2002 SCC 53 (CanLII)

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev*. 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[16] This duty imposed on a deputy head (s. 50 of the Act) to ensure that the spirit and intent of the Act are complied with in a given case is exceptional. A quite unusual power to intervene has been conferred on the Commissioner and, when he receives a complaint, Parliament has expressly ordered him to get to the heart of the matter and not simply to examine the technical legality of the actions taken by the government department against which the complaint is laid.

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51. Staff

51. Such officers and employees as are necessary for the proper conduct of the work of the office of the Commissioner shall be appointed in the manner authorized by law.

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52. Technical assistance

52. The Commissioner may engage, on a temporary basis, the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties of his office and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of those persons.

53. *Public Service Superannuation Act*

53. The Commissioner and the officers and employees of the office of the Commissioner appointed under section 51 shall be deemed to be persons employed in the public service for the purposes of the *Public Service Superannuation Act*.

R.S., 1985, c. 31 (4th Supp.), s. 53; 2003, c. 22, s. 225(E).

54. Order exempting Commissioner from directives

54. The Governor in Council, on the recommendation of the Treasury Board, may by order exempt the Commissioner from any directives of the Treasury Board or the Governor in Council made under the *Financial Administration Act* that apply to deputy heads or other administrative heads in relation to the administration of federal institutions.

Duties and Functions of Commissioner

55. Duties and functions

55. The Commissioner shall carry out such duties and functions as are assigned to the Commissioner by this Act or any other Act of Parliament, and may carry out or engage in such other related assignments or activities as may be authorized by the Governor in Council.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

> 56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.
>
> (2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to

the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev*. 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

[38] The Privacy Commissioner and the Official Languages Commissioner follow an approach that distinguishes them from a court. Their unique mission is to resolve tension in an informal manner: one reason that the office of ombudsman was created was to address the limitations of legal proceedings. As W. Wade wrote (*Administrative Law* (8th ed. 2000), at pp. 87-88):

> If something illegal is done, administrative law can supply a remedy, though the procedure of the courts is too formal and expensive to suit many complainants. But justified grievances may equally well arise from action which is legal, or at any rate not clearly illegal, when a government department has acted inconsiderately or unfairly or where it has misled the complainant or delayed his case excessively or treated him badly. Sometimes a statutory tribunal will be able to help him both cheaply and informally. But there is a large residue of grievances which fit into none of the regular legal moulds, but are none the less real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. . . . What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. . . . It was because it filled that need that the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.

[39] An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia Development Corp. v. Friedmann*, 1984 CanLII 121 (SCC), [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, circa 1809. He described their genesis (at pp. 458-59):

> As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.
>
> The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in The Parliamentary Ombudsman (1975) refer to, at p. 15, as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic — if it is not properly controlled — is itself destructive of democracy and its values".
>
> The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively

in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

[...]

[45] Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

[...]

[58] The non-disclosure of personal information provided in s. 22(1)(b) is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, at para. 43, "[t]he reasonable expectation of probable harm implies a confident belief". There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly. The power provided in s. 22(1)(*b*) must be exercised in a manner that respects the nature and objectives of the *Official Languages Act*. The Commissioner must have regard to, *inter alia*, the private and confidential nature of investigations, as provided by Parliament. As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the *Official Languages Act*. Section 22(1)(b) must be applied in a way that is consistent with both Acts.

[...]

[63] Although the role of the Commissioner of Official Languages is similar to that of the Privacy Commissioner, the two Acts that they are responsible for enforcing, and the situations in which those Acts apply, are different in a number of respects. Language is a means of expression proper to an individual. It is the vehicle by which a cultural group transmits its distinct culture and traditions, and it is an essential tool for expressing and communicating ideas. It is not surprising that the history of Canada is marked by a number of conflicts over language, considering the presence of two dominant languages in this country. As A. Braën explained, language is a cultural benchmark that may be the source of conflicts ("Language Rights", in M. Bastarache, ed., *Language Rights in Canada* (1987), 1, at pp. 15‑16:

> Language is an essential means of cultural expression and its vitality, according to the Commission [Royal Commission on Bilingualism and Biculturalism], is a necessary although insufficient condition for the survival of a culture as a whole. However, in a bilingual or multilingual society language will be a constant focus of tensions to the extent [that] it expresses the community interests of cultural or language groups. [Emphasis added.]

On the history of bilingualism in Canada, see: C.-A. Sheppard, *The Law of Languages in Canada* (1971), Study No. 10 of the Royal Commission on Bilingualism and Biculturalism, at pp. 1-96, and F. Chevrette and H. Marx, *Droit constitutionnel: notes et jurisprudence* (1982), at pp. 1583-88.

[...]

[65] Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is reasonable to maintain confidentiality. For these reasons, I would dismiss the main appeal.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373 (FCA) [hyperlink not available]

[17] The constitutional entrenchment of language rights and their quasi-constitutional extension, qualified by the appeal for caution made to the courts by the Supreme Court, do not however imply, in the absence of specific indications to this effect, an alteration of the powers of the courts which have to interpret and apply these rights. Just as the *Canadian Charter of Rights and Freedoms* is not in itself a source of new jurisdictions, so the 1988 *Official Languages Act* does not create new jurisdictions other than those, vested in the Commissioner of Official Languages and the Federal Court Trial Division, which it creates expressly.

SEE ALSO:

Parasiuk v. Québec (Tribunal administratif), 2004 CanLII 16530 (QC SC) [judgment available in French only]

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56. (1) Duty of Commissioner under Act

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

56. (2) Idem

56. (2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the Official Languages Act, was not complied with. […]

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

> – They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;
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> – They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;
>
> – They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;
>
> – They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;
>
> – As a rule, they may not disclose information they receive.

[38] The Privacy Commissioner and the Official Languages Commissioner follow an approach that distinguishes them from a court. Their unique mission is to resolve tension in an informal manner: one reason that the office of ombudsman was created was to address the limitations of legal proceedings. […]

[39] An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. [...]

[45] Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the

Official Languages Act is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[15] The phrase "the spirit and intent of this Act", noted in s. 58(4) of the Act, is also found in s. 56(1) of the Act which gives the Commissioner the duty to take all actions and measures within his authority to ensure recognition of the status of each of the official languages and compliance with the spirit and intent of the Act in the administration of the affairs of federal institutions.[3] The spirit and intent of the Act bring us to the preamble of the *Official Languages Act*, in particular the following paragraph (C.O.A., p. 34):

> And whereas the Constitution of Canada also provides for guarantees relating to the right of any member of the public to communicate with, and to receive available services from, any institution of the Parliament or Government of Canada in either official language ...

[...]

[19] Second, in considering the matter the Commissioner did not take the spirit and intent of the Act into account. In accordance with his duty as stated in s. 56(1) of the Act and the power of investigation conferred on him by s. 58(4) of the Act, the Commissioner should have determined whether the Public Service of Canada office in Toronto, as a federal institution in a place where there was a significant demand for the use of French, had complied with the spirit and intent of the Act in its communications with and service to the appellant.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[9] While reasserting a number of values and language rights recognized in the *Charter*, the *OLA* not only imposes on federal institutions a number of prescribed duties; it also encourages them to take active measures to foster the broad objectives of the *OLA*. In this respect, VIA's language policies are monitored by various public institutions, including the Official Languages Branch of the Treasury Board, through annual reviews, and the Commissioner who has the mandate to promote and oversee the full implementation of the *OLA*, to protect the language rights of Canadians and to promote linguistic duality and bilingualism.

See also: Seesahai v. Via Rail Canada, 2009 FC 859 (CanLII), Collins v. Via Rail Canada, 2009 FC 860 (CanLII), Bonner v. Via Rail Canada, 2009 FC 857 (CanLII), Temple v. Via Rail Canada Inc., [2010] 4 FCR 80, 2009 FC 858 (CanLII)

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[54] The *Official Languages Act* creates the office of the Commissioner of Official languages and sets out his responsibilities, which include taking all measures to ensure the recognition of the status of each of the official languages and to ensure compliance with the spirit of this Act and the intention of Parliament in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society. To further this mission, the Commissioner carries out investigations either on his own initiative or as a result of complaints he receives and presents his reports and recommendations in accordance with the law.

Parasiuk v. Québec (Tribunal administratif), 2004 CanLII 16530 (QC SC) [judgment available in French only]

[OUR TRANSLATION]

[8] The Commissioner, as a body created by a specific statute, the *Official Languages Act*, has only those powers that are specifically assigned by the Act or that can be inferred by necessary implication. In fact, the Supreme Court of Canada, in *Les Immeubles Port Louis Ltée v. Corporation municipale du Village de Lafontaine* stated that statutory creatures have only the powers they were specifically delegated or that are a direct result of the powers so delegated. […]

[11] The *Official Languages Act* applies to federal institutions. Parts I and II apply to the debates and other proceedings of the Parliament of Canada and the legislative and other instruments of the Parliament of Canada. Parts III and IV apply to the administration of justice in federal courts, communication with the public and provision of services by federal institutions. Parts V and VI apply to languages of work in federal institutions and the participation of English-speaking Canadians and French-speaking Canadians in federal institutions. Part VII applies to the advancement of English and French in Canadian society. […]

[13] The conclusion of this review is that the *Official Languages Act* only imposes obligations on the federal government and its institutions and the mandate of the Commissioner, as public officer on matters of language, is limited to the federal government and its institutions.

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[56] The role of the Commissioner is to investigate a complaint which is brought under the Act, and to make a report and recommendation concerning that complaint. This role is defined by section 56 of the Act.

> 56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.
>
> (2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

[57]The Commissioner, who is appointed under the Act, has the mandate to investigate the allegations that the applicant's language rights had been breached**.**

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[38] Part IX of the Act speaks of the powers and duties of the Commissioner of Official Languages and particularly, under subsection 56(1), the Act provides that the Commissioner has the duty to assure the recognition of the status of each of the official languages and compliance with the spirit and intent of the Act in government administration. To do this, the Commissioner is given wide powers of investigation either on his own or pursuant to a complaint made to him.

[…]

[68] Another aspect worthy of review is the Commissioner's comments with respect to the standards of bilingual services at some of the district offices of Revenue Canada, and more particularly the Halifax Office. The Commissioner's role in this respect follows again from several provisions of the Official Languages Act. The more generic provision is found in subsection 56(2), which reads as follows:

56. ...

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

[…]

[89] I repeat, however, that curial scrutiny of staffing actions must of necessity be circumscribed. I agree with the view expressed by the Court of Appeal in the *Viola* case (*supra*) that the test would be the same without the objectivity test imposed by section 91 of the statute and that, of course, no frivolous or arbitrary approach to bilingual staffing can be countenanced. The "spirit and intent" of the Act, as set out in subsection 56(1) must always be respected.

Canada (Commissioner of Official Languages) v. Air Canada, 1998 CanLII 8008 (FC), rev'd in part [1999] F.C.J. No. 738 (FCA) [hyperlink not available].

[12] Section 56 of the Act provides that it is the duty of the Commissioner to take all necessary measures to ensure recognition of the status of both official languages and compliance with the spirit and intent of the Act. For this purpose, it is the duty of the Commissioner to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner (subsection 56(2)). When exercised within the scope of his authority, his power is exceptional and he has a quite unusual power to intervene. [...]

Canada (A.G.) v. Asselin, [1995] F.C.J. No. 846 (FC) [hyperlink not available]

[11] The *Official Languages Act* creates a set of language rights based on the duties imposed on the federal government by the Constitution. It is quasi-constitutional legislation which reflects a social and political compromise, gives the Commissioner the powers of a true language ombudsman and establishes an administrative process for securing relief. In addition, that Act provides for judicial review, empowering the Federal Court to hear complaints relating to language requirements that are applied to staffing actions in the Public Service. Only persons who have complained to the Commissioner may bring proceedings in the Federal Court, and only the Commissioner, not appeal boards, has the power to investigate that issue.

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

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57. Review of regulations and directives

57. The Commissioner may initiate a review of (a) any regulations or directives made under this Act, and (b) any other regulations or directives that affect or may affect the status or use of the official languages, and may refer to and comment on any findings on the review in a report made to Parliament pursuant to section 66 or 67.

Investigations

58. (1) Investigation of complaints

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case, (a) the status of an official language was not or is not being recognized, (b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or (c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

58. (2) Who may make complaint

58. (2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue.

58. (3) Discontinuance of investigation

58. (3) If in the course of investigating any complaint it appears to the Commissioner that, having regard to all the circumstances of the case, any further investigation is unnecessary, the Commissioner may refuse to investigate the matter further.

58. (4) Right of Commissioner to refuse or cease investigation

58. (4) The Commissioner may refuse to investigate or cease to investigate any complaint if in the opinion of the Commissioner

> **(a) the subject-matter of the complaint is trivial;**
>
> **(b) the complaint is frivolous or vexatious or is not made in good faith; or**
>
> **(c) the subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of this Act, or does not for any other reason come within the authority of the Commissioner under this Act.**

58. (5) Complainant to be notified

58. (5) Where the Commissioner decides to refuse to investigate or cease to investigate any complaint, the Commissioner shall inform the complainant of that decision and shall give the reasons therefor.

ANNOTATIONS – SUBSECTION 58(1)

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

Canada (Commissaire Aux Langues Officielles) v. Air Canada, 1999 CanLII 8095 (FCA)

[10] Sections 58, 64(1), 77 and 78 of the Act indicate that a complaint must be addressed to "a particular instance or case", that the Commissioner is to investigate that particular case and that the Commissioner shall inform the complainant "in such manner . . . as the Commissioner thinks proper" of the results of the investigation. Strictly speaking, there is no requirement under the Act that the Commissioner "report" to the complainant. The "report", as such, is instead to be sent to the President of the Treasury Board and the deputy head of the federal institution concerned (subsection 63(1)).

Canada (Commissioner of Official Languages) v. Air Canada, 1998 CanLII 8008 (FC), rev'd in part [1999] F.C.J. No. 738 (FCA) [hyperlink not available].

[13] The Commissioner must consider every complaint he receives. If he refuses to investigate or ceases to investigate any complaint, he must give the complainant the reasons for his decision (section 58). After carrying out an investigation pursuant to a complaint, the Commissioner must

provide a report, with reasons, to the complainant and the institution concerned (subsection 64(1)). Where he has made recommendations but the institution has not acted thereon, the Commissioner may inform the complainant: in other words, he may conduct a follow-up and make comments or new recommendations (subsection 64(2)).

SEE ALSO:

Air Canada v. Canada (Commissioner of Official Languages), 1997 CanLII 5843 (FC)

ANNOTATIONS – SUBSECTION 58(2)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[1] Subsection 58(2) of the *Official Languages Act* [R.S.C., 1985 (4th supp.), c. 31] (the Act) allows any "group" to bring a complaint before the Commissioner of Official Languages (the Commissioner). Relying on this provision, the Forum des maires de la Péninsule acadienne (the Forum or respondent), in October 1999, complained to the Commissioner that an administrative reorganization in New Brunswick by the Canadian Food Inspection Agency (the Agency) had been carried out to the detriment of the Francophone areas in the north of the province. The Forum specifically criticized the Agency for transferring four inspectors from the Shippagan office, in the Acadian peninsula, to the Shediac office located in the southeastern portion of the province, assigning the supervision of the food inspection office for the Acadian peninsula to a unilingual Anglophone manager in the Blacks Harbour office and having constantly, since the early 1990s, reduced the number of employees in the Shippagan inspection division. The Forum argued that the decisions made by the Agency had an impact not only on the service to the public and the Agency's ability to comply with the right of the employees in the Shippagan office to work in French, but also on the economy of the region. The Forum also contended that the Agency's decisions reflected a trend toward the gradual erosion of the existing services that had developed in the region (A.B., Vol. 1, at page 46).

[...]

[17] [...] The "complainant", according to subsection 58(2), may be a "person" or a "group".

ANNOTATIONS – SUBSECTION 58(4)

St-Onge v. Canada (Office of the Commissioner of Official Languages) (C.A.), [1992] 3 FCR 287, 1992 CanLII 8671 (FCA)

[7] The trial judge observed that this court only exceptionally has jurisdiction to intervene in decisions of an administrative nature made in accordance with legislation. Section 58(4) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) ("the Act"), provides:

> 58(4) The commissioner may refuse to investigate or cease to investigate any complaint *if in the opinion of the Commissioner*
>
> (a) the subject-matter of the complaint is trivial;
>
> (b) the complaint is frivolous or vexatious or is not made in good faith; or
>
> (c) the *subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of this Act*, or does not for any other reason come within the authority of the Commissioner under this Act.

(Emphasis added.)

[...]

[11] The respondent acknowledged that s. 58(4)(c) of the Act is so worded that the Commissioner's discretion to refuse or cease to investigate a complaint is limited to cases where the subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of the Act. The respondent further admitted that Toronto was a place where there is a significant demand for the use of French as provided for in s. 22 of the Act, which to begin with distinguishes the Toronto area from the two areas, Chicoutimi and Saskatoon, to which the trial judge somewhat unfortunately referred. There could be no question of comparing the legal position of areas in which there is no significant demand with that of areas such as Toronto where a significant demand exists and where Parliament, by s. 22 of the Act, has expressly imposed greater obligations on the offices of federal institutions and thereby conferred more extensive rights on the public in communicating with them and receiving their services.

[...]

[15] The phrase "the spirit and intent of this Act", noted in s. 58(4) of the Act, is also found in s. 56(1) of the Act which gives the Commissioner the duty to take all actions and measures within his authority to ensure recognition of the status of each of the official languages and compliance with the spirit and intent of the Act in the administration of the affairs of federal institutions.[3] The spirit and intent of the Act bring us to the preamble of the *Official Languages Act*, in particular the following paragraph (C.O.A., p. 34):

> And whereas the Constitution of Canada also provides for guarantees relating to the right of any member of the public to communicate with, and to receive available services from, any institution of the Parliament or Government of Canada in either official language ...

[...]

[18] First, as to whether there was a contravention of the Act, he did not investigate the aspect of the appellant's complaint relating to his difficulty in establishing oral contact in French with the Public Service Commission of Canada, which obliged him to make several telephone calls before he could finally get hold of someone who could answer his questions in the language of his choice. The Commissioner only noted the letter of May 17, 1990, and the telephone conversation with the Director in French on June 14, 1990 — as to which there was no need for him to intervene, since the Commissioner concluded to his satisfaction that these two incidents did not involve a contravention of the Act and no basis for intervention had been suggested. However, he did not inquire into the legality of what occurred between these two incidents. The court must accordingly return the file to him so he can undertake such an examination.

[19] Second, in considering the matter the Commissioner did not take the spirit and intent of the Act into account. In accordance with his duty as stated in s. 56(1) of the Act and the power of investigation conferred on him by s. 58(4) of the Act, the Commissioner should have determined whether the Public Service of Canada office in Toronto, as a federal institution in a place where there was a significant demand for the use of French, had complied with the spirit and intent of the Act in its communications with and service to the appellant.

SEE ALSO:

Canada (Attorney General) v. Montreuil, 2009 FC 60 (CanLII)

Englander v. Telus Communications Inc., 2004 FCA 387 (CanLII)

59. Notice of intention to investigate

59. Before carrying out an investigation under this Act, the Commissioner shall inform the deputy head or other administrative head of any federal institution concerned of his intention to carry out the investigation.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

60. (1) Investigation to be conducted in private

60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.

60. (2) Opportunity to answer allegations and criticisms

60. (2) It is not necessary for the Commissioner to hold any hearing and no person is entitled as of right to be heard by the Commissioner, but if at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds to make a report or recommendation that may adversely affect any individual or any federal institution, the Commissioner shall, before completing the investigation, take every reasonable measure to give to that individual or institution a full and ample opportunity to answer any adverse allegation or criticism, and to be assisted or represented by counsel for that purpose.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

[...]

[40] Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

[...]

[42] The *Privacy Act* must therefore be applied to the Office of the Commissioner of Official Languages in a manner consistent with the objective of the *Official Languages Act* of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions. Parliament has expressly provided that investigations by the Commissioner shall be conducted in private and that investigators shall not disclose information that comes to their knowledge in the performance of their duties and functions:

> 60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.
>
> 72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act. [Emphasis added.]

These provisions illustrate Parliament's desire to facilitate access to the Commissioner and to recognize the very delicate nature of the use of an official language at work by a minority group. The private and confidential nature of investigations is an important aspect of the implementation of the *Official Languages Act*. Without protections of this nature, complainants might be reluctant to file complaints with the Commissioner, for example because they are afraid that their opportunities for advancement would be reduced, or their workplace relationships would suffer. As well, these provisions encourage witnesses to participate in the Commissioner's investigations. They are less likely to be afraid that their participation might have a negative impact on the employer-employee relationship or their relations with other employees, and to refuse to cooperate for fear of getting in trouble or damaging their careers. The affidavit of Mr. Langelier, Assistant Director General of the Investigations Branch, explains the importance of preserving a measure of confidentiality in the Commissioner's investigations, for the following reasons, among others:

> [TRANSLATION] – the investigators gave assurances to the people interviewed that the information gathered would be kept confidential in order to secure the cooperation of those people . . . .
>
> – . . . members of the public, and in particular public servants, will hesitate to file complaints ... if they are warned that their identities and any information that they disclose to the OCOL investigators is likely to be disclosed otherwise than where required in order to comply with the principles of natural justice or, as an exception, in an application for a remedy under Part X of the [*Official Languages Act*];
>
> – members of the public, and in particular public servants, will be more reluctant to cooperate with OCOL investigators, and in order to give effect to the obligation imposed on the COL to investigate complaints, investigators will have to resort to their powers in relation to

investigations, including summoning witnesses to attend and compelling them to testify and produce documents;

– the OCOL's investigatory process will become much more formal and rigid, and this will compromise the COL's ombudsman role;

– the fact that the COL is required to disclose information could interfere with his role as mediator and facilitator and thereby jeopardize the power of persuasion and the credibility that an ombudsman must have in order to discharge his functions.

[...]

[44] In addition to enacting specific provisions to ensure that investigations are held in private, Parliament gave the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board (s. 62(2)(a)). The Minister of Justice at the time, Ray Hnatyshyn, discussed that provision in addressing the legislative committee (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, Issue No. 20, June 7, 1988, at pp. 20:25 and 20:29) as follows:

> It is appropriate, after we have talked about the ombudsman character of the office, that in this case the commissioner has the opportunity to examine the kind of harassment, intimidation, discrimination or obstruction that might take place with respect to any individual and have an opportunity to examine these matters and bring them to the attention of the President of the Treasury Board. I think this is an opportunity to make sure all Canadians and all people who are involved and employed and against whom a complaint could be laid under this bill can do so freely without fear of discrimination. I think it is important for all Canadians to feel they have the right to use this bill and use the office of the commissioner without fear of retribution or recrimination for taking a complaint forward.
>
> . . .
>
> But if you have raised a complaint in the first place, you are on record, and maybe you are being discriminated against.
>
> Certainly the commissioner's function is to protect you; not to make life any more difficult for you but make sure you are not going to suffer negative consequences. If you prevent him from doing that, or have a veto, then it may be counterproductive in the legislation to the interests of all your fellow employees. It would certainly allow the same discrimination to take place with other people if they feel they cannot beat the system. [Emphasis added.]

The *Privacy Act* must be applied to the Office of the Commissioner of Official Languages in such a way as to recognize the unique context in which the Commissioner's investigations are conducted. In ss. 60, 62 and 72, Parliament clearly recognized the delicate situation involved in the use of an official language at work by a minority group, by requiring that investigations be conducted in private and be kept confidential, to protect complainants and witnesses from any prejudice that might result from their involvement in the complaints and the investigation process, and by giving the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board. If Parliament had not enacted those provisions, it might have been difficult to achieve the objectives of the *Official Languages Act*. The participation of witnesses and complainants is central to the effectiveness of the Act. Because the purpose of the investigation is to determine the truth and understand the individuals' experience of the situation, the investigators must be circumspect in collecting information and assessing the information obtained.

[45] Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

[...]

[47] At the time in question, the policy of the Office of the Commissioner of Official Languages was to explain to witnesses that ss. 60 and 72 of the *Official Languages Act* provided that investigations were conducted in private, and that ss. 73 and 74 of the Act provided for limited circumstances in which testimony could be disclosed. As Mr. Langelier said in his affidavit:

> [translation] The credibility of the Commissioner, in my view, requires that the information disclosed to the Commissioner and his representatives in the course of investigations is kept strictly confidential, subject to the following exceptions:
>
> A) situations in which the Commissioner must disclose information which, in his opinion, is necessary for the conduct of his investigations. These include compliance with the principles of natural justice, where it is essential that the person or institution that is the subject of a recommendation know the identity of the complainant and what the complainant has said;
>
> B) situations in which the Commissioner is involved in an application for a court remedy under Part X of the OLA. In those cases, the Commissioner may disclose or authorize the disclosure of information. [Emphasis added.]

The Commissioner's policy was therefore to assure witnesses that the information they disclosed to investigators would be kept confidential, within the limits of ss. 72, 73 and 74. In this case, the promise of confidentiality was also made subject to those sections; as the appellant's factum states:

> The investigators explained the role and mandate of the Commissioner as an Ombudsman and gave their assurances that the interviews would be kept confidential in light of sections 60(1), 72, 73 and 74 of the *Official Languages Act*. The investigators explained that pursuant to these sections, the investigations are conducted "in private". [Emphasis added.]

The promise of confidentiality made to the witnesses in the course of the investigation concerning Mr. Lavigne's complaint was therefore not absolute.

[48] After the respondent filed his complaint, the Commissioner of Official Languages altered the policy concerning the instructions to be given to witnesses. His new policy required that investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act*. Investigators still inform witnesses that investigations are conducted in private, as provided in s. 60(1) of the *Official Languages Act*, and that the information that comes to the investigators' knowledge, including the testimony they give, will not be disclosed unless

disclosure is necessary for the investigation or in the course of proceedings under Part X, or in cases where disclosure is required for reasons of procedural fairness under s. 60(2) of the *Official Languages Act*. In addition, investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act* and that the information collected may be exempt from the disclosure requirement where an exception to disclosure applies.

[...]

[58] The non-disclosure of personal information provided in s. 22(1)(b) is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, at para. 43, "[t]he reasonable expectation of probable harm implies a confident belief". There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly. The power provided in s. 22(1)(*b*) must be exercised in a manner that respects the nature and objectives of the *Official Languages Act*. The Commissioner must have regard to, *inter alia*, the private and confidential nature of investigations, as provided by Parliament. As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the *Official Languages Act*. Section 22(1)(b) must be applied in a way that is consistent with both Acts.

[...]

[61] I do not believe that Mr. Langelier's statements provide a reasonable basis for concluding that disclosure of the notes of the interview with Ms. Dubé could reasonably be expected to be injurious to future investigations. Mr. Langelier contends that disclosure would have an injurious effect on future investigations, without proving this to be so in the circumstances of this case. The Commissioner's decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner's decision not to disclose the personal information requested was based on the fact that Ms. Dubé had not consented to disclosure, and does not establish what risk of injury to the Commissioner's investigations the latter might cause. If Ms. Dubé had given permission, the Commissioner would have disclosed the information. The appellant's factum states:

> Jacqueline Dubé did not give permission to disclose to the Respondent the personal information concerning him that was recorded in the course of the interview she gave the OCOL [Office of the Commissioner of Official Languages] [and so] [t]he OCOL did not disclose any of this personal information. [Emphasis added.]

The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean

that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the *Privacy Act* and the *Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case. In the case of Ms. Dubé, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner's investigations.

[...]

[64] In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate context in which the Commissioner carries out his functions.

[65] Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is reasonable to maintain confidentiality. For these reasons, I would dismiss the main appeal.

Canada (Commissaire Aux Langues Officielles) v. Air Canada, 1999 CanLII 8095 (FCA)

[10] Sections 58, 64(1), 77 and 78 of the Act indicate that a complaint must be addressed to "a particular instance or case", that the Commissioner is to investigate that particular case and that the Commissioner shall inform the complainant "in such manner . . . as the Commissioner thinks proper" of the results of the investigation. Strictly speaking, there is no requirement under the Act that the Commissioner "report" to the complainant. The "report", as such, is instead to be sent to the President of the Treasury Board and the deputy head of the federal institution concerned (subsection 63(1)).

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[38] Finally, the Commissioner has the obligation to ensure that investigations are conducted in private pursuant to sections 60 and 72 of the *OLA*. The Commissioner and every person acting on his behalf also have a duty not to disclose any information that comes to their knowledge in the performance of their duties and functions under the *OLA*. The private and confidential nature of investigations is an important aspect of the implementation of the *OLA*, because without these protections, complainants might be reluctant to file complaints with the Commissioner, or witnesses may be reluctant to participate in the Commissioner's investigations: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at paras. 36 and 42.

[39] In addition, the Commissioner has a duty under section 16.1 of the *Access to Information Act*, "to refuse to disclose any record requested under this Act that contains information that was objected or created by them or on their behalf in the course of an investigation examination or audit conducted by them or under their authority".

[40] The applicant made an access to information request to the Commissioner for the same documents he is requesting in this motion. Access to the requested information was denied by the Commissioner on the basis of section 16.1 of the *Access to Information Act*. The present proceedings should not act as a substitute for procedures under the *Access to Information Act*, nor as means to circumvent the protections that the statute puts in place.

[41] For all the foregoing reasons, I am therefore of the view that the Prothonotary did not err in finding that there are no provisions in the *OLA* pursuant to which the Court could compel the production of the documents and information sought by the applicant.

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61. (1) Procedure

61. (1) Subject to this Act, the Commissioner may determine the procedure to be followed in carrying out any investigation under this Act.

61. (2) Receiving and obtaining of information by officer designated

61. (2) The Commissioner may direct that information relating to any investigation under this Act be received or obtained, in whole or in part, by any officer of the office of the Commissioner appointed under section 51 and that officer shall, subject to such restrictions or limitations as the Commissioner may specify, have all the powers and duties of the Commissioner under this Act in relation to the receiving or obtaining of that information.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

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62. (1) Powers of Commissioner in carrying out investigations

62. (1) The Commissioner has, in relation to the carrying out of any investigation under this Act, other than an investigation in relation to Part III, power

> **(a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of any matter within his authority under this Act, in the same manner and to the same extent as a superior court of record;**
>
> **(b) to administer oaths;**

(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as in his discretion the Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law; and

(d) subject to such limitation as may in the interests of defence or security be prescribed by regulation of the Governor in Council, to enter any premises occupied by any federal institution and carry out therein such inquiries within his authority under this Act as the Commissioner sees fit.

62. (2) Threats, intimidation, discrimination or obstruction to be reported

62. (2) Where the Commissioner believes on reasonable grounds that

(a) an individual has been threatened, intimidated or made the object of discrimination because that individual has made a complaint under this Act or has given evidence or assisted in any way in respect of an investigation under this Act, or proposes to do so, or

(b) the Commissioner, or any person acting on behalf or under the direction of the Commissioner, has been obstructed in the performance of the Commissioner's duties or functions under this Act, the Commissioner may report that belief and the grounds therefor to the President of the Treasury Board and the deputy head or other administrative head of any institution concerned.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[44] In addition to enacting specific provisions to ensure that investigations are held in private, Parliament gave the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board (s. 62(2)(a)). The Minister of Justice at the time, Ray Hnatyshyn, discussed that provision in addressing the legislative committee (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72*, Issue No. 20, June 7, 1988, at pp. 20:25 and 20:29) as follows:

> It is appropriate, after we have talked about the ombudsman character of the office, that in this case the commissioner has the opportunity to examine the kind of harassment, intimidation, discrimination or obstruction that might take place with respect to any individual and have an opportunity to examine these matters and bring them to the attention of the President of the Treasury Board. I think this is an opportunity to make sure all Canadians and all people who are involved and employed and against whom a complaint could be laid under this bill can do so freely without fear of discrimination. I think it is important for all Canadians to feel they have the right to use this bill and use the office of the commissioner without fear of retribution or recrimination for taking a complaint forward.
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> . . .
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> But if you have raised a complaint in the first place, you are on record, and maybe you are being discriminated against.
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> Certainly the commissioner's function is to protect you; not to make life any more difficult for you but make sure you are not going to suffer negative consequences. If you prevent him from doing that, or have a veto, then it may be counterproductive in the legislation to the

> interests of all your fellow employees. It would certainly allow the same discrimination to take place with other people if they feel they cannot beat the system. [Emphasis added.]

The *Privacy Act* must be applied to the Office of the Commissioner of Official Languages in such a way as to recognize the unique context in which the Commissioner's investigations are conducted. In ss. 60, 62 and 72, Parliament clearly recognized the delicate situation involved in the use of an official language at work by a minority group, by requiring that investigations be conducted in private and be kept confidential, to protect complainants and witnesses from any prejudice that might result from their involvement in the complaints and the investigation process, and by giving the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board. If Parliament had not enacted those provisions, it might have been difficult to achieve the objectives of the *Official Languages Act*. The participation of witnesses and complainants is central to the effectiveness of the Act. Because the purpose of the investigation is to determine the truth and understand the individuals' experience of the situation, the investigators must be circumspect in collecting information and assessing the information obtained.

[45] Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

Canada (Commissaire Aux Langues Officielles) v. Air Canada, 1999 CanLII 8095 (FCA)

[10] Sections 58, 64(1), 77 and 78 of the Act indicate that a complaint must be addressed to "a particular instance or case", that the Commissioner is to investigate that particular case and that the Commissioner shall inform the complainant "in such manner . . . as the Commissioner thinks proper" of the results of the investigation. Strictly speaking, there is no requirement under the Act that the Commissioner "report" to the complainant. The "report", as such, is instead to be sent to the President of the Treasury Board and the deputy head of the federal institution concerned (subsection 63(1)).

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[30] The Commissioner does not have the jurisdiction to order the status quo pending completion of his inquiry. Even on completion, the Commissioner has no jurisdiction to adjudicate the merits of a complaint. Once the Commissioner has communicated the conclusions of the investigation or his recommendations, the complainant or the Commissioner can bring an application before the Federal Court to obtain an order.

[...]

[55] Parliament has declined to give the Commissioner the jurisdiction to intervene by way of order or injunction. Instead, there is express provision for recourse to the Federal Court.

According to s. 80 of the *Official Languages Act*, this application shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to s. 46 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. If it is established that a federal institution has not complied with the *Official Languages Act*, the court has the jurisdiction to grant the relief that is deemed appropriate and fair in the circumstances.

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63. (1) Conclusion of investigation

63. (1) If, after carrying out an investigation under this Act, the Commissioner is of the opinion that

> **(a) the act or omission that was the subject of the investigation should be referred to any federal institution concerned for consideration and action if necessary,**
>
> **(b) any Act or regulations thereunder, or any directive of the Governor in Council or the Treasury Board, should be reconsidered or any practice that leads or is likely to lead to a contravention of this Act should be altered or discontinued, or**
>
> **(c) any other action should be taken, the Commissioner shall report that opinion and the reasons therefor to the President of the Treasury Board and the deputy head or other administrative head of any institution concerned.**

63. (2) Other policies to be taken into account

63. (2) In making a report under subsection (1) that relates to any federal institution, the Commissioner shall have regard to any policies that apply to that institution that are set out in any Act of Parliament or regulation thereunder or in any directive of the Governor in Council or the Treasury Board.

63. (3) Recommendations

63. (3) The Commissioner may (a) in a report under subsection (1) make such recommendations as he thinks fit; and (b) request the deputy head or other administrative head of the federal institution concerned to notify the Commissioner within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[16] The Commissioner, it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a report that she may accompany with recommendations (subsections 63(1), (3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.

Canada (Commissioner of Official Languages) v. Air Canada, 1999 CanLII 8095 (FCA)

[10] Sections 58, 64(1), 77 and 78 of the Act indicate that a complaint must be addressed to "a particular instance or case", that the Commissioner is to investigate that particular case and that the Commissioner shall inform the complainant "in such manner . . . as the Commissioner thinks

proper" of the results of the investigation. Strictly speaking, there is no requirement under the Act that the Commissioner "report" to the complainant. The "report", as such, is instead to be sent to the President of the Treasury Board and the deputy head of the federal institution concerned (subsection 63(1)).

[11] In this case, the Commissioner combined eighteen complaints for investigation purposes. He identified these complaints in his report, made a summary of them, says he reviewed them and made a number of recommendations that could be characterized as systemic. It is true that he did not specifically discuss each of the complaints in his report, and that his report does not contain any "results" as such. However, subsection 64(1) of the Act does not require that the Commissioner formally arrive at any "results" in his report. […]

[13] The powers of the Commissioner of Official Languages are unique in that the Act expressly allows him, under section 79, in the context of a court proceeding in relation to a particular instance or case, to file "information relating to any similar complaint". The proceeding does not cease to be an individual one, in that the complaint in question is the one that is the subject matter of the proceeding, but it was Parliament's intention that the Court, which, under subsection 77(4), may "grant such remedy as it considers appropriate and just in the circumstances" (the same language that is found in subsection *24(1)* of the *Canadian Charter of Rights and Freedoms*), should be able to have before it an overall view, and thus an idea of the scope of the problem, if a problem exists.

[14] Another peculiarity of the Commissioner's duties is that he has, on the one hand, an obligation, under subsection 63(1) of the Act, at the conclusion of each investigation, to report his "opinion and the reasons therefor" to the President of the Treasury Board and the federal institution concerned if he is of the opinion that some action should be taken and, on the other hand, the possibility, under subsection 63(3), to "make such recommendations as he thinks fit" in his report.

[15] Not surprisingly, in these circumstances, the Commissioner passes indistinctly from the particular to the general when he exchanges his investigator's hat for the "reporter's". This is not to say that he should not himself have made a distinction in the course of his investigation between the particular and the general; all I am saying is that he may have done so without expressly stating it. Some inferences are permitted in such cases that would perhaps not be allowed in other circumstances, provided the Court can be satisfied that the Commissioner did look into the particular case.

[16] The Act itself provides that a particular complaint may serve as the gateway into a federal institution's system as a whole. This was Parliament's intention, as a means of giving more teeth to an enactment, the *Official Languages Act*, which serves as a special tool for the recognition, affirmation and extension of the linguistic rights recognized by the *Canadian Charter of Rights and Freedoms*.

[17] In other words, this is an area in which an overly litigious approach is particularly inappropriate. The Act itself invites one to go beyond the particular case to the general, and a federal institution against which not one but several complaints are brought can hardly feign surprise or cry injustice if the Commissioner, in an investigation, in his report, in his findings, or in the context of a court proceeding, was quick to transform the argument on a particular case into a general argument

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SEE ALSO:

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 FCR 212, 1999 CanLII 9386 (FCA)

Lavoie v. Canada (Attorney General), 2007 FC 1251 (CanLII)

Canadian Union of Postal Workers and Canada Post Corporation Re: National Grievance Imperative Staffing of Bilingual Wicket Positions, [1994] C.L.A.D. No. 1045, 35 L.A.C. (4th) 300 [hyperlink not available]

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64. (1) Where investigation carried out pursuant to complaint

64. (1) Where the Commissioner carries out an investigation pursuant to a complaint, the Commissioner shall inform the complainant and any individual by whom or on behalf of whom, or the deputy head or other administrative head of any federal institution by which or on behalf of which, an answer relating to the complaint has been made pursuant to subsection 60(2), in such manner and at such time as the Commissioner thinks proper, of the results of the investigation.

64. (2) Where recommendations made

64. (2) Where recommendations have been made by the Commissioner under subsection 63(3) but adequate and appropriate action has not, in the opinion of the Commissioner, been taken thereon within a reasonable time after the recommendations are made, the Commissioner may inform the complainant of those recommendations and make such comments thereon as he thinks proper, and shall provide a copy of the recommendations and comments to any individual, deputy head or administrative head whom the Commissioner is required under subsection (1) to inform of the results of the investigation.

ANNOTATIONS

Canada (Commissaire Aux Langues Officielles) v. Air Canada, 1999 CanLII 8095 (FCA)

[11] In this case, the Commissioner combined eighteen complaints for investigation purposes. He identified these complaints in his report, made a summary of them, says he reviewed them and made a number of recommendations that could be characterized as systemic. It is true that he did not specifically discuss each of the complaints in his report, and that his report does not contain any "results" as such. However, subsection 64(1) of the Act does not require that the Commissioner formally arrive at any "results" in his report. In the instant case, the Commissioner, "pursuant to section 64(1) of the *Official Languages Act*", sent his "final investigation report" to Mr. Jolette on July 18, 1996, in a letter from which I excerpt the following:

> [Translation]
>
> . . .
>
> As you already know, we invited all of the parties involved to respond to our results in April 1996 and we incorporated the essential items in their comments into Part VIII of the report.
>
> . . .
>
> Since your complaint concerns Part IV of the *OLA*, you may apply to the Court under section 77. The sixty-day period runs from the date on which you receive this letter.
>
> Section 78 further provides that the Commissioner may himself apply to the Court for a remedy if he has the consent of the complainant.

. . .

[Emphasis added]

In doing this, the Commissioner was clearly informing the complainant that his complaint was justified and that he could now apply to the Court as provided by the Act.

[12] It would have been preferable, of course, if the Commissioner had taken the trouble to write in his report that he had reviewed each of the complaints and found that each was individually merited, but it may be inferred from the language of the report and the recommendations it contains that this is what the Commissioner did. The Commissioner might have been more exacting, but a lack of attention to detail is not in itself reason to overturn his decision. Furthermore, if I may focus on the sixth complaint, which was addressed to an announcement that Air Canada had allegedly not made in both official languages, the report contains the following passage: [...]

I do not think it is unreasonable to infer from this passage that the Commissioner found that the three complaints in question, including the one from this complainant, were justified.

Dionne v. Canada (Bureau du surintendant des institutions financières), 2015 CF 862 [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[16] Pursuant to subsection 64(2), the Commissioner [of Official Languages] does not really make recommendations, but he can inform the complainant and provide comments when he is of the opinion that his recommendations under subsection 63(3) were not acted on within a reasonable time. Thus, it may also be argued that the purpose of subsection 64(2) is the communication of a follow-up report. In this regard, the Court agrees with the Commissioner that the meaning that should be given to subsection 64(2) is the following (see paragraph 27 of the Commissioner's written submissions): This paragraph indicates that when, in the Commissioner's opinion, the recommendations have not been implemented within a reasonable time, the Commissioner can inform the complainant and make recommendations on the issue.

[…]

[18] The Court also shares the Commissioner's view that Parliament's intention in subsections 64(2) and 77(2) is not to link the right of recourse in subsection 77(2) to the Commissioner's follow-up report findings.

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[30] The Commissioner does not have the jurisdiction to order the status quo pending completion of his inquiry. Even on completion, the Commissioner has no jurisdiction to adjudicate the merits of a complaint. Once the Commissioner has communicated the conclusions of the investigation or his recommendations, the complainant or the Commissioner can bring an application before the Federal Court to obtain an order.

Air Canada v. Canada (Commissioner of Official Languages), 1997 CanLII 5843 (FC)

[23] Nothing in the Act indicates that information in closed files, namely files already considered by the Commissioner, cannot be reconsidered in reviewing similar complaints in respect of the same federal institution. The closed files in question in the case at bar were apparently not closed to the satisfaction of the complainants. The fact that those complainants did not avail themselves of the court remedy available to them under Part X of the Act does not render the material

information contained in their files irrelevant or inadmissible. The Act draws no distinction between complaints that are "open" and those that are "closed".

[24] Furthermore, subsection 64(2) authorizes the Commissioner to follow up on his recommendations where in his opinion adequate and appropriate action has not been taken thereon within a reasonable time. Subsection 64(2) places no time limit on this follow-up by the Commissioner. There may be situations in which complaints are closed administratively after promises or commitments are received from the federal institution concerned. However, when the commitments are not honoured or other complaints are subsequently filed, the Commissioner can continue to deal with the unresolved problem.

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65. (1) Report to Governor in Council where appropriate action not taken

65. (1) If, within a reasonable time after a report containing recommendations under subsection 63(3) is made, adequate and appropriate action has not, in the opinion of the Commissioner, been taken thereon, the Commissioner, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, may transmit a copy of the report and recommendations to the Governor in Council.

65. (2) Action by Governor in Council

65. (2) The Governor in Council may take such action as the Governor in Council considers appropriate in relation to any report transmitted under subsection (1) and the recommendations therein.

65. (3) Report to Parliament

65. (3) If, within a reasonable time after a copy of a report is transmitted to the Governor in Council under subsection (1), adequate and appropriate action has not, in the opinion of the Commissioner, been taken thereon, the Commissioner may make such report thereon to Parliament as he considers appropriate.

65. (4) Reply to be attached to report

65. (4) The Commissioner shall attach to every report made under subsection (3) a copy of any reply made by or on behalf of any federal institution concerned.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

(2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

Reports to Parliament

66. Annual report

66. The Commissioner shall, within such time as is reasonably practicable after the termination of each year, prepare and submit to Parliament a report relating to the conduct of his office and the discharge of his duties under this Act during the preceding year

including his recommendations, if any, for proposed changes to this Act that the Commissioner deems necessary or desirable in order that effect may be given to it according to its spirit and intent.

ANNOTATIONS

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[69] In fulfilling these duties and in reporting annually to Parliament, pursuant to section 66, the Commissioner had this to say regarding the staffing of positions in Revenue Canada:

[70] In 1983 — "weak francophone participation in the Maritimes ..."

[71] In 1984 — "There has been only a slight improvement in the representation of official language minorities in the regional establishments since 1982."

[72] In 1985 — "The Department should do everything possible to increase the bilingual capacity of its audit and collections services; this deficiency is particularly unfortunate in a department with coercive powers."

[73] In 1986 — "Little has been done to resolve the language difficulties mentioned last year relating to the audit and collections programmes ..."

[74] "...(some) district offices, including Halifax ... have no bilingual auditors."

[75] In 1987 — "The major weakness in service to the public is to be found in the audit and collections group. Even though we have been bringing this situa tion to the Department's attention since 1982, it still has no bilingual auditor in Halifax ..."

[76] In 1988 — "The poor bilingual capability of departmental auditors improved somewhat during 1988 ... now, the Halifax region has three (bilingual auditors) ..."

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67. (1) Special reports

67. (1) The Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 66.

67. (2) Reply to be attached to report

67. (2) The Commissioner shall attach to every report made under this section a copy of any reply made by or on behalf of any federal institution concerned.

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68. Contents of report

68. The Commissioner may disclose in any report made under subsection 65(3) or section 66 or 67 such matters as in his opinion ought to be disclosed in order to establish the grounds for any conclusions and recommendations contained therein, but in so doing

shall take every reasonable precaution to avoid disclosing any matter the disclosure of which would or might be prejudicial to the defence or security of Canada or any state allied or associated with Canada.

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69. (1) Transmission of report

69. (1) Every report to Parliament made by the Commissioner under subsection 65(3) or section 66 or 67 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling respectively in those Houses.

69. (2) Reference to parliamentary committee

69. (2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of section 88.

Delegation

70. Delegation by Commissioner

70. The Commissioner may authorize any person to exercise or perform, subject to such restrictions or limitations as the Commissioner may specify, any of the powers, duties or functions of the Commissioner under this or any other Act of Parliament except

(a) the power to delegate under this section; and

(b) the powers, duties or functions set out in sections 63, 65 to 69 and 78.

General

71. Security requirements

71. The Commissioner and every person acting on behalf or under the direction of the Commissioner who receives or obtains information relating to any investigation under this Act shall, with respect to access to and the use of such information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of such information.

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72. Confidentiality

72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[3] In the course of their investigation, the investigators working for the Office of the Commissioner of Official Languages questioned some 25 employees of the Department, including the respondent, his immediate supervisor and some of his co-workers, as well as managers and other employees. The investigators encountered problems in conducting their investigation because a number of Department employees were reluctant to give information, fearing reprisals by the respondent. In those instances, the investigators explained the role and mandate of the Commissioner as an ombudsman, and the private nature of the investigations. They gave assurances that the interviews would remain confidential within the limits of ss. 72, 73 and 74 of the *Official Languages Act*.

[...]

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev. 215*):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

[40] Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

[...]

[42] The *Privacy Act* must therefore be applied to the Office of the Commissioner of Official Languages in a manner consistent with the objective of the *Official Languages Act* of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions. Parliament has expressly provided that investigations by the Commissioner shall be conducted in private and that investigators shall not disclose information that comes to their knowledge in the performance of their duties and functions:

> 60. (1) Every investigation by the Commissioner under this Act shall be conducted in private.
>
> 72. Subject to this Act, the Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act. [Emphasis added.]

These provisions illustrate Parliament's desire to facilitate access to the Commissioner and to recognize the very delicate nature of the use of an official language at work by a minority group. The private and confidential nature of investigations is an important aspect of the implementation of the *Official Languages Act*. Without protections of this nature, complainants might be reluctant to file complaints with the Commissioner, for example because they are afraid that their opportunities for advancement would be reduced, or their workplace relationships would suffer. As well, these provisions encourage witnesses to participate in the Commissioner's investigations. They are less likely to be afraid that their participation might have a negative impact on the employer-employee relationship or their relations with other employees, and to refuse to cooperate for fear of getting in trouble or damaging their careers. The affidavit of Mr. Langelier, Assistant Director General of the Investigations Branch, explains the importance of preserving a measure of confidentiality in the Commissioner's investigations, for the following reasons, among others:

> [TRANSLATION] – the investigators gave assurances to the people interviewed that the information gathered would be kept confidential in order to secure the cooperation of those people . . . .
>
> – . . . members of the public, and in particular public servants, will hesitate to file complaints ... if they are warned that their identities and any information that they disclose to the OCOL investigators is likely to be disclosed otherwise than where required in order to comply with the principles of natural justice or, as an exception, in an application for a remedy under Part X of the [*Official Languages Act*];
>
> – members of the public, and in particular public servants, will be more reluctant to cooperate with OCOL investigators, and in order to give effect to the obligation imposed on the COL to investigate complaints, investigators will have to resort to their powers in relation to investigations, including summoning witnesses to attend and compelling them to testify and produce documents;
>
> – the OCOL's investigatory process will become much more formal and rigid, and this will compromise the COL's ombudsman role;
>
> – the fact that the COL is required to disclose information could interfere with his role as mediator and facilitator and thereby jeopardize the power of persuasion and the credibility that an ombudsman must have in order to discharge his functions.

[...]

[44] In addition to enacting specific provisions to ensure that investigations are held in private, Parliament gave the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board (s. 62(2)(a)). The Minister of Justice at the time, Ray Hnatyshyn, discussed that provision in addressing the legislative committee (Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-72, Issue No. 20, June 7, 1988, at pp. 20:25 and 20:29) as follows:

> It is appropriate, after we have talked about the ombudsman character of the office, that in this case the commissioner has the opportunity to examine the kind of harassment, intimidation, discrimination or obstruction that might take place with respect to any individual and have an opportunity to examine these matters and bring them to the attention of the President of the Treasury Board. I think this is an opportunity to make sure all Canadians and all people who are involved and employed and against whom a complaint could be laid under this bill can do so freely without fear of discrimination. I think it is important for all Canadians to feel they have the right to use this bill and use the office of the commissioner without fear of retribution or recrimination for taking a complaint forward.
>
> . . .
>
> But if you have raised a complaint in the first place, you are on record, and maybe you are being discriminated against.
>
> Certainly the commissioner's function is to protect you; not to make life any more difficult for you but make sure you are not going to suffer negative consequences. If you prevent him from doing that, or have a veto, then it may be counterproductive in the legislation to the interests of all your fellow employees. It would certainly allow the same discrimination to take place with other people if they feel they cannot beat the system. [Emphasis added.]

The *Privacy Act* must be applied to the Office of the Commissioner of Official Languages in such a way as to recognize the unique context in which the Commissioner's investigations are conducted. In ss. 60, 62 and 72, Parliament clearly recognized the delicate situation involved in the use of an official language at work by a minority group, by requiring that investigations be conducted in private and be kept confidential, to protect complainants and witnesses from any prejudice that might result from their involvement in the complaints and the investigation process, and by giving the Commissioner the power to report the belief that a complainant or witness has been threatened, intimidated or made the object of discrimination, and the grounds therefor, to the President of the Treasury Board. If Parliament had not enacted those provisions, it might have been difficult to achieve the objectives of the *Official Languages Act*. The participation of witnesses and complainants is central to the effectiveness of the Act. Because the purpose of the investigation is to determine the truth and understand the individuals' experience of the situation, the investigators must be circumspect in collecting information and assessing the information obtained.

[45] Both the respondent and the Privacy Commissioner, who is an intervener in this case, argue that it is not necessary that interviews be confidential in order to secure the participation of witnesses, because the Commissioner of Official Languages has broad powers that include the power to summon and enforce the attendance of witnesses (s. 62 of the *Official Languages Act*). That argument cannot succeed, because using the procedure for compelling attendance compromises the ombudsman role of the Commissioner. It is the responsibility of the Commissioner to investigate complaints that are submitted to him impartially, and to resolve them using flexible mechanisms that are based on discussion and persuasion. The Commissioner must protect witnesses and assist victims in exercising their rights. Requiring the Commissioner to have regular recourse to the procedure for enforcing the attendance of individuals before him is inconsistent with the role of an ombudsman. In addition, enforcing the attendance of witnesses

would needlessly complicate the investigations, and would be injurious to them. A person who is compelled to testify may be recalcitrant and less inclined to cooperate. The way in which the *Official Languages Act* is interpreted must not be injurious to activities undertaken by the Commissioner that are intended to resolve conflicts in an informal manner.

[...]

[47] At the time in question, the policy of the Office of the Commissioner of Official Languages was to explain to witnesses that ss. 60 and 72 of the *Official Languages Act* provided that investigations were conducted in private, and that ss. 73 and 74 of the Act provided for limited circumstances in which testimony could be disclosed. As Mr. Langelier said in his affidavit:

> [translation] The credibility of the Commissioner, in my view, requires that the information disclosed to the Commissioner and his representatives in the course of investigations is kept strictly confidential, subject to the following exceptions:
>
> A) situations in which the Commissioner must disclose information which, in his opinion, is necessary for the conduct of his investigations. These include compliance with the principles of natural justice, where it is essential that the person or institution that is the subject of a recommendation know the identity of the complainant and what the complainant has said;
>
> B) situations in which the Commissioner is involved in an application for a court remedy under Part X of the *OLA*. In those cases, the Commissioner may disclose or authorize the disclosure of information. [Emphasis added.]

The Commissioner's policy was therefore to assure witnesses that the information they disclosed to investigators would be kept confidential, within the limits of ss. 72, 73 and 74. In this case, the promise of confidentiality was also made subject to those sections; as the appellant's factum states:

> The investigators explained the role and mandate of the Commissioner as an Ombudsman and gave their assurances that the interviews would be kept confidential in light of sections 60(1), 72, 73 and 74 of the *Official Languages Act*. The investigators explained that pursuant to these sections, the investigations are conducted "in private". [Emphasis added.]

The promise of confidentiality made to the witnesses in the course of the investigation concerning Mr. Lavigne's complaint was therefore not absolute.

[48] After the respondent filed his complaint, the Commissioner of Official Languages altered the policy concerning the instructions to be given to witnesses. His new policy required that investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act*. Investigators still inform witnesses that investigations are conducted in private, as provided in s. 60(1) of the *Official Languages Act*, and that the information that comes to the investigators' knowledge, including the testimony they give, will not be disclosed unless disclosure is necessary for the investigation or in the course of proceedings under Part X, or in cases where disclosure is required for reasons of procedural fairness under s. 60(2) of the *Official Languages Act*. In addition, investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act* and that the information collected may be exempt from the disclosure requirement where an exception to disclosure applies.

[...]

[58] The non-disclosure of personal information provided in s. 22(1)(b) is authorized only where disclosure "could reasonably be expected" to be injurious to investigations. As Richard J. said in *Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, *supra*, at para.

43, “[t]he reasonable expectation of probable harm implies a confident belief”. There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure. Confidentiality of personal information must only be protected where justified by the facts and its purpose must be to enhance compliance with the law. A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The Commissioner of Official Languages has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly. The power provided in s. 22(1)(b) must be exercised in a manner that respects the nature and objectives of the *Official Languages Act*. The Commissioner must have regard to, *inter alia*, the private and confidential nature of investigations, as provided by Parliament. As I have explained, the sections providing for the confidentiality and secrecy of investigations are essential to the implementation of the *Official Languages Act*. Section 22(1)(*b*) must be applied in a way that is consistent with both Acts.

[...]

[61] I do not believe that Mr. Langelier’s statements provide a reasonable basis for concluding that disclosure of the notes of the interview with Ms. Dubé could reasonably be expected to be injurious to future investigations. Mr. Langelier contends that disclosure would have an injurious effect on future investigations, without proving this to be so in the circumstances of this case. The Commissioner’s decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner’s decision not to disclose the personal information requested was based on the fact that Ms. Dubé had not consented to disclosure, and does not establish what risk of injury to the Commissioner’s investigations the latter might cause. If Ms. Dubé had given permission, the Commissioner would have disclosed the information. The appellant’s factum states:

> Jacqueline Dubé did not give permission to disclose to the Respondent the personal information concerning him that was recorded in the course of the interview she gave the OCOL [Office of the Commissioner of Official Languages] [and so] [t]he OCOL did not disclose any of this personal information. [Emphasis added.]

The appellant does not rely on any specific fact to establish the likelihood of injury. The fact that there is no detailed evidence makes the analysis almost theoretical. Rather than showing the harmful consequences of disclosing the notes of the interview with Ms. Dubé on future investigations, Mr. Langelier tried to prove, generally, that if investigations were not confidential this could compromise their conduct, without establishing specific circumstances from which it could reasonably be concluded that disclosure could be expected to be injurious. There are cases in which disclosure of the personal information requested could reasonably be expected to be injurious to the conduct of investigations, and consequently the information could be kept private. There must nevertheless be evidence from which this can reasonably be concluded. Even if permission is given to disclose the interview notes in this case, that still does not mean that access to personal information must always be given. It will still be possible for investigations to be confidential and private, but the right to confidentiality and privacy will be qualified by the limitations imposed by the *Privacy Act* and the *Official Languages Act*. The Commissioner must exercise his discretion based on the facts of each specific case. In the case of Ms. Dubé, the record as a whole does not provide a reasonable basis for concluding that disclosure of the notes of her interview could reasonably be expected to be injurious to the Commissioner’s investigations.

[...]

[64] In the particular context of employment, the use of an official language by a minority group is a very delicate situation. It may be difficult for an employee to make a complaint for the purpose of having his or her language rights recognized. The employee is in a situation of twofold weakness: he belongs to a minority group, and his relationship with the employer is one of subordination. Instead of tackling these difficulties by asserting his rights, an employee may prefer to conform to the language of the majority. The objective of the *Official Languages Act* is precisely to make that kind of behaviour unnecessary, by enhancing the vitality of both official languages. To facilitate the exercise of language rights, Parliament has expressly provided that investigations will be private and confidential, and has given the Commissioner of Official Languages a mandate to ensure that the Act is enforced. This is the delicate context in which the Commissioner carries out his functions.

[65] Parliament has made the Office of the Commissioner of Official Languages subject to the *Privacy Act*, and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so. In the case before us, the appellant has not succeeded in showing that it is reasonable to maintain confidentiality. For these reasons, I would dismiss the main appeal.

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[38] Finally, the Commissioner has the obligation to ensure that investigations are conducted in private pursuant to sections 60 and 72 of the *OLA*. The Commissioner and every person acting on his behalf also have a duty not to disclose any information that comes to their knowledge in the performance of their duties and functions under the *OLA*. The private and confidential nature of investigations is an important aspect of the implementation of the *OLA*, because without these protections, complainants might be reluctant to file complaints with the Commissioner, or witnesses may be reluctant to participate in the Commissioner's investigations: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at paras. 36 and 42.

[39] In addition, the Commissioner has a duty under section 16.1 of the *Access to Information Act*, "to refuse to disclose any record requested under this Act that contains information that was objected or created by them or on their behalf in the course of an investigation examination or audit conducted by them or under their authority".

[40] The applicant made an access to information request to the Commissioner for the same documents he is requesting in this motion. Access to the requested information was denied by the Commissioner on the basis of section 16.1 of the *Access to Information Act*. The present proceedings should not act as a substitute for procedures under the *Access to Information Act*, nor as means to circumvent the protections that the statute puts in place.

[41] For all the foregoing reasons, I am therefore of the view that the Prothonotary did not err in finding that there are no provisions in the OLA pursuant to which the Court could compel the production of the documents and information sought by the applicant.

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73. Disclosure authorized

73. The Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information

> **(a) that, in the opinion of the Commissioner, is necessary to carry out an investigation under this Act; or**

(b) in the course of proceedings before the Federal Court under Part X or an appeal therefrom.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[3] In the course of their investigation, the investigators working for the Office of the Commissioner of Official Languages questioned some 25 employees of the Department, including the respondent, his immediate supervisor and some of his co-workers, as well as managers and other employees. The investigators encountered problems in conducting their investigation because a number of Department employees were reluctant to give information, fearing reprisals by the respondent. In those instances, the investigators explained the role and mandate of the Commissioner as an ombudsman, and the private nature of the investigations. They gave assurances that the interviews would remain confidential within the limits of ss. 72, 73 and 74 of the *Official Languages Act*.

[...]

[40] Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

[...]

[46] The appellant contends that the access to information mechanism set out in ss. 73 and 74 of the *Official Languages Act* is a complete scheme, and that those provisions enabled the respondent to obtain disclosure of the information he needed in order to submit his complaint and secure redress. In the appellant's submission, Parliament intended that the information collected by the Commissioner would remain private, unless, and only in the event that, it could be disclosed under the *Official Languages Act*. The effect of that interpretation is to exempt the *Official Languages Act* from the application of the *Privacy Act*. It defeats the complainant's right to obtain access to personal information about him under the *Privacy Act*. It would be contrary to the clear intention of Parliament, which was that the Office of the Commissioner of *Official Languages* was to be subject to the *Privacy Act*, to accept that interpretation, and it must be rejected. The two Acts must be interpreted and applied harmoniously.

[47] At the time in question, the policy of the Office of the Commissioner of Official Languages was to explain to witnesses that ss. 60 and 72 of the *Official Languages Act* provided that investigations were conducted in private, and that ss. 73 and 74 of the Act provided for limited circumstances in which testimony could be disclosed. As Mr. Langelier said in his affidavit:

> [translation] The credibility of the Commissioner, in my view, requires that the information disclosed to the Commissioner and his representatives in the course of investigations is kept strictly confidential, subject to the following exceptions:
>
> A) situations in which the Commissioner must disclose information which, in his opinion, is necessary for the conduct of his investigations. These include compliance with the principles

of natural justice, where it is essential that the person or institution that is the subject of a recommendation know the identity of the complainant and what the complainant has said;

B) situations in which the Commissioner is involved in an application for a court remedy under Part X of the *OLA*. In those cases, the Commissioner may disclose or authorize the disclosure of information. [Emphasis added.]

The Commissioner's policy was therefore to assure witnesses that the information they disclosed to investigators would be kept confidential, within the limits of ss. 72, 73 and 74. In this case, the promise of confidentiality was also made subject to those sections; as the appellant's factum states:

The investigators explained the role and mandate of the Commissioner as an Ombudsman and gave their assurances that the interviews would be kept confidential in light of sections 60(1), 72, 73 and 74 of the *Official Languages Act*. The investigators explained that pursuant to these sections, the investigations are conducted "in private". [Emphasis added.]

The promise of confidentiality made to the witnesses in the course of the investigation concerning Mr. Lavigne's complaint was therefore not absolute.

[48] After the respondent filed his complaint, the Commissioner of Official Languages altered the policy concerning the instructions to be given to witnesses. His new policy required that investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act*. Investigators still inform witnesses that investigations are conducted in private, as provided in s. 60(1) of the *Official Languages Act*, and that the information that comes to the investigators' knowledge, including the testimony they give, will not be disclosed unless disclosure is necessary for the investigation or in the course of proceedings under Part X, or in cases where disclosure is required for reasons of procedural fairness under s. 60(2) of the *Official Languages Act*. In addition, investigators inform witnesses that the Office of the Commissioner of Official Languages is subject to the *Privacy Act* and that the information collected may be exempt from the disclosure requirement where an exception to disclosure applies.

SEE ALSO:

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

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74. No summons

74. The Commissioner or any person acting on behalf or under the direction of the Commissioner is not a compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than proceedings before the Federal Court under Part X or an appeal therefrom.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

[...]

[40] Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

[...]

[46] The appellant contends that the access to information mechanism set out in ss. 73 and 74 of the *Official Languages Act* is a complete scheme, and that those provisions enabled the respondent to obtain disclosure of the information he needed in order to submit his complaint and secure redress. In the appellant's submission, Parliament intended that the information collected by the Commissioner would remain private, unless, and only in the event that, it could be disclosed under the *Official Languages Act*. The effect of that interpretation is to exempt the *Official Languages Act* from the application of the *Privacy Act*. It defeats the complainant's right to obtain access to personal information about him under the *Privacy Act*. It would be contrary to the clear intention of Parliament, which was that the Office of the Commissioner of Official Languages was to be subject to the *Privacy Act*, to accept that interpretation, and it must be rejected. The two Acts must be interpreted and applied harmoniously. [...]

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[36] Section 74 of the *OLA* states a general rule that the Commissioner or any person acting on his behalf or under his direction is not a compellable witness in any proceedings, with the exception of proceedings commenced under Part X of the *OLA*. It does not create a duty or make it obligatory for the Commissioner to file evidence in proceedings commenced under Part X to which he is not a party.

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75. (1) Protection of Commissioner

75. (1) No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commissioner under this Act.

75. (2) Libel or slander

75. (2) For the purposes of any law relating to libel or slander, (a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation by or on behalf of the Commissioner under this Act is privileged; and (b) any report made in good faith by the Commissioner under this Act and any fair and accurate account of the report made in good faith in a newspaper or any other periodical publication or in a broadcast is privileged.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[37] In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

– They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;

– They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;

– They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;

– They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;

– As a rule, they may not disclose information they receive.

Lavigne v. Office of the Commissioner of Official Languages, 2004 FC 787 (CanLII)

[55] Additionally, the Court must consider that the plaintiff's allegations in his statement of claim relating to any negligence, incompetence, fraud or bias continue to be general allegations devoid of any material support. In view of Rule 181(a) and paragraph 75(1) of the *Official Languages Act*, the plaintiff should have provided much more support for his statement of claim […].

[56] Additionally, to avoid the application of subsection 75(1), supra, of the *Official Languages Act*, the plaintiff in his statement of claim maintained that he intended to challenge the unconstitutionality of this subsection and provide details regarding that challenge in due course. Such a general allegation cannot stand and the plaintiff should have provided details of the basis of his challenge in his statement of claim. The same is true of the plaintiff's allegation regarding the application of section 7 of the *Charter*, to the extent that such a section could even be considered applicable in the case at bar.

Part X – Court Remedy

76. Definition of "Court"

76. In this Part, "Court" means the Federal Court.

R.S., 1985, c. 31 (4th Supp.), s. 76; 2002, c. 8, s. 183.

ANNOTATIONS

Centre québécois du droit de l'environnement v. National Energy Board, 2015 FC 192 (CanLII)

[pp. 5-7] The moving parties argue that the Federal Court has jurisdiction to hear this motion and suspend the process for filing the funding and participation applications to the Board, by relying essentially on section 76 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) (*OLA*), which sets out that the court remedies created by that statute are the responsibility of the Federal Court. Even though judicial review of the Board's rulings falls within the jurisdiction of the Federal Court of Appeal pursuant to paragraph 28(1)(f) of the *Federal Courts Act*, RSC 1985, c F-7 (*FCA*), it is concurrent and non-exclusive jurisdiction that cannot depart from the specific remedy set out in the *OLA*.

Even though that theory can appear attractive at first blush, it does not stand up to analysis. A close reading of the [National Energy Board] Act and the *FCA* shows that Parliament's clear intention was to make the Federal Court of Appeal the only court that has jurisdiction to hear applications for judicial review or appeals against rulings made by the Board. In fact, section 22 of the [National Energy Board] Act provides that a party that wishes to contest a ruling of the Board must file an appeal to the Federal Court of Appeal, and obtain leave to appeal from that Court. When the situation does not give rise to such right of appeal, it is through an application for judicial review to the Federal Court of Appeal that a ruling of the Board can be challenged. [...]

To the extent that the purpose of the interlocutory injunction motion brought by the moving parties is essentially to challenge the ruling rendered by the Board on January 6, 2015 (and reiterated on February 3), it seems clear to me that this Court is not the appropriate forum and that the procedural vehicle chosen is inappropriate. It goes without saying that it would be wrong to do indirectly what is not permitted directly. [...]

Because this Court has no jurisdiction with respect to the main proceeding, it cannot have jurisdiction to grant interlocutory relief: [...].

R. v. Portelance (27 November 2007), Ottawa 06-30399 (ON CJ) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[5] The Ontario Court of Justice is a provincial court. [...]

[7] I cannot assume jurisdiction or powers that do not belong to me or that I have not been expressly or implicitly conferred by any law. Thus, the *OLA* does not confer a provincial court powers arising from non-compliance with its provisions. These are assigned to the Commissioner or the Federal Court of Canada.

SEE ALSO:

Canada (Commissioner of Official Languages) v. Air Canada, 1998 CanLII 8008 (FC), rev'd in part [1999] F.C.J. No. 738 (FCA) [hyperlink not available].

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77. (1) Application for remedy

77. (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part. 2005, c. 41, s.3.

77. (2) Limitation period

77. (2) An application may be made under subsection (1) within sixty days after (a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1), (b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or (c) the complainant is informed of the Commissioner's decision to refuse or cease to investigate the complaint under subsection 58(5), or within such further time as the Court may, either before or after the expiration of those sixty days, fix or allow.

77. (3) Application six months after complaint

77. (3) Where a complaint is made to the Commissioner under this Act but the complainant is not informed of the results of the investigation of the complaint under subsection 64(1), of the recommendations of the Commissioner under subsection 64(2) or of a decision under subsection 58(5) within six months after the complaint is made, the complainant may make an application under subsection (1) at any time thereafter.

77. (4) Order of Court

77. (4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

77. (5) Other rights of action

77. (5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

ANNOTATIONS – SUBSECTION 77(1)

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[32] In *Forum des maires*, Décary J.A. clearly explained the nature of the court remedy provided for in s. 77 of the *OLA* (at paras. 15-21). Although the scope of the remedy has since been broadened by the inclusion of Part VII, his comments on its nature are no less relevant. I agree with his analysis and will therefore review its salient points here before addressing the issue before us. […]

[34] Thus, the remedy provided for in s. 77 is grounded in the complaint to the Commissioner and the results of the Commissioner's investigation. As Décary J.A. explained, "the capacity as an 'applicant' to the Court is derived from the capacity as a 'complainant' to the Commissioner (subsection 77(1)) and it is the date of communication of the report that serves as the point of

departure for the calculation of the time periods (subsection 77(2))" (para. 17). The merits of the complaint are determined as of the time of the alleged breach, and the facts that existed as of the date the complaint was filed with the Commissioner are therefore determinative of the outcome of the application.

[35] Although the complaint to the Commissioner and the investigation that follows form the basis for the remedy, it must be made clear that the Commissioner is not a tribunal for the purposes of the *OLA* and that an application under s. 77 is not an application for judicial review […].

[36] The Commissioner's reports are admissible in evidence but are not binding on the parties. The evidence provided during the Commissioner's investigation may therefore be supplemented or even contradicted. Nor are the Commissioner's conclusions binding on the judge, who hears the matter de novo. As well, the Commissioner's reports and the conclusions they contain must be considered in the context of the Commissioner's specific mandate […].

[37] Finally, although the assessment of the merits of the complaint is based on the facts that existed as of the time the complaint was filed with the Commissioner, any remedy must be adapted to the circumstances that exist as of the time of the court's order.

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[5] After the Commissioner's report was submitted, the respondent applied to the Federal Court, Trial Division for a remedy from the Department under Part X of the *Official Languages Act*. The Federal Court, being of the opinion that an application under that Part is a proceeding de novo, based its decision on the evidence submitted in affidavit form, and not on the evidence contained in the Commissioner's investigation files. The affidavits included those of France Doyon, Jacqueline Dubé and Normand Chartrand. The respondent had an opportunity to cross-examine the Department's witnesses, including those three individuals, but did not do so. On October 30, 1996, the Federal Court (whose decision was affirmed on appeal (1998), 228 N.R. 124) ordered the Department to pay the respondent $3,000 in damages and to write him a letter of apology: 1996 CanLII 3854 (FC), [1997] 1 F.C. 305.

[...]

[36] As well, it is the Commissioner who decides what procedure to follow in conducting investigations, subject to the following requirements: the obligation to give notice of intention to investigate (s. 59), the obligation to ensure that investigations are conducted in private (s. 60(1)) and the obligation to give the individual or federal institution in question the opportunity to answer any adverse allegation or criticism (s. 60(2)). The investigation must also be conducted promptly, since the complainant is entitled to make an application for a court remedy six months after the complaint is made (s. 77(3)). The Commissioner and every person acting on his behalf may not disclose any information that comes to their knowledge in the performance of their duties and functions under the *Official Languages Act* (s. 72).

CBC/Radio-Canada v. Canada (Commissioner of Official Languages), 2015 FCA 251 (CanLII)

[48] Consequently, I have difficulty with the remarks which the Judge made at paragraph 101 of his reasons of the second decision, that the Court's power under section 77 "is essentially 'remedial'" and that the Court is not there to investigate the "alleged failure of a federal institution to uphold its duty to take positive measures". In my respectful view, it is the Federal Court's duty under section 77 of the *OLA* to determine whether there has been a failure to comply with the *OLA* and, if so, to grant the appropriate remedy in the circumstances of the case. This means that it is up to the Federal Court to make the relevant findings with respect to the federal institution's

conduct, based on the evidence before it, in order to determine whether there has been a breach of the *OLA*.

[…]

[79] As I indicated earlier, the Judge's view was that the whole of the complaint made by Dr. Amellal and the Comité fell within the jurisdiction of both the Commissioner and the CRTC [*Canadian Radio-television and Telecommunications Commission*]. In my view, that cannot be. I believe that I am on safe grounds in so saying because the Commissioner himself recognizes that he does not have jurisdiction over what are truly programming activities. The question therefore is whether all of CBC's activities at issue in this case are programming activities and, if so, do they necessarily fall within the CRTC's exclusive jurisdiction. If any of these activities were not programming activities, did they then fall within the Commissioner's realm?

[80] Consequently, were we to accept to determine the question of jurisdiction at issue in this appeal, it would be left to us to review the evidence and make the factual findings which must be made in order to determine the legal issues. This would have to be done without the benefit of the Judge's view on the questions which I have raised. In the circumstances of this case, I am of the opinion that it would be very unwise for us to proceed in such a way.

Norton v. Via Rail Canada Inc., 2005 FCA 205 (CanLII)

[15] An order striking an originating application before hearing is an extraordinary remedy, granted only in narrowly defined circumstances. Such an application is not struck unless it clearly has no possibility of success (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc*., 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 (C.A.) at page 600). An application under section 77 of the *OLA* should not be struck unless there is no possibility that the Judge hearing the application will grant a remedy.

[16] In this case, the basis for striking the applications was essentially that the Federal Court lacked the jurisdiction to grant a remedy, either because the appellants are seeking to specifically enforce non-binding recommendations, or because the subject matter of the complaint is within the exclusive jurisdiction of a labour arbitrator. I must respectfully disagree with the Judge and the Prothonotary that the jurisdictional issues raised in these applications are so clear that the applications cannot possibly result in a remedy.

[…]

[21] There may be other legal issues that should be resolved before it is determined whether any remedy is appropriate. For example, it seems to me that the applications disclose the possibility of a debate as to whether the Collective Agreement is intended to bar the appellants from all recourse to section 77 of the *OLA*. If that is indeed what the Collective Agreement purports to do, then an issue may arise as to whether it is possible, as a matter of law, to bargain away the right of a person to bring an application under section 77 of the *OLA*.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[15] […] Subsection 77(2) provides for "an application" (referred to as a "recours" in the French text), and it is "[TRANSLATION] an application [*demande*] under section 77 of the *Official Languages Act*" that the Forum had filed. This proceeding is not an application for judicial review, although it is governed procedurally by the rules applicable to applications (see paragraph 300(b) of the *Federal Court Rules*, 1998). This application is instead similar to an action.

[16] The Commissioner, it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a

report that she may accompany with recommendations (subsections 63(1), (3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.

[17] However, to ensure that the *Official Languages Act* has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone, Parliament has created a "remedy" in the Federal Court that the Commissioner herself (section 78) or the complainant (section 77) may use. This remedy, the scope of which I will examine later, is designed to verify the merits of the complaint, not the merits of the Commissioner's report (subsection 77(1)), and, where applicable, to secure relief that is appropriate and just in the circumstances (subsection 77(4)). The Commissioner's report is nevertheless the source or the pretext for the remedy or, to repeat the words of Madam Justice Desjardins in relation to the comparable report filed by the Information Commissioner, a "[TRANSLATION] precondition to the exercise of the remedy" (*Information Commissioner of Canada v. Canada (Minister of National Defence)* (1999), 240 N.R. 244 (F.C.A.), at p. 255): the capacity as an "applicant" to the Court is derived from the capacity as a "complainant" to the Commissioner (subsection 77(1)) and it is the date of communication of the report that serves as the point of departure for the calculation of the time periods (subsection 77(2)). The "complainant", according to subsection 58(2), may be a "person" or a "group".

[18] Thus we see that the remedy differs from an application for judicial review within the meaning of section 18.1 of the *Federal Courts Act*. It does not attack the "decision" of the federal institution as such. It may be undertaken by a person or a group, which may not be "directly affected by the matter in respect of which relief is sought" (see subsection 18.1(1) of the *Federal Courts Act*). The relief the applicant may be seeking is not limited to the remedies prescribed in subsection 18.1(3) of the *Federal Courts Act*, as the Court, by way of exception, has the discretion that it "considers appropriate and just in the circumstances" (s-s. 77(4)). New evidence is admissible (section 79). The matter is heard and determined in a summary manner (section 80).

[19] There are some important implications to the fact that the remedy under Part X is basically similar to an action.

[20] For example, the judge hears the matter de novo and is not limited to the evidence provided during the Commissioner's investigation. The remedy is constantly shifting in the sense that even if the merit of the complaint is determined as it existed at the time of the alleged breach, the remedy, if there is one that is appropriate and just, must be adapted to the circumstances that prevail at the time when the matter is adjudicated. The remedy will vary according to whether or not the breach continues.

[21] Moreover, the Commissioner's reports are admissible in evidence, but they are not binding on the judge and may be contradicted like any other evidence. The explanation is obvious. The Commissioner conducts her inquiry in secret and her conclusions may be based on facts that the parties concerned by the complaint will not necessarily have been able to verify. Furthermore, for reasons that I will soon give, the purpose of the court remedy is more limited than the purpose of the Commissioner's inquiry and it may be that the Commissioner takes into account some considerations that the judge may not consider. […]

[25] The language of subsection 77(1) is clear and explicit. Parliament intended that only those complaints in respect of a right or duty under certain sections or parts of the Act could be the subject matter of the remedy under Part X. The suggestion by counsel for the Commissioner that a complaint need only be filed under some sections or parts of the Act listed in subsection 77(1) in order to set in motion a proceeding by the complainant in respect of any provision whatsoever

of the Act cannot be adopted. Not only would Parliament have been using meaningless words when it went to the trouble to list certain sections and parts of the Act in subsection 77(1), but also, and perhaps above all, this list is completely compatible with Parliament's intention, clearly expressed elsewhere in the Act, to ensure that not every section or every part of the Act should enjoy the same status or the same protection in the courts. […]

[27] This asymmetry of the Act is easily explained when we note that it deals not only with policies and commitments but also with rights and duties. Subsection 77(1) is itself highly instructive in this regard, as it specifies that the complaints it covers are addressed not to the sections or parts of the Act in themselves, but to "a right or duty under" particular sections or parts. So Parliament has spoken with great care, so as to ensure that only those disputes in respect of particular rights or duties may be taken before the Court. This prudence is especially warranted in that the remedial authority conferred by subsection 77(4) is exceptional in scope and it is readily understandable that Parliament did not intend to give the courts the power to interfere in the area of policies and commitments that is not usually within their jurisdiction.

Marchessault v. Canada Post Corporation, 2003 FCA 436 (CanLII)

[10] I would add, however, that the reasons of the Applications Judge, and the memorandum of fact and law filed on behalf of Canada Post in this appeal, treat this proceeding as if it were an application for judicial review of a decision by the Commissioner of Official Languages. In my view, an application for a remedy under section 77 of the *OLA* is a *sui generis* proceeding in which the Court is asked to determine whether conduct that has been the subject of a complaint to the Commissioner (in this case, Canada Post's bilingual classification of the position of postmaster at Corderre) breached the *OLA*. Thus, in the context of this case the subject of the application is Canada Post's classification, not the Commissioner's dismissal of the complaint.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373 (FCA) [hyperlink not available]

[17] [...] Just as the *Canadian Charter of Rights and Freedoms* is not in itself a source of new jurisdictions, so the 1988 *Official Languages Act* does not create new jurisdictions other than those, vested in the Commissioner of Official Languages and the Federal Court Trial Division, which it creates expressly.

Dionne v. Canada (Bureau du surintendant des institutions financières), 2016 CF 506 [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[8] The applicant submits that the principle of “great circumspection”, by allowing the filing of an additional affidavit, does not apply to an application under section 77 of the *OLA* in the same way it applies to an application for judicial review, as stated by the Federal Court of Appeal in *Mazhero*. The applicant notes that the evidence in an application for judicial review is restricted. An application under section 77 of the *OLA* is a proceeding *de novo* in which the parties have the right to introduce new evidence. I agree. However, section 77 of the *OLA* was written expressly for proceedings to be decided through an application with the Federal Court. It follows that the Federal Court application requirements apply to proceedings pursuant to section 77 of the *OLA*

[…]

[25] I also accept the applicant’s arguments that this application is of public interest, and that some of the questions raised in this application are new.

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[27] An application under section 77 of the *OLA* is different from an application for judicial review. It is designed to verify the merits of the complaint made to the Commissioner, not of the

Commissioner's decision or report, and to secure relief that is appropriate and just in the circumstances: *Forum des maires de la péninsule acadienne v. Canada (Food Inspection Agency)*, [2004] 4 F.C.R. 276, 2004 FCA 263, at paras. 15 and 17.

[28] The three applications which form the basis of these proceedings do not attack the Commissioner's decisions but are rather *de novo* proceedings where the judge hears and weighs the evidence advanced by the parties to determine whether the *OLA* has been infringed. Therefore, the Commissioner does not have a duty under Rule 317 of the *Federal Courts Rules* to disclose information in the current proceedings. Such being the case, I can see no error in the decision of the Prothonotary.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[61] The *OLA* and its regulations form a comprehensive statutory regime that governs all matters related to language rights within federal institutions, reflects a social and political compromise, gives the Commissioner the powers of a true language ombudsman and creates a Court process for securing relief in cases contemplated by subsection 77(1) of the *OLA* [...].

[62] Thus, pursuant to subsection 77(1) of the *OLA*, any person who has made a complaint to the Commissioner "in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV or V, or in respect of section 91, may apply to the Court for a remedy under [Part X]" [my emphasis]. There is, however, a statutory indication that the recourse provided for in section 77 of the *OLA* is not exclusive, but concurrent with other recourses, since "nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section" (subsection 77(5) of the *OLA*).

[…]

[69] Thus, insofar as the interpretation or application of section 91 of the *OLA* is concerned, the Court dismisses the respondent's proposition that the Federal Court's jurisdiction under subsection 77(1) of the *OLA* to examine the legality of the challenged staffing actions is ousted by the mandatory grievance arbitration procedure provided for under subsection 57(1) of the *Labour Code*, or that a labour arbitrator would be better placed today than the Court to decide the matter, further considering in the latter instance that the delays in making a grievance and referring same to the labour arbitrator expired a long time ago and that VIA never objected to the jurisdiction of the Commissioner to investigate the applicant's complaint.

[…]

[82] Finally, this Court has decided that in its analysis of the remedy to be granted under section 77 of the *OLA*, it must hear the matter *de novo* and re-examine the applicant's complaint; the Court is thus not limited to the evidence provided during the Commissioner's investigation. Moreover, the Commissioner's report is admissible in evidence, but is not binding on the Court and may be contradicted like any other evidence (*Forum des maires*, above, at paragraphs 20-21; *Rogers v. Canada (Department of National Defence)*, above, at paragraph 40).

[...]

[96] First, the Commissioner implicitly accepted that if the advancement opportunities of unilingual employees were not adversely affected, the bilingual requirements would be necessary to perform the functions for which the staffing actions were undertaken. The reason the advancement opportunities were adversely affected was that too few French language opportunities were provided in the workplace, reducing the chances of senior unilingual employees' to bid for training in these positions. Again, this Court is not called upon to decide whether this action constituted a breach of section 39 of the *OLA*, because this particular provision is not mentioned in subsection 77(1) of the *OLA*.

[...]

[117] While a breach of section 91 permits the Court to issue a remedy under subsection 77(4), there can be no Court remedy in the case of a breach to section 39. It must be remembered that the enabling provision for a court remedy, that is subsection 77(1), is an exhaustive list. Part VI where section 39 is found is not mentioned in subsection 77(1). Even if a section 39 breach were established, this Court would have no jurisdiction to remedy that breach under the authority of subsection 77(4) (see *Ayangma v. Canada (2002)*, 2002 FCT 707 (CanLII), 221 F.T.R. 81 at paragraph 65, affirmed (2003), 303 N.R. 92, 2003 FCA 149 (CanLII)).

Lavoie v. Canada (Attorney General), 2007 FC 1251 (CanLII)

[42] I feel that for the purpose of the proceedings at bar two principles should be drawn from the Federal Court of Appeal judgments:

> * section 77 of the *OLA* does not preclude an action for judicial review under section 18.1 of the *Federal Courts Act*; and
>
> * an action under section 18.1 of the *Federal Courts Act* cannot be used to enforce the provisions of the *OLA* which do not create a duty or a right but simply consist of a commitment by the government.

Lavigne v. Canada Post Corporation, 2006 FC 1345 (CanLII)

[37] Mr. Lavigne cannot simply allege a breach of the *Official Languages Act* in this Court. That Act has its own procedures for launching complaints. Specifically, Mr. Lavigne must first make a formal complaint to the Commissioner of Official Languages. Then, the Commissioner will decide whether to investigate that complaint, and finally, whether to make any recommendations to the government. Coming to the Court at this stage is premature.

Raîche v. Canada (Attorney General), [2005] 1 FCR 93, 2004 FC 679 (CanLII)

[92] Last, the respondent contends that Part X of the *OLA*, which describes the court remedies available, does not provide for any remedy under Part VII because Part X does not entitle an applicant to seek judicial review of a decision made under Part VII.

[93] However, the Commissioner submits that the Court has jurisdiction to intervene in respect of decisions made under Part VII of the *OLA*.

[94] The two parties cited different case law in support of their arguments. In fact, the Court of Appeal has made two conflicting rulings on this point. As the Commissioner contends, the Court concluded in *Devinat* that it has the authority to review a decision involving parts of the *OLA* that do not fall under Part X, pursuant to the general jurisdiction assigned to the Court to review decisions of courts and tribunals.

[95] On the other hand, the Court of Appeal has also concluded, in *Ayangma*, that Part X of the *OLA* denies the applicant judicial review in respect of matters involving the parts of the *OLA* that are not specified in Part X.

[96] The Court is of the opinion that the decision of the Court of Appeal in *Devinat* applies. In *Devinat*, the Court quoted the Judicial Committee of the Privy Council, as follows [*Board v. Board*, 1919 CanLII 546 (UK JCPC), [1919] A.C. 956, at page 962]:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing is prescribed, that alone is sufficient to give jurisdiction to the King's Courts

> of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

[97] Because that principle is so fundamental to the law, the Court will not interpret the law so as to grant a right but deny a remedy, unless the law expressly precludes that remedy.

[98] In the case of the *OLA*, the law does not expressly preclude a remedy. Accordingly, under section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the *Federal Courts Act*, the Court has jurisdiction to hear the application for judicial review.

Standard of Review

[99] The standard of review that applies to the decision of the Commission under Part VII of the *OLA* is similar to the standard of review that applies to decisions of the Commission under the *Readjustment Act*. Nonetheless, there are a few important differences.

[100] On the other hand, the Commission has discretion to decide whether it is appropriate to apply Part VII of the *OLA*.

[101] Given that Part VII is declaratory, the Court must show considerable deference to the Commission.

[102] The issue in this case is a question of fact. Having regard to the factors, the standard of review is the standard of the patently unreasonable decision.

[103] The finding made by the Court, that the Commission contravened the *Readjustment Act*, applies here as well. The Commission decided that, by transferring the parishes from the electoral district of Acadie-Bathurst to the electoral district of Miramichi, it was respecting the community of interest in the parishes. That decision was erroneous, however, because it was made without regard for the evidence before the Commission. As well, saying that the addition of Acadians to the electoral district of Miramichi was going to increase the percentage of Acadians, and would then increase the Acadian community's political power, was patently unreasonable, because the percentage of francophones was not going to rise by adding the parishes of Saumarez, Allardville and Bathurst to the electoral district of Miramichi.

[104] The Court is of the opinion that the Commission tried to apply Part VII of the *OLA* in a manner in keeping with the intention of Parliament, but that it failed to do so because its findings of fact were erroneous. Accordingly, the Court sets aside the decision of the Commission.

N.B. – This judgment was rendered prior to the 2005 modifications to the *Official Languages Act* that amended Part VII, adding paragraphs 41(2) and 41(3) and making Part VII justiciable pursuant to s. 77 of the Act.

Vicrossano Inc. v. Canada (Attorney General), 2002 FCT 1999 (CanLII)

[21] […] [A]t section 58, the *Official Languages Act* provides for a scheme for registering complaints of alleged infringements of the Act and for the conduct of investigations into those complaints. Remedial provisions are reflected in sections 63 to 65.

[22] Subsection 77(1) of the *Official Languages Act* provides for recourse to this Court by any person who has made a complaint in respect of certain rights or duties under the *Official Languages Act*, including those here at issue. Here, no complaint was made to the Commissioner of Official Languages. In the absence of such a complaint, and more particularly, in the absence of evidence that the President of the applicant has fully pursued the complaint and remedial procedure available to her under the *Official Languages Act*, I am satisfied that it is not open to

the applicant to, in effect, initiate such a complaint as an element of this application for judicial review.*

> *See *Harelkin v. The University of Regina*, [1979] 2 S.C.R. 561 at 593 where Justice Beetz, for the majority wrote: The courts should not use their discretion to promote delay and expenditure unless there is no other way to protect a right. I believe the correct view was expressed by O'Halloran J. in *The King ex.rel. Lee v. Workmen's Compensation Board* ... dealing with mandamus but equally applicable to certiorari: Once it appears a public body has neglected or refused to perform a statutory duty to a person entitled to call for its exercise, then mandamus issues ex debito justitiae if there is no other convenient remedy... If however, there is a convenient alternative remedy, the granting of mandamus is discretionary, but to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice.

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[59] Although the [Official Languages] Act does not state that the Commissioner's report is binding on a court, it is surely evidence which is to be taken into consideration upon an application for a remedy under the Act. The Commissioner of Official Languages is specifically authorized to monitor the protection of language rights in accordance with the Act. The status of this Act as "quasi-constitutional legislation" was recognized by the Federal Court of Appeal in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at page 386 as follows : [...]

[60] In my opinion, the nature of the Act as quasi-constitutional legislation means that a report of the Commissioner, after the conduct of an investigation, can be accepted as evidence that a breach of the Act has occurred. The findings and conclusion of the Commission were not seriously challenged by the respondent. Accordingly, I confirm the findings of the Commission that the staffing mode for the position in question should have been bilingual non-imperative, with a linguistic profile of CBC. Further, I find that the improper designation for the position breached the applicant's language rights.

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[89] It is important to note that the powers conferred on the Commissioner of Official Languages to investigate and make recommendations may not be confused with the possible court remedies identified in Part X of the *OLA*. While the Commissioner of Official Languages has very broad powers to investigate and make recommendations, it seems clear that the court remedies provided by Parliament in subsection 77(1) of the *OLA* are much narrower. [...]

[91] On the other hand, it should be noted that the Federal Court of Appeal held in *Devinat*, *supra*, that applications may still be brought under section 18.1 of the *Federal Court Act* in respect of breaches of the parts of the *OLA* that are not referred to in subsection 77(1) of the *OLA*. I need not revisit that issue in this case, except to say that the applicant has chosen to use only the procedures set out in paragraph 78(1)(a) of the *OLA* and it is therefore in that regard that I must make my decision.

[92] However, it does not seem to me to be either necessary or desirable to approach the allegations that sections 16 to 20 of the *Charter* have been violated with the same rigour.

[93] The *Charter* applies to all Canadians, and it is not necessary that a remedy under the *Charter* be specified in order for the *Charter* to be given effect.

SEE ALSO:

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

Canada (Attorney General) v. Montreuil, 2009 FC 60 (CanLII)

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

Knopf v. Canada (House of Commons), 2006 FC 808 (CanLII)

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

Bakayoko v. Bell Nexxia, 2004 FC 1408 (CanLII)

Rogers v. Canada (Department of National Defence), 2001 FCT 90 (CanLII)

Duguay v. Canada, 1999 CanLII 8653 (FC)

Devinat v. Canada (Immigration and Refugee Board), [1998] 3 FCR 590, 1998 CanLII 9064 (FC)

ANNOTATIONS – SUBSECTION 77(2)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[17] […] The Commissioner's report is nevertheless the source or the pretext for the remedy or, to repeat the words of Madam Justice Desjardins in relation to the comparable report filed by the Information Commissioner, a "[TRANSLATION] precondition to the exercise of the remedy" (*Information Commissioner of Canada v. Canada (Minister of National Defence)* (1999), 240 N.R. 244 (F.C.A.), at p. 255): the capacity as an "applicant" to the Court is derived from the capacity as a "complainant" to the Commissioner (subsection 77(1)) and it is the date of communication of the report that serves as the point of departure for the calculation of the time periods (subsection 77(2)).

Dionne v. Canada (Bureau du surintendant des institutions financières), 2015 CF 862 [hyperlink not available] [judgment available in French only]

[NOTRE TRADUCTION]

[15] From the outset, it seems to me that the language in subsection 77(2) is not clear. In fact, the recommendations under subsection 64(2) are actually in this case those that were already included in the final investigation report, as set out in subsection 63(3) and the start of subsection 64(2) of the Act.

[…]

[17] The Court shares the opinion of the Commissioner [of Official Languages] to the effect that the right of recourse under subsection 77(2) of the Act must, like language rights in general, be interpreted broadly and liberally.

[18] The Court also shares the Commissioner's view that Parliament's intention in subsections 64(2) and 77(2) is not to link the right of recourse in subsection 77(2) to the Commissioner's follow-up report findings.

[19] In other words, regardless of the Commissioner's finding to the effect that a government institution, here the OSFI [Office of the Superintendent of Financial Institutions], implemented or failed to implement his recommendations in a satisfactory manner, a complainant may bring the debate before the Federal Court. In this regard, the Court adopts the Commissioner's comments in paragraphs 42 to 44 of his written submissions:

[TRANSLATION]

> [42] The Commissioner submits that Parliament's intention was not to limit the complainant's right of recourse to situations where the Commissioner is not satisfied with the implementation of the OLA. It was instead to give the complainant the chance to turn to the courts to obtain a just and appropriate remedy, while first leaving it open to the Commissioner to resolve the complaint. As a result, the right of recourse in section 77 should not be limited to situations in which the Commissioner is dissatisfied, in his follow-up report, with the implementation of his recommendations.
>
> [43] A complainant's right to apply for a remedy under section 77 is not linked to the Commissioner's findings, but instead to a specific triggering event (the issuance of an opinion or report) or to the passage of time since the filing of the complaint. The content of the opinions or reports that give rise to the right of recourse is not relevant for the exercise of that right. This is supported by the fact that the Court, in an application for a remedy filed under section 77 of the OLA, is not bound by the findings of the investigation or the follow-up because it is a proceeding *de novo*.
>
> [44] Thus, the Commissioner submits that it is the issuance of the final follow-up report, and not the content of that report, that triggers the 60-day time period for applying for a remedy pursuant to section 77. Any other interpretation of subsection 77(2) would be contrary to Parliament's intention.

[20] In addition, and as the Commissioner seems to point out in paragraphs 49 and following the same submissions, an approach such as that put forward by the AGC [Attorney General of Canada] to the effect that the right of recourse in subsection 77(2) is only available when the Commissioner is dissatisfied with the action taken by a federal institution following his recommendations constitutes an unworkable approach.

[21] In fact, the Commissioner's follow-up may take several months. Also, until such time as the Commissioner issues his follow-up report, the complainant cannot be cognizant of its outcome and thus know, even in the possible case of negative comments by the Commissioner that he or she may go to the Federal Court.

[22] The Commissioner stated the following in paragraphs 50 to 52:

[TRANSLATION]

> [50] In fact, given that it takes several months for the Commissioner to determine whether his follow-up to the investigations will lead to satisfactory results, the complainants were forced to apply for a remedy within 60 days of the Commissioner's final investigation report to maintain their right, and would not risk waiting until the end of the Commissioner's follow-up.
>
> [51] The follow-up process established by the Commissioner therefore becomes, in large part, useless, which Parliament clearly did not want to happen, because it explicitly integrated the power to follow up in Part IV of the OLA concerning the conduct of investigations. Thus, the interpretation of subsection 77(2) proposed by the AGC would be contrary to the principle of coherence and the systematic nature of the law, according to which interpretations that would emasculate other provisions of the law or render them unnecessary should be avoided.
>
> [52] Such interpretation could lead to excessive court processes with respect to issues on the application of the OLA, which is contrary to the concern for judicial economy and the Commissioner's role as defined in the OLA.

[23] The AGC suggested that in the event of a positive follow-up report, a complainant would simply have to, if he or she wants to access the Federal Court, file a new complaint after the completion of the report. In my opinion, such approach would only result in multiple proceedings and would derogate from the broader context of the Act.

[…]

[25] Alternatively, to the extent that I am wrong on this first aspect, I feel that the specific circumstances of this case favour the Court's power in subsection 77(2) of the Act to right now extend the 60-day time limit contained therein and to not require the applicant to file a motion for an extension of time in this regard.

Canada (Commissioner of Official Languages) v. Air Canada, 1998 CanLII 8008 (FC), rev'd in part [1999] F.C.J. No. 738 (FCA) [hyperlink not available].

[14] Part X of the Act, entitled "Court Remedy", provides, in section 76, that in this Part, "Court" means the Federal Court Trial Division. Section 77 provides that any person who has made a complaint to the Commissioner may apply to this Court for a remedy. Section 77 also sets out the four specific times at which the application may be made by the complainant:

1- Sixty days after the complainant was informed of the Commissioner's decision to refuse or cease to investigate the complaint (subsections 77(2) and 58(5));

2- Six months after the complaint was made if the complainant has not yet been informed of the results of the investigation of the complaint (subsection 77(3));

3- Sixty days after the results of an investigation of the complaint by the Commissioner are reported to the complainant (subsection 77(2)); and

4- Sixty days after the complainant is informed that the Commissioner is of the opinion that the institution concerned has not taken action within a reasonable time on the recommendations he made previously (subsections 77(2) and 64(2)).

Montreuil v. Air Canada, [1996] F.C.J. No. 1235 (FC) [hyperlink not available]

[3] In my view, the two tests applicable to the Court's exercise of its discretion to extend the limitation period in subsection 77(2) of the Act are, first, that the reasons for failing to observe the limitation period be based on satisfactory explanations and, second, that the remedy in respect of which the extension is being sought have a reasonable chance of success (*Leblanc v. National Bank of Canada*, [1994] 1 F.C. 81).

Étienne v. Canada, [1992] F.C.J. No. 438 (FC) [hyperlink not available]

[15] The issue is to decide what meaning is to be ascribed to the words contained in s. 77 of the Act. Is the court, for no matter what reason, or for that matter even when no reason is given, to simply extend the delays in which to allow a person to commence proceedings? I think not. What would be the purpose of stipulating a delay in the statute if for any reason or for no reason the court extends the delays in which to commence legal proceedings?

[16] The court has been given the discretion to extend the delay to commence proceedings but the court can only exercise this discretion in a judicious manner, that is to say, if the plaintiff submits an acceptable reason. I say an acceptable reason to indicate that the court should attempt not to deprive one of a judicial right because of delay but one must have some valid reason for failing to commence legal proceedings within the legal delays stipulated in a statute.

[...]

[19] It is true the Plaintiff is not an attorney but it is also true that the Plaintiff is a well learned individual who would and should have clearly understood the paragraph in the March 14, 1991 letter telling him he had 60 days to commence proceedings from the date he received the letter. If he did not understand what the paragraph meant he should have consulted an attorney. Furthermore, the Plaintiff's affidavit said he thought it meant "jours ouvrables". Assuming this to be correct, he is still outside his delays.

[20] The Plaintiff states that there is no prejudice to the Defendants. I do not agree. The Defendants, if I grant the present application is prejudiced because the Defendants would have to defend an action at considerable cost. It is simple to say "the Defendants would not be prejudiced by allowing the Application" when one is not the Defendant.

[21] Would justice be better served by allowing the present application rather than refusing it? I am satisfied that justice would better be served by not allowing the present application for the reason that some meaning must be given to the section in the Act. To allow the present application on the simple pretence of not understanding the statement "Veuillez toutefois noter que le délai de soixante jours prévue par la loi court à partir de la date à laquelle vous recevrez cette lettre" would be to make Sec. 77(2) of the Act meaningless.

SEE ALSO:

Knopf v. Canada (House of Commons), 2006 FC 808 (CanLII)

ANNOTATIONS – SUBSECTION 77(4)

Thibodeau v. Air Canada, [2014] 3 S.C.R. 340, 2014 SCC 67 (CanLII)

[91] The appellants contend that there is a conflict between two acts of the same legislature. The *Carriage by Air Act*, incorporating the *Montreal Convention*, purports to preclude an award of damages while s. 77(4) of the *OLA* permits the court to grant an "appropriate and just" remedy, including damages. In short, the appellants' position is that the exclusion of damages during international air travel conflicts with the power to award an "appropriate and just" remedy. […]

[97] This is not the situation that faces us here. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The exclusion of a damages remedy in the context of international air travel is thus not a direct contradiction of the remedial power under the *OLA*.

[98] This case is therefore not one of direct contradiction but of overlap. The *OLA*'s broad and discretionary remedial provisions permit an award of damages where that is what the court considers to be an appropriate and just remedy in the circumstances. The *Montreal Convention*, on the other hand, restricts claims for damages by passengers in the context of international air travel. Overlapping provisions, however, do not necessarily conflict. Laws do not conflict simply because "they overlap, are active in the same field or deal with the same subject matter": Côté (4th ed.), at p. 376; *Toronto Railway,* at p. 499. If the overlapping laws can both apply, it is presumed that they are meant to apply, and "[t]he only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law": Sullivan, at p. 326. […]

[112] Section 77(4) of the *OLA* is certainly part of a quasi-constitutional statutory scheme designed to both reflect and to actualize the "equality of status" of English and French as the official languages of Canada and the "equal rights and privileges as to their use in all institutions of the Parliament and government of Canada" as declared in s. 16(1) of the *Charter*: see, e.g., *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Lavigne*, at para. 23. Like s. 24(1) of the *Charter*, s. 77(4) of the *OLA* confers a wide remedial authority and should be interpreted generously to

achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires us to read "the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Lavigne*, at para. 25, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As I see it, the *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada's international obligations given effect by another federal statute.

[113] It is unlikely that, by means of the broad and general wording of s. 77(4), Parliament intended this remedial power to be read as an exclusive and exhaustive statement in relation to the Federal Court's remedial authority under the *OLA*, overriding all other laws and legal principles. The appellants' position in effect is that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law. This proposition runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada's international law obligations: see, e.g., *Daniels*, at p. 541; *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at paras. 128-31; Sullivan, at pp. 539-42.

[114] I find it impossible to discern any such intent in the broad and general language of s. 77(4). Instead, this provision should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles — including Canada's international undertakings incorporated into Canadian statute law — which guide the court in deciding what remedy is "appropriate and just".

[115] Moreover, a review of the legislative history of this provision provides no evidence that Parliament intended to authorize awards of damages in violation of Canada's international commitments. The legislative record shows that members of Parliament discussing the scope of s. 77 of the *OLA* at the time of its enactment did not focus on the specific remedies available under this provision, but rather on how it gave courts the ability to enforce, through remedies, certain parts of the new *OLA*, in contrast to its predecessor that was merely declaratory: see *House of Commons Debates*, vol. X, 2nd Sess., 33rd Parl., February 8, 1988, at pp. 12706, 12712, 12715 and 12737 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, Mr. Jean-Robert Gauthier, Ms. Marion Dewar, Hon. Warren Allmand); *House of Commons Debates*, vol. XIV, 2nd Sess., 33rd Parl., July 7, 1988, at p. 17224 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada). While the debate contemplated that damages could constitute an "appropriate and just" remedy in certain circumstances, it highlighted the open-ended nature of these terms and that they left to the courts the duty of determining what would be an "appropriate and just remedy" in the circumstances: *Debates of the Senate*, vol. IV, 2nd Sess., 33rd Parl., July 27, 1988, at pp. 4135-36. There is nothing in this to suggest any intent that this power would override other limitations on the court's authority to award damages.

[116] We are not in a situation like that faced by the Court in *Perron-Malenfant* in which allowing both provisions to operate empties the remedial provisions in the statute of much of their meaning. It is not suggested that the powers of the Commissioner, including his authority to apply to the Federal Court for remedies under s. 78 of the *OLA*, conflict with the limitation on damages under the *Montreal Convention*. Damages are by no means the only remedies available under s. 77(4) and the limitation on their availability set out in Article 29 of the *Montreal Convention* applies only in respect of claims by passengers arising out of international carriage by air. I therefore reject the contention that my proposed interpretation of the *Montreal Convention* somehow silences language rights.

[117] In short, there are no indicators here of a conflict between these two provisions in the narrow and strict sense of conflict which applies in this context, and there is no hint in the text,

scheme or purpose of the *OLA* that the brief, broad, general and highly discretionary provision in s. 77(4) was intended to permit courts to make orders in breach of Canada's international undertakings which have been incorporated into federal law.

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

[37] Finally, although the assessment of the merits of the complaint is based on the facts that existed as of the time the complaint was filed with the Commissioner, any remedy must be adapted to the circumstances that exist as of the time of the court's order.

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

[19] There are some important implications to the fact that the remedy under Part X is basically similar to an action.

[20] For example, the judge hears the matter *de novo* and is not limited to the evidence provided during the Commissioner's investigation. The remedy is constantly shifting in the sense that even if the merit of the complaint is determined as it existed at the time of the alleged breach, the remedy, if there is one that is appropriate and just, must be adapted to the circumstances that prevail at the time when the matter is adjudicated. The remedy will vary according to whether or not the breach continues.

[…]

[53] What the Agency is really disputing, and this is what its memorandum indicates, is not the merits of the complaint at the time it was filed, in October 1999, but the choice of relief ordered by the Judge in September 2003. As the Agency puts it, the evidence before the Court at the time when the case was reserved in June 2003 established that the deficiencies that existed at the time of the complaint had been corrected. And this leads the Agency to conclude that no relief is necessary and that the object of the application is now moot. On this point, the Agency is mistaken about the role of the Judge who hears an application based on section 77 of the *Official Languages Act*. That role is to decide whether the complaint was justified at the time it was filed, not whether it is justified at the time of the trial. If the Judge decides that the complaint was justified at the time it was filed, he must allow the application and then strive to define "such remedy as [the Court] considers appropriate and just in the circumstances" (subsection 77(4)). Needless to say, if the alleged deficiencies have all been remedied at the time of the trial, and if the complaint is then no longer justified, the Judge may choose not to order any relief, except for example in the form of costs.

Ayangma v. Canada, 2003 FCA 149 (CanLII)

[31] Section 21, 22 and 28 of the *OLA* are found within Part IV of the Act entitled "Communications With and Services to the Public". Although the phrase "Services to the Public" is not defined in the *OLA*, it clearly does not apply to a competition under the *PSEA*, [*Public Service Employment Act*] an Act which relates to staffing within the Public Service and which has its own code of language provisions. The appellant's submission (appellant's Memorandum of Fact and Law, para. 88) "that having bilingual individuals in the hiring board is not only a service to the appellant as an individual, but it is also rendering a great service to the public as required by section 10 of the *PSEA* to help hire the best qualified candidate...", is simply of no avail in this context. Section 39 of the *OLA* on the other hand is a statement of commitment by the Government of Canada. Since that provision is found in Part VI of the Act, it is excluded by virtue of subsection 77(1) of the Act from the application of Part X which is entitled "Court Remedy". The appellant invokes, to his benefit, subsection 77(4) of the Act. But that subsection only applies in proceedings under subsection 77(1).

Canada (Commissaire Aux Langues Officielles) v. Air Canada, 1999 CanLII 8095 (FCA)

[13] The powers of the Commissioner of Official Languages are unique in that the Act expressly allows him, under section 79, in the context of a court proceeding in relation to a particular instance or case, to file "information relating to any similar complaint". The proceeding does not cease to be an individual one, in that the complaint in question is the one that is the subject matter of the proceeding, but it was Parliament's intention that the Court, which, under subsection 77(4), may "grant such remedy as it considers appropriate and just in the circumstances" (the same language that is found in subsection 24(1) of the *Canadian Charter of Rights and Freedoms*), should be able to have before it an overall view, and thus an idea of the scope of the problem, if a problem exists.

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[70] Where the Court is of the opinion that a federal institution is not in compliance with the *Official Languages Act*, subsection 77(4) of that Act authorizes the Court to grant such remedy as it "considers appropriate and just in the circumstances". Because I am of the opinion that failing to make patents available in both official languages violates Part VII of the *Official Languages Act*, the question of the remedy must be answered.

[…]

[75] As I said earlier, in my opinion, a violation of Part VII of the *Official Languages Act* cannot result in the same remedies as violations of Parts I to V of that Act. Deciding otherwise would amount to eliminating the difference between those provisions and denying the effect of the precise limits that Parts I to V set on the government's obligations in respect of bilingualism. In addition, I agree with the respondents that the decisions of federal institutions to give effect to the government's commitment under Part VII are entitled to a certain deference on the part of the courts.

[76] However, they cannot be conclusive; otherwise, why would Parliament have made those provisions enforceable? Deciding that the courts do not have the power to make orders forcing the government to take specific measures to remedy violations of its obligations under Part VII would make Parliament's choice to "give it teeth" by making it enforceable pointless and ineffective. […]

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[117] While a breach of section 91 permits the Court to issue a remedy under subsection 77(4), there can be no Court remedy in the case of a breach to section 39. It must be remembered that the enabling provision for a court remedy, that is subsection 77(1), is an exhaustive list. Part VI where section 39 is found is not mentioned in subsection 77(1). Even if a section 39 breach were established, this Court would have no jurisdiction to remedy that breach under the authority of subsection 77(4).

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[61] This moves attention to the second issue, that is the appropriate remedy. The answer to that question depends upon the characterization of the applicant's loss that resulted from the actions of the CSC [Correctional Service] in classifying the Kingston position as bilingual imperative. Did he lose the opportunity to compete for a position or did he lose the opportunity to be appointed?

[...]

[71] While Mr. Rogers is not entitled to compensation of a mere loss of opportunity to compete for appointment to a position, loss of opportunity is not an accurate identification of the loss suffered in this case. In *Canada (Attorney General) v. Morgan*, 1991 CanLII 8221 (FCA), [1992] 2 F.C. 401 (C.A.) the Federal Court of Appeal found that there does not need to be a probable result that the wrong is connected to the loss, only a serious possibility that it is connected.

[...]

[73] Accordingly, having already found that there was a serious possibility that Mr. Rogers would have been appointed to the position, I am of the opinion that such a loss is not a "loss of opportunity", and as such, demands compensation.

[74] Here the applicant is seeking a remedy pursuant to the Act which is quasi-constitutional legislation. In my opinion, the nature of the legislation grants flexibility in the matter of finding an appropriate remedy for a breach of the rights recognized by the Act.

[...]

[76] A broad view should be taken about the nature of remedy which can be granted under the Act. This approach, however, does not authorize a court to award a monetary remedy without evidence pertaining to the actual loss and independent of the principles of mitigation. In *Whitehead v. Servodyne Canada Ltd*. (1987), 8 C.H.R.R. D/3874, the Ontario Board of Inquiry found that the principles of mitigation apply to the calculation of "statutory compensation" and deducted from its award the salary and benefit monies that the complainant had earned from alternate employment, after the loss of her job.

[77] However, there is insufficient evidence in the present case to allow a meaningful assessment of damages. The "principled approach" argued by the applicant does not replace evidence. Accordingly, the assessment of damages will be referred to a reference to be conducted pursuant to the *Federal Court Rules*, 1998 [SOR/98-106]. Upon the hearing of the reference, if it proceeds, the evidence should include the salary which the applicant may have earned in the Kingston position.

Lavigne v. Canada, 1997 CanLII 4800 (FC)

[20] Subsection 77(4) of the Act is a restatement of subsection 24(1) of the *Charter* which allows anyone whose rights or freedoms under the *Charter* have been infringed or denied to apply to a court of competent jurisdiction to "obtain such remedy as the court considers appropriate and just in the circumstances". Just as subsection 24(1) of the *Charter* gives the Court a broad discretion to grant a remedy for a *Charter* violation, subsection 77(4) of the Act gives the Court an equally broad discretion to grant a remedy for a violation of the language rights protected under it.

[…]

[25] Finally, the 1988 *Official Languages Act* is a statute designed to create practical and effective legal rights and obligations. To accomplish this objective, and to ensure that the Act is indeed an effective instrument for the protection of the language rights of Canadians, damages must be included among the realm of remedies available to the Court under subsection 77(4). The ability of the Court to award damages is, in my view, essential to the enforcement of guaranteed quasi-constitutional rights.

Côté v. Canada (Commissioner of Official Languages), [1994] F.C.J. No. 423 (FC) [hyperlink not available]

[9] [S]. 77(4) gives this Court in addition to its power of review jurisdiction to grant a remedy if it concludes that a federal institution has not complied with the Act. […]

[12] In my opinion the exercise of this ancillary power does not depend on what was alleged in the originating motion. This Court has jurisdiction to grant relief in every case where it finds that an institution has failed to comply with the Act, so long as it considers doing so is appropriate and just in the circumstances.

SEE ALSO:

DesRochers v. Canada (Industry), [2009] 1 S.C.R. 194, 2009 SCC 8 (CanLII)

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

Canada (Commissioner of Official Languages) v. CBC/Radio-Canada, 2012 FC 650 (CanLII)

Lavigne v. Canada (Human Rights Commission), 2011 FC 290 (CanLII) [comparison between the remedy provided under subsection 77(4) of the *OLA* and the one provided under section 48 of the *Privacy Act*].

Thibodeau v. Air Canada, 2005 FC 1621 (CanLII)

Air Canada (Re), 2004 CanLII 73244 (ON SC)

Lavigne v. Canada (Human Resources Development), [2002] 2 FCR 165, 2001 FCT 1365 (CanLII)

Leduc v. Canada, 2000 CanLII 15454 (FC)

Duguay v. Canada, 1999 CanLII 8653 (FC)

ANNOTATIONS – SUBSECTION 77(5)

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 FCR 212, 1999 CanLII 9386 (FCA)

[24] Subsection 77(5) states:

> 77. . . .
>
> (5) Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section. [Emphasis added.]

[25] The complaint made by the appellant falls under Part III of the *OLA*, which contains section 20. Subsection 77(5) is linked to section 77, as the first words in that subsection indicate. In the respondent's submission, section 77 does not preclude any other right of action in respect of complaints relating to sections 4 to 7 and 10 to 13 or Parts IV or V, or based on section 91. However, the situation is different with complaints coming under Part III of the *OLA*. In the respondent's submission, subsection 77(5) is of no assistance to the appellant and complaints covered by Part III may only be dealt with in accordance with the investigation procedure laid down in section 56 et seq. of the *OLA*. The Commissioner of Official Languages may, after investigation, report to the President of the Treasury Board (subsections 62(2) and 63(1)) at the same time as he communicates his conclusions to the complainant (section 64). He may also elect to inform the Governor in Council (subsection 65(1)) or Parliament, either in his annual report or in a special report (sections 66 and 67). However, in the respondent's submission, a court action may not be brought by the appellant.

[26] The respondent said that the *OLA* contains a complete code. In the cases mentioned in Part X of the *OLA*, a complainant may bring an action in the courts. In other cases, it is for the Treasury Board, the Governor in Council or Parliament to take action on the report by the Commissioner of Official Languages. In the case at bar, the respondent submitted, the complainant does not have the right to go to the courts.

[27] The appellant submitted, for his part, that the application of subsection 77(5) is not limited to section 77 and he retains his right to bring a court action for any other complaint not covered by the procedure laid down in section 77.

[28] Regardless of the meaning to be given to subsection 77(5), on which it is not necessary for the Court to rule, the respondent's argument in my opinion is not justified. For such a strict interpretation to be accepted, the exclusion would have to be made expressly. It clearly cannot be presumed.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[62] Thus, pursuant to subsection 77(1) of the *OLA*, any person who has made a complaint to the Commissioner "in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV or V, or in respect of section 91, may apply to the Court for a remedy under [Part X]" [my emphasis]. There is, however, a statutory indication that the recourse provided for in section 77 of the *OLA* is not exclusive, but concurrent with other recourses, since "nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section" (subsection 77(5) of the *OLA*).

Lavoie v. Canada (Attorney General), 2007 FC 1251 (CanLII)

[39] The question that arises here is whether the effect of section 77 of the *OLA* is to exclude actions under section 18.1 of the *Federal Court Act*. The Federal Court of Appeal has already ruled on this point in *Devinat v. Canada (Immigration and Refugee Board)*, [1999] F.C.J. No. 1774 (F.C.A.). At that time it held that actions under section 18.1 of the *Federal Courts Act* could be brought for breaches of the provisions of the *OLA* not covered by subsection 77(1) of the *OLA*, in view of the fact that subsection 77(5) of the *OLA* states that nothing in the section "abrogates or derogates from any right of action a person might have other than the right of action set out in this section" […].

[42] I feel that for the purpose of the proceedings at bar two principles should be drawn from the Federal Court of Appeal judgments:

* section 77 of the *OLA* does not preclude an action for judicial review under section 18.1 of the *Federal Courts Act*; and

* an action under section 18.1 of the *Federal Courts Act* cannot be used to enforce the provisions of the *OLA* which do not create a duty or a right but simply consist of a commitment by the government […].

R. v. Portelance (27 November 2007), Ottawa 06-30399 (ON CJ) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[8] Admittedly the law does not deprive individuals of other rights of action. Subsection 77(5) of the Act does not create a defense, it only preserves rights of action in other courts. However, it seems to me that there is a fundamental difference between a right of action and defense. [...]

SEE ALSO:

Raîche v. Canada (Attorney General), [2005] 1 FCR 93, 2004 FC 679 (CanLII)

Bakayoko v. Bell Nexxia, 2004 FC 1408 (CanLII)

Vicrossano Inc. v. Canada (Attorney General), 2002 FCT 1999 (CanLII)

78. (1) Commissioner may apply or appear

78. (1) The Commissioner may

> **(a) within the time limits prescribed by paragraph 77(2)(a) or (b), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;**
>
> **(b) appear before the Court on behalf of any person who has applied under section 77 for a remedy under this Part; or**
>
> **(c) with leave of the Court, appear as a party to any proceedings under this Part.**

78. (2) Complainant may appear as party

78. (2) Where the Commissioner makes an application under paragraph (1)(a), the complainant may appear as a party to any proceedings resulting from the application.

78. (3) Capacity to intervene

78. (3) Nothing in this section abrogates or derogates from the capacity of the Commissioner to seek leave to intervene in any adjudicative proceedings relating to the status or use of English or French.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[35] Like the Privacy Commissioner, the Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with:

> 56. (1) It is the duty of the Commissioner to take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.
>
> (2) It is the duty of the Commissioner, for the purpose set out in subsection (1), to conduct and carry out investigations either on his own initiative or pursuant to any complaint made to the Commissioner and to report and make recommendations with respect thereto as provided in this Act.

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the Commissioner arising from any act or omission to the effect that, in any particular instance or case,

(a) the status of an official language was not or is not being recognized,

(b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or

(c) the spirit and intent of this Act was not or is not being complied within the administration of the affairs of any federal institution.

(2) A complaint may be made to the Commissioner by any person or group of persons, whether or not they speak, or represent a group speaking, the official language the status or use of which is at issue. [Emphasis added.]

The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant (s. 78).

Air Canada v. Thibodeau, 2012 FCA 14 (CanLII)

[10] An order to add an applicant as a party to proceedings under Rule 104(1)(b) of the *Federal Courts Rules*, SOR/98-106, is discretionary (*Stevens v. Canada (Commissioner, Commission of Inquiry)* [1998] 4 F.C. 125 at paragraph 10 (F.C.A.) [Stevens]). This principle also applies to the mechanism provided for in paragraph 78(1)(c) of the *OLA*, which states that the Commissioner may, "with leave of the Court, appear as a party to any proceedings" [emphasis added].

[11] The judge's discretion is guided by one test alone: necessity.

Parasiuk v. Québec (Tribunal administratif), 2004 CanLII 16530 (QC SC) [judgment available in French only]

[OUR TRANSLATION]

[15] This is a question of jurisdiction, in a narrow sense. Canada's *Official Languages Act* only gives the Commissioner, as a public officer in language matters, a mandate limited to the federal government and its institutions. There is no reference in this case to the application of the *Official Languages Act* to the federal government or a federal institution. The Commissioner can only act for a purpose within her jurisdiction and no provision of her enabling statute authorizes the Commissioner to intervene in a dispute dealing with a provision of a Quebec law in language matters.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373 (FCA) [hyperlink not available]

[4] The Commissioner of Official Languages then requested leave, pursuant to subsection 78(3) of the *Official Languages Act*, to intervene in the action at bar. On June 25, 1990 he was given

leave to submit arguments in writing and orally regarding the following question of law only: should the decision challenged in these proceedings be set aside on the ground that in rendering it the Appeal Board usurped the exclusive jurisdiction of the Commissioner under the *Official Languages Act*?

[...]

[22] The intervener, the Commissioner of Official Languages, put forward an additional argument in response to those of the respondent: he suggested that under the 1988 *Official Languages Act*, he alone has jurisdiction to see that the Act is properly administered. At the hearing, his counsel qualified this to say the least bold proposition and argued that as a consequence of *Gariépy* (supra, note 4), and I would add *Kelso* (supra, note 3), and in view of the very wording of subsections 77(5) and 78(3), the exclusive jurisdiction claimed by the Commissioner ousted only the jurisdiction of "administrative" tribunals and did not preclude that of "judicial" tribunals. Since I conclude that the 1988 *Official Languages Act* has not given the appeal board the power to decide on the validity or legality of the language requirements made by a department, I do not have to decide whether recourse to the Commissioner pursuant to that Act is necessarily the only recourse available in terms of "administrative" tribunals, in every case where a breach of the 1988 *Official Languages Act* is alleged.

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

[55] Parliament has declined to give the Commissioner the jurisdiction to intervene by way of order or injunction. Instead, there is express provision for recourse to the Federal Court. According to section 80 of the *Official Languages Act*, this application shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Courts Act*. If it is established that a federal institution has not complied with the *Official Languages Act*, the court has the jurisdiction to grant the relief that is deemed appropriate and fair in the circumstances.

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[37] […] Under section 78(3) of the *OLA*, the Commissioner has the capacity to seek leave to intervene in “any adjudicative proceedings relating to the status or use of English or French”. The decision to seek leave to intervene in court proceedings is at the discretion of the Commissioner. There is no obligation to do so. The Commissioner is at liberty to intervene when he deems it appropriate, and may wait until the parties have completed their respective records before deciding to seek leave to intervene.

Thibodeau v. Air Canada, 2005 FC 1156 (CanLII)

[79] In this case there is no doubt that the applicant raises a serious question and that he has a genuine interest in the subject-matter of the application. However, is there some other, more reasonable and effective manner in which the issue may be brought before the courts? Perhaps the Commissioner could have exercised the remedy herself: English version: "78(1)(a) . . . may apply to the Court for a remedy" following the conclusion of her investigation. But, based on my analysis of paragraph 78(1)(a) and subsection 78(2), I think both the complainant (the applicant in this proceeding) and the Commissioner may exercise the remedy under paragraph 78(1)(a). In the present circumstances, using my discretion, I grant the applicant standing on behalf of the public interest.

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[45] The Commissioner, under a court order dated January 15, 1991, became an intervenor pursuant to subsection 78(1) of the *Official Languages Act*. This intervention, in my view, is consonant with the statutory powers and duties of the Commissioner to ensure recognition of the

status of our official languages and compliance with the spirit and intent of the Act in federal institutions.

Chouinard v. Canada, [1995] F.C.J. No. 1021 (FC) [hyperlink not available]

[8] […] Counsel for the respondent objected to the Commissioner being authorized to appear as a party on the ground that the Commissioner has no real interest in the action brought by the applicant pursuant to Part X. However, any action contemplated by Part X is against a federal institution, not the Commissioner. His interest in appearing as a party must be determined in light of the provisions of Part X and the other provisions of the Act. Counsel for the respondent also drew the Court's attention to s. 78(3) of the Act and suggested that the Commissioner only be granted the right to intervene. In my opinion, the purpose of that provision is to preserve the Commissioner's power to seek leave to intervene in any judicial proceeding relating to the status or use of French or English. It does not thereby limit the scope of s. 78(1). […]

SEE ALSO:

Air Canada v. Thibodeau, 2012 FCA 14 (CanLII)

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

Westmount (Ville de) v. Québec (Procureur Général du), 2001 CanLII 13655 (QC CA) [judgment available in French only]

Canada (Commissioner of Official Languages) v. Air Canada, 1999 CanLII 8095 (FCA)

Re Headley and Public Service Commission appeal board, [1987] 2 FCR 235, 1987 CanLII 5362 (FCA)

Parasiuk v. Québec (Tribunal administratif), 2004 CanLII 16530 (QC SC) [judgment available in French only]

Canada (Commissioner of Official Languages) v. Air Canada, 1997 CanLII 5843 (FC)

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79. Evidence relating to similar complaint

79. In proceedings under this Part relating to a complaint against a federal institution, the Court may admit as evidence information relating to any similar complaint under this Act in respect of the same federal institution.

ANNOTATIONS

Thibodeau v. Air Canada, 2012 FCA 246 (CanLII)

[63] It will not be necessary to discuss these preliminary objections. Assuming, for the purposes of this appeal, that the Judge could have, under section 79, admitted evidence of complaints by third parties, and that the Thibodeaus have public interest standing to seek the remedies already discussed, I am of the view that the structural order issued by the Federal Court is not justified in the light of the evidence on the record. It cannot stand because, among other things, it is imprecise and disproportionate with regard to the prejudice suffered by the Thibodeaus.

Canada (Commissioner of Official Languages) v. Air Canada, 1999 CanLII 8095 (FCA)

[8] At the hearing, in fact, counsel for the Commissioner acknowledged that the argument over the first five complaints was to some degree academic, once the sixth complaint could proceed. Indeed, section 79 of the Act allows the Commissioner, by way of exception, in the context of court proceedings under Part X of the Act, to put in evidence information relating to similar complaints made against Air Canada. In so far as the first five complaints had worked their way into the file on the sixth complaint through the back door, counsel said he was satisfied and conceded for all intents and purposes that the first five complaints had indeed been "closed".

[...]

[13] The powers of the Commissioner of Official Languages are unique in that the Act expressly allows him, under section 79, in the context of a court proceeding in relation to a particular instance or case, to file “information relating to any similar complaint”. The proceeding does not cease to be an individual one, in that the complaint in question is the one that is the subject matter of the proceeding, but it was Parliament’s intention that the Court, which, under subsection 77(4), may “grant such remedy as it considers appropriate and just in the circumstances” (the same language that is found in subsection 24(1) of the *Canadian Charter of Rights and Freedoms*), should be able to have before it an overall view, and thus an idea of the scope of the problem, if a problem exists.

[…]

[16] The Act itself provides that a particular complaint may serve as the gateway into a federal institution’s system as a whole. This was Parliament’s intention, as a means of giving more teeth to an enactment, the *Official Languages Act*, which serves as a special tool for the recognition, affirmation and extension of the linguistic rights recognized by the *Canadian Charter of Rights and Freedoms*.

[17] In other words, this is an area in which an overly litigious approach is particularly inappropriate. The Act itself invites one to go beyond the particular case to the general, and a federal institution against which not one but several complaints are brought can hardly feign surprise or cry injustice if the Commissioner, in an investigation, in his report, in his findings, or in the context of a court proceeding, was quick to transform the argument on a particular case into a general argument.

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[31] Section 79 of the *OLA* states that in proceedings commenced under section 77, “the Court may admit as evidence information relating to any similar complaint under this Act in respect of the same federal institution”. Thus, section 79 does not create a duty for the Commissioner to disclose information relating to similar complaints but simply renders such types of information admissible in these proceedings.

[32] Section 79 of the *OLA* has a dual purpose: firstly, to present the courts with a full portrait of the context and, secondly, to enable a party to present proof that there is a systemic problem within the institution with regard to *OLA* compliance. It helps the Court assess the scope of the problem and the circumstances of the application so as best to determine the appropriate relief: *Commissaire aux langues officielles du Canada v. Air Canada* (1997), 141 F.T.R. 182, at paras. 17-18.

[33] Section 79 of the *OLA* does not oblige the Commissioner to provide parties with proof of similar complaints. However, the Commissioner has chosen in this case to exercise his discretion under section 73(b) of the *OLA* and prepare a list of similar complaints. The information contained in the list sent to the applicant by the Commissioner on March 13, 2008 provides him with the number of similar past complaints, the dates on which the complaints were made, the allegations made against the CPC, and the decisions reached by the Commissioner

after having carried out each investigation. This is sufficient information to present the court with a full portrait of the context, and contains enough information to fulfill the purpose of section 79, without compromising the Commissioner's duties with regard to the confidentiality of investigators.

Thibodeau v. Air Canada, 2005 FC 1156 (CanLII)

[81] Section 82 of the *OLA* provides that in the event of any inconsistency between Parts I to V and any other Act of Parliament or regulation thereunder, those Parts prevail to the extent of the inconsistency. Section 79 is in Part X of the *OLA*, a part that is not mentioned in section 82 of the *OLA*. But the *OLA* is a quasi-constitutional statute and by its very nature prevails over other legislation.

[82] Here, I adopt the position of Mr. Justice Dubé in *Canada (Commissioner of Official Languages) v. Air Canada*, *supra*, that section 79 is one of a kind and does not appear in other similar legislation. I believe that Parliament introduced this section because it thought it was important that the Court be able to obtain a more accurate portrait of the context so as best to determine the appropriate relief.

[83] Consequently, I think that when a question must be decided under the *OLA*, section 79 prevails over the other rules of evidence. In my opinion, this section should be considered an exception to the general rules in evidentiary matters. To limit the scope of this section would, I think, conflict with Parliament's intention to allow the Court to obtain an overall appreciation of the situation. […]

[97] We know that the *OLA* applies to Air Canada. The collective agreements under the aegis of the *CLC* must not be incompatible with the implementation of the *OLA*'s purpose. If some incompatibility develops, the *OLA* will prevail over the provisions of the collective agreement.

Air Canada v. Canada (Commissioner of Official Languages), 1997 CanLII 5843 (FC)

[16] Air Canada's position is therefore that the Commissioner may only apply for a remedy limited to facts relating to a specific complaint, the investigation of that complaint and the resulting reports and recommendations. In my view, this interpretation is too narrow and is inconsistent with the general objectives of the Act and its remedial and quasi-constitutional nature. The filing of a complaint and the complainant's consent are preconditions for a remedy. On the other hand, the following provision, section 79, states that information relating to any "similar" complaint in respect of "the same federal institution" may be admitted as evidence. [...]

[17] This section is one of a kind and does not appear in other similar legislation. Parliament's intention is clearly to present the courts with a full context. I therefore agree with the Commissioner's position that the remedy is not limited to certain types of ground services listed in Paul Comeau's two specific complaints but may apply to all ground services provided by Air Canada at the Halifax airport.

[18] In my view, the purpose of section 79 is to enable the Commissioner to prove to the Court that there is a systemic problem and that it has existed for a number of years. Unless all similar complaints are filed in evidence, the Court cannot assess the scope of the problem and the circumstances of the application.

[19] It is up to the judge presiding at the hearing on the merits of the motion to assess the probative force of all these facts or all this information in the context of more general considerations.

[…]

[23] Nothing in the Act indicates that information in closed files, namely files already considered by the Commissioner, cannot be reconsidered in reviewing similar complaints in respect of the same federal institution. The closed files in question in the case at bar were apparently not closed to the satisfaction of the complainants. The fact that those complainants did not avail themselves of the court remedy available to them under Part X of the Act does not render the material information contained in their files irrelevant or inadmissible. The Act draws no distinction between complaints that are "open" and those that are "closed".

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

Air Canada (Re), 2004 CanLII 73244 (ON SC)

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80. Hearing in summary manner

80. An application made under section 77 shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Courts Act*. R.S., 1985, c. 31 (4th Supp.), s. 80; 2002, c. 8, s. 182.

ANNOTATIONS

Lavigne v. Canada Post Corporation, 2009 FC 756 (CanLII)

[24] Mr. Lavigne relies on the decision of this Court in *Lavigne v. Canada (Minister of Human Resources Development) et al*. (1995), 96 F.T.R. 68, for the proposition that Rule 317 applies to applications made pursuant to section 77 of the *OLA*. In that case, Justice Marc Noël (as he then was) wrote:

> Section 77 provides that a person who has made a complaint to the Commissioner may thereafter apply to this court for a remedy. Section 80 provides that such an application is to be heard in a summary manner in accordance with rules made pursuant to s. 46 of the *Federal Court Act*, R.S.C. 1985, c. F-7. As no such rules have been promulgated, general rules pertaining to applications made to the court are applicable.

[25] As a general principle, this proposition is unassailable. Yet for a particular rule to be applicable in the context of an application made pursuant to section 77 of the *OLA*, its language must be able to accommodate the situation for which its application is sought. The general principle cannot thwart or subvert the rationale behind the rule or do away with its wording.

[26] Rule 317 is designed to request materials from a tribunal in cases of judicial review of its decision. Although the present proceedings, which are not judicial review applications but rather applications commenced under section 77 of the *OLA*, are governed by Part V of the *Federal Courts Rules*, Rule 317 cannot be invoked against the Commissioner because its decision is not under review. There can be no production under Rule 317 unless an order of the tribunal exists and is under review: see *Patterson v. Bath Institution*, 18 Admin. L.R.(4th) 57, 2004 FC 972, at para. 11.

[27] An application under section 77 of the *OLA* is different from an application for judicial review. It is designed to verify the merits of the complaint made to the Commissioner, not of the Commissioner's decision or report, and to secure relief that is appropriate and just in the circumstances: *Forum des maires de la péninsule acadienne v. Canada (Food Inspection Agency)*, [2004] 4 F.C.R. 276, 2004 FCA 263, at paras. 15 and 17.

[28] The three applications which form the basis of these proceedings do not attack the Commissioner's decisions but are rather de novo proceedings where the judge hears and weighs the evidence advanced by the parties to determine whether the *OLA* has been infringed. Therefore, the Commissioner does not have a duty under Rule 317 of the *Federal Courts Rules* to disclose information in the current proceedings. Such being the case, I can see no error in the decision of the Prothonotary.

Lavigne v. Canada, 1997 CanLII 4800 (FC)

[17] As to the question of damages, I would like to deal first with the respondent's submission that no damages ought to be awarded because this proceeding was brought by notice of motion. [...]

[18] [T]he legislator has specified that the application under section 77 of the Act brought by the applicant shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*. [...] [C]onsidering the proceedings herein, the documentary evidence, and the arguments made on behalf of all the parties with respect to the applicant's claim for damages, and taking into account that the respondents have not shown nor even complained of any prejudice resulting from the procedure used by the applicant, I conclude that the right of the respondents to raise all their possible defences with respect to the applicant's claim for damages has not been prejudiced at all.

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[6] Pursuant to section 80 of the *Official Languages Act*, proceedings in this Court are determined in a summary manner. As a result, the evidence adduced at the hearing comprised various affidavits and exhibits together with transcripts of cross-examinations on some of these. The whole of the evidence is accordingly quite extensive and I should attempt to summarize it as best as possible.

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

LaRoque v. Société Radio-Canada, 2009 CanLII 35736 (ON SC)

Côté v. Canada (Department of the Environment), [1992] F.C.J. No. 469 (FC) [hyperlink not available]

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81. (1) Costs

81. (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

81. (2) Idem

81. (2) Where the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

ANNOTATIONS

Tailleur v. Canada (Attorney General), [2016] 2 FCR 415, 2015 FC 1230 (CanLII)

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

Picard v. Commissioner of Patents, 2010 FC 86 (CanLII)

[81] Subsection 81(1) of the *Official Languages Act* provides that, ordinarily, in an application under section 77, costs will follow the event. However, subsection 81(2) provides that "[w]here the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result."

[82] Relying on that provision, the applicant is seeking the costs of this case regardless of the result. He submits that the issues raised in the case, in particular concerning the effect of Part VII of the *Official Languages Act* and the content of the bilingualism obligation in relation to delegated legislation (the class to which patents belong, in his submission), are novel and important.

[83] The respondents oppose awarding costs to the applicant, but acknowledge the Court's discretion in this regard.

[84] Notwithstanding the applicant's very partial success, he is entitled to his costs in this case under subsection 81(2). Apart from all the technical details, the fact that patents granted by a country that considers itself bilingual are unilingual is an important question. Although this year marked the 40th anniversary of the *Official Languages Act*, that question has never been raised before now, and the applicant did Canadians a service by making it a subject of public debate.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[130] Exercising my discretion and having considered all relevant factors, I find that this is one of those cases raising an important new principle in relation to the *OLA* where costs should be awarded to the applicant even if the applicant was not successful in the result. This application has raised the complex interplay between the various parts of the *OLA* and some of its key provisions. The clarification of the scope of these provisions in the context of the challenged staffing actions goes far beyond the immediate interests of the parties involved in this litigation. This case sheds additional light on general guiding principles governing the assessment of reasonableness of bilingual requirements in cases where a federal institution provides services to the traveling public.

Knopf v. Canada (House of Commons), 2006 FC 808 (CanLII)

[61] In the result, Mr. Knopf's application will be dismissed and a judgment will issue accordingly. The Speaker does not seek costs and no costs will be awarded to the Speaker. The Attorney General submits that the provisions of subsection 81(2) of the *OLA* do not apply because this

matter raises no new issues. Therefore, costs should follow the event. Mr. Knopf is content to leave the issue of costs in the Court's hands. While I agree with the Attorney General that the issues do not fall within the parameters of subsection 81(2) of the *OLA*, the issues are important ones, as the Attorney General readily acknowledged. Subsection 81(1) of the *OLA* expressly provides that costs are within the discretion of the Court. In the exercise of that discretion, I decline to award costs against Mr. Knopf.

SEE ALSO:

Knopf v. Canada (Speaker of the House of Commons), 2007 FCA 308 (CanLII)

DesRochers v. Canada (Industry), [2007] 3 FCR 3, 2006 FCA 374 (CanLII)

Thibodeau v. Air Canada, 2005 FC 1621 (CanLII)

Part XI – General

82. (1) Primacy of Parts I to V

82. (1) In the event of any inconsistency between the following Parts and any other Act of Parliament or regulation thereunder, the following Parts prevail to the extent of the inconsistency:

(a) Part I (Proceedings of Parliament);

(b) Part II (Legislative and other Instruments);

(c) Part III (Administration of Justice);

(d) Part IV (Communications with and Services to the Public); and

(e) Part V (Language of Work).

82. (2) Canadian Human Rights Act excepted

82. (2) Subsection (1) does not apply to the *Canadian Human Rights Act* or any regulation made thereunder.

ANNOTATIONS

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53 (CanLII)

[40] Parliament has made it plain that the *Privacy Act* applies to the Office of the Commissioner of Official Languages: the latter is listed in the schedule to the Act as a government institution that is subject to the *Privacy Act*. As well, s. 2 of the *Privacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although s. 82 of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament or regulation thereunder. None of the sections relied on by the appellant is found in those parts: ss. 60(1), 72, 73 and 74 are in Part IX of the Act. The meanings of the provisions in issue in these appeals must therefore be reconciled, and they must be read together.

Thibodeau v. Air Canada, 2012 FCA 246 (CanLII)

[37] Air Canada correctly submits that, before concluding that legal provisions are in conflict, there should be an attempt to harmonize them, in view of the general presumption that the law is coherent:

> [TRANSLATION] 1150. […] The law, the product of the rational legislator, is deemed to be a reflection of coherent and logical thought. Interpretations consistent with the premise of legislative rationality are therefore favoured over those that are incoherent, inconsistent, illogical or paradoxical.
>
> […]
>
> 1152. […] The statute is to be read as a whole, and each of its components should fit logically into its scheme. This coherence should extend to rules contained in other legislation… Accompanying this "horizontal" consistency, a "vertical" consistency is also presumed. Enactments are deemed to fit into a hierarchy of legal norms.
>
> (Pierre-André Côté *et al. Interprétation des lois*, 4e éd. (Montréal, Thémis, 2009)) [Côté, "*Interprétation des lois 2009*"] […]

[44] There is no implicit conflict of laws here. The cumulative application of the *Montreal Convention* and of the *OLA* to the circumstances of the Thibodeaus does not produce an unreasonable or absurd result (Pierre-André Côté et al., *Interprétation des lois*, 4th ed., (Montréal: Thémis, 2011) at paragraph 1312). Subsection 77(4) is flexible enough to allow an interpretation reconciling its objectives with those of Article 29 of the *Montreal Convention*. Such reconciliation does not in any way diminish the force of section 82 of the *OLA*. This approach does not deprive the Thibodeaus of all of their rights and remedies under the *OLA*, except that they are not entitled to compensatory or non-compensatory damages for incidents occurring during international carriage, where the *Montreal Convention* has full force. In addition, the appellant is at all times subject to Part IV of the *OLA*. [...]

[46] It must also be recalled that the award of damages is not the sole possible remedy where there is a violation of a right (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 at paragraph 21), even if the right is constitutional or quasi-constitutional in nature. Since the parties did not present arguments as to other possible remedies in the case, I will refrain from discussing them, except to state that, at the hearing, the appellant's counsel acknowledged that Air Canada's arguments would have been different if the Federal Court had awarded the Thibodeaus a lump sum as damages for all of the incidents. There has also been no definitive response as to whether the remedy could have taken the form of a gift to an organization defending minority language rights, a type of relief often awarded by consent or in a criminal context. This Court may, someday, have the opportunity to address these issues.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373 (FCA) [hyperlink not available]

[16] The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter Rights and Freedoms*, it follows the rules of interpretation of that *Charter* as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the *Charter*, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but

are nonetheless the result of a delicate social and political compromise, it requires the courts to exercise caution and to “pause before they decide to act as instruments of change”, as Beetz J. observed in *Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education et al.*

Thibodeau v. Air Canada, 2005 FC 1156 (CanLII)

[81] Section 82 of the *OLA* provides that in the event of any inconsistency between Parts I to V and any other Act of Parliament or regulation thereunder, those Parts prevail to the extent of the inconsistency. Section 79 is in Part X of the *OLA*, a part that is not mentioned in section 82 of the *OLA*. But the *OLA* is a quasi-constitutional statute and by its very nature prevails over other legislation.

[82] Here, I adopt the position of Mr. Justice Dubé in *Canada (Commissioner of Official Languages) v. Air Canada*, that section 79 is one of a kind and does not appear in other similar legislation. I believe that Parliament introduced this section because it thought it was important that the Court be able to obtain a more accurate portrait of the context so as best to determine the appropriate relief.

[83] Consequently, I think that when a question must be decided under the *OLA*, section 79 prevails over the other rules of evidence. In my opinion, this section should be considered an exception to the general rules in evidentiary matters. To limit the scope of this section would, I think, conflict with Parliament's intention to allow the Court to obtain an overall appreciation of the situation.

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[59] Although the Act does not state that the Commissioner's report is binding on a court, it is surely evidence which is to be taken into consideration upon an application for a remedy under the Act. The Commissioner of Official Languages is specifically authorized to monitor the protection of language rights in accordance with the Act. The status of this Act as "quasi-constitutional legislation" was recognized by the Federal Court of Appeal in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, at page 386 as follows : [...]

[60] In my opinion, the nature of the Act as quasi-constitutional legislation means that a report of the Commissioner, after the conduct of an investigation, can be accepted as evidence that a breach of the Act has occurred. The findings and conclusion of the Commission were not seriously challenged by the respondent. Accordingly, I confirm the findings of the Commission that the staffing mode for the position in question should have been bilingual non-imperative, with a linguistic profile of CBC. Further, I find that the improper designation for the position breached the applicant's language rights.

Schreiber v. Canada, 1999 CanLII 8898 (FC)

[131] The right accorded under the Exclusion Approval Order to an incumbent employee in an indeterminate position need not always conflict with the rights and duties in the *Official Languages Act*. For example, circumstances may be envisaged in which it may be possible for a unilingual employee to remain in a position with bilingual language requirements without adversely affecting the implementation of a program to deliver bilingual services. As a result, in order to determine, in the context of the present proceeding, whether there is an inconsistency between the rights and duties in the *Official Languages Act* and the right in the Exclusion Approval Order, the nature of the bilingual services to be provided must be examined.

[…]

[133] In my opinion, the facts of the present case establish that there was an inconsistency between the constitutionally based language rights and the corresponding duties imposed on the

Department in the *Official Languages Act* and the Exclusion Approval Order right excluding Mr. Schreiber from the requirement of bilingualism. By virtue of section 82 of the *Official Languages Act*, the provisions of Part IV and Part V, respectively involving communications with and services to the public and language of work, prevail to the extent of the inconsistency. In the circumstances of the present case, Mr. Schreiber was therefore not entitled to rely on paragraph 6(a) of the Exclusion Approval Order to exclude him from the operation of the bilingual requirements in section 20 of the *Public Service Employment Act*. As a result, he was not entitled to work operationally in his position as an air traffic controller at the Ottawa Control Tower following the implementation of bilingual air traffic control services, until such time as he met the language requirements of his position. In other words, given the unique and complex environment of air traffic control services at the Ottawa Control Tower, the Department was entitled to allow only fully bilingual air traffic controllers to work at that location following the implementation of bilingual services in 1992.

SEE ALSO:

Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency), [2004] 4 FCR 276, 2004 FCA 263 (CanLII)

Canada (Attorney General) v. Green, [2000] 4 FCR 629, 2000 CanLII 17146 (FC)

Schreiber v. Canada, 1999 CanLII 8898 (FC)

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83. (1) Rights relating to other languages

83. (1) Nothing in this Act abrogates or derogates from any legal or customary right acquired or enjoyed either before or after the coming into force of this Act with respect to any language that is not English or French.

83. (2) Preservation and enhancement of other languages

83. (2) Nothing in this Act shall be interpreted in a manner that is inconsistent with the preservation and enhancement of languages other than English or French.

SEE ALSO:

Abbasi v. Canada (Citizenship and Immigration), 2010 FC 288 (CanLII)

Toma v. Canada (Minister of Citizenship and Immigration), 2006 FC 779 (CanLII)

Canada Post v. P.S.A.C. (1996), 58 L.A.C. (4th) 377 [hyperlink not available]

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84. Consultations

84. The President of the Treasury Board, or such other minister of the Crown as may be designated by the Governor in Council, shall, at a time and in a manner appropriate to the circumstances, seek the views of members of the English and French linguistic minority communities and, where appropriate, members of the public generally on proposed regulations to be made under this Act.

85. (1) Draft of proposed regulation to be tabled

85. (1) The President of the Treasury Board, or such other minister of the Crown as may be designated by the Governor in Council, shall, where the Governor in Council proposes to make any regulation under this Act, lay a draft of the proposed regulation before the House of Commons at least thirty days before a copy of that regulation is published in the Canada Gazette under section 86.

85. (2) Calculation of thirty day period

85. (2) In calculating the thirty day period referred to in subsection (1), there shall not be counted any day on which the House of Commons does not sit.

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86. (1) Publication of proposed regulation

86. (1) Subject to subsection (2), a copy of each regulation that the Governor in Council proposes to make under this Act shall be published in the *Canada Gazette* at least thirty days before the proposed effective date thereof, and a reasonable opportunity shall be afforded to interested persons to make representations to the President of the Treasury Board with respect thereto.

86. (2) Exception

86. (2) No proposed regulation need be published under subsection (1) if it has previously been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

86. (3) Calculation of thirty day period

86. (3) In calculating the thirty day period referred to in subsection (1), there shall not be counted any day on which neither House of Parliament sits.

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87. (1) Tabling of regulation

87. (1) A regulation that is proposed to be made under paragraph 38(2)(a) and prescribes any part or region of Canada for the purpose of paragraph 35(1)(a) shall be laid before each House of Parliament at least thirty sitting days before the proposed effective date thereof.

87. (2) Motion to disapprove proposed regulation

87. (2) 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.

87. (3) Where motion adopted

87. (3) Where a motion referred to in subsection (2) is adopted by both Houses of Parliament, the proposed regulation to which the motion relates may not be made.

87. (4) Prorogation or dissolution of Parliament

87. (4) Where Parliament dissolves or prorogues earlier than twenty-five sitting days after a proposed regulation is laid before both Houses of Parliament under subsection (1) and a motion has not been disposed of under subsection (2) in relation to the proposed regulation in both Houses of Parliament, the proposed regulation may not be made.

87. (5) Definition of "sitting day"

87. (5) For the purposes of this section, "sitting day" means, in respect of either House of Parliament, a day on which that House sits.

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88. Permanent review of Act, etc., by parliamentary committee

88. The administration of this Act, any regulations and directives made under this Act and the reports of the Commissioner, the President of the Treasury Board and the Minister of Canadian Heritage made under this Act shall be reviewed on a permanent basis by such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established for that purpose.

R.S., 1985, c. 31 (4th Supp.), s. 88; 1995, c. 11, s. 30.

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89. Section 126 of *Criminal Code* not applicable

89. For greater certainty, it is hereby declared that section 126 of the *Criminal Code* does not apply to or in respect of any contravention or alleged contravention of any provision of this Act.

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90. Parliamentary and judicial powers, privileges and immunities saved

90. Nothing in this Act abrogates or derogates from any powers, privileges or immunities of members of the Senate or the House of Commons in respect of their personal offices and staff or of judges of any Court.

SEE ALSO:

Quigley v. Canada (House of Commons), [2003] 1 FCR 132, 2002 FCT 645 (CanLII)

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91. Staffing generally

91. Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.

ANNOTATIONS

Norton v. Via Rail Canada Inc., 2005 FCA 205 (CanLII)

[47] In their applications before the Federal Court, the appellants seek the enforcement of the Commissioner's recommendations. The relief sought is intended to force VIA to allow unilingual employees to apply for bilingual Service Manager positions on non-designated routes and to provide second-language training where needed; to assign unilingual employees to one of the two Assistant Service Co-ordinator positions on the Western Transcontinental train with second-language training; and to enable unilingual employees to apply for Assistant Service Co-ordinator positions on non-designated routes, again with second-language training.

[48] If implemented, these recommendations could grant the appellants future promotions that will of necessity affect other employees in the bargaining unit who currently occupy these positions based on seniority. This will obviously give rise to other grievances to be heard by federal labour arbitrators. The complexity of this task was recognized by the Commissioner at the conclusion of her report:

> The recommendations contained in this report are aimed at helping VIA Rail build upon the success of its hiring policy to date in a manner fully consistent with its linguistic responsibilities to both passengers and staff. We recognize that collective agreement considerations such as the bidding process for train assignments present certain challenges in implementing some of the recommendations. Given that most of the complainants are members of the union concerned, we hope that this investigation, which involved lengthy consultations with numerous employees, will assist VIA Rail in finding appropriate solutions. [Emphasis Added]

It is obvious from this conclusion that at the time of her report in May of 2002, the Commissioner recognized these disputes as matters best suited to internal resolution by VIA and the CAW due to the existence of the Collective Agreement and the obligations created thereunder.

[49] The appellants also seek lost wages and pension benefits for VIA's alleged failure to allow their advancement in the workplace contrary to section 91 of the *OLA*, plus their costs. In applying for these remedies, the appellants are effectively asking the Federal Court to interpret and apply VIA's employment practices and policies as set out in the Collective Agreement and to make a determination as to whether they should have been promoted and granted monetary relief. Complaints of this nature are the everyday work of federal labour arbitrators and normally fall within their exclusive jurisdiction.

Canada (A.G.) v. Viola, [1991] 1 F.C. 373, [1990] F.C.J. No. 1052 (FCA) [hyperlink not available]

[17] The constitutional entrenchment of language rights and their quasi-constitutional extension, qualified by the appeal for caution made to the courts by the Supreme Court, do not however imply, in the absence of specific indications to this effect, an alteration of the powers of the courts which have to interpret and apply these rights. Just as the *Canadian Charter of Rights and Freedoms* is not in itself a source of new jurisdictions, so the 1988 *Official Languages Act* does not create new jurisdictions other than those, vested in the Commissioner of Official Languages and the Federal Court Trial Division, which it creates expressly. As in the case at bar, the fact that the Department might be subject to more specific legal duties than in the past when it comes time to determine the language requirements of a position does not mean that an appeal board thereby acquires a jurisdiction which was heretofore beyond it. Unless the Act itself contains some indication that Parliament intended to give an appeal board a new jurisdiction affecting the

department's managerial rights, the appeal board will have to resign itself to continuing to perform the function it has until now exercised, and to leave to other jurisdictions the responsibility for deciding whether a department has complied with the provisions of the 1988 *Official Languages Act* in a given case.

[18] The respondent contended that this new jurisdiction was conferred on an appeal board as a consequence, inter alia, of the wording of part six of the preamble ("with due regard to the principle of selection of personnel according to merit"), subsection 39(3) ("Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit") and section 91 ("Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken").

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

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

[...]

[23] In seeking to ascertain whether the language requirements of the position were justified and to determine whether they were established arbitrarily and improperly, contrary to the provisions of the 1988 *Official Languages Act*, the president of the Appeal Board considered and decided a matter that was beyond his jurisdiction. Accordingly, his finding that there was reason to doubt the merits of the disputed appointments cannot be upheld.

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

[69] Thus, insofar as the interpretation or application of section 91 of the *OLA* is concerned, the Court dismisses the respondent’s proposition that the Federal Court’s jurisdiction under subsection 77(1) of the *OLA* to examine the legality of the challenged staffing actions is ousted by the mandatory grievance arbitration procedure provided for under subsection 57(1) of the *Labour Code*, or that a labour arbitrator would be better placed today than the Court to decide the matter, further considering in the latter instance that the delays in making a grievance and referring same to the labour arbitrator expired a long time ago and that VIA never objected to the jurisdiction of the Commissioner to investigate the applicant’s complaint. […]

[79] As I read section 91, a federal institution cannot, in the guise of purportedly giving effect to its obligations under Part IV or V of the *OLA*, set language requirements that are not objectively related to the provision of bilingual services in the particular setting where those functions are performed by the employee. For example, on VIA's trains, this might include imposing bilingual requirements on the positions of cook and chef which are not front-line positions. I will examine later in these reasons (see paragraphs 98 to 106), whether section 91 also prevents VIA from negotiating the bilingual requirements of front-line positions with trade unions in routes or stations not designated bilingual by TBS.

[80] That said, this Court in *Professional Institute of the Public Service*, above, has already decided that an applicant assumes "a fairly heavy burden" in establishing that the federal institution's designation of a bilingual position "lacks objectivity" (paragraph 53). It will require by the judge who assesses the matter "a finding that there was no evidentiary base to the designation, or that the designation was evidently unreasonable, or that there was an error of law somewhere" (*Ibid*).

[81] In this regard, whether VIA could otherwise organize crews on its trains so that de facto bilingual personnel in other front-line positions not designated as bilingual, such as SSAs, are always present and can be asked to perform duties and functions incumbent upon unilingual personnel in the two positions in issue, is not relevant in a section 91 analysis. The focus is not on the SSA duties and responsibilities but on "the functions for which the staffing action is undertaken" – here, the filling of ASC and SM positions by bilingual personnel following the implementation of the NEPO initiative in 1998.

[…]

[95] Although as a practical matter, the duties and responsibilities of the SMs and ASCs vis-à-vis the travelling public were apparently the same on all train routes, the Commissioner nevertheless suggested that the bilingual requirements on the Western remote routes were contrary to both section 91 and Part VI (section 39) of the *OLA* "to the extent that they adversely affect the advancement opportunities of unilingual employees" [my emphasis]. This conclusion of fact and law made by the Commissioner is not binding on the Court, and I must distinguish and depart from that part of her report for the sake of my analysis, which again is made under section 91 of the *OLA*.

[96] First, the Commissioner implicitly accepted that if the advancement opportunities of unilingual employees were not adversely affected, the bilingual requirements would be necessary to perform the functions for which the staffing actions were undertaken. The reason the advancement opportunities were adversely affected was that too few French language opportunities were provided in the workplace, reducing the chances of senior unilingual employees' to bid for training in these positions. Again, this Court is not called upon to decide whether this action constituted a breach of section 39 of the *OLA*, because this particular provision is not mentioned in subsection 77(1) of the *OLA*.

[97] Second, the Commissioner was apparently of the view that bilingual requirements for front-line positions, even if they involved extensive contact with the travelling public and some safety features, were not objectively required on remote routes simply because they had not been designed as bilingual by TBS. As explained in the following paragraphs, the fact that these routes had not been designated (and are still not designated) as bilingual by TBS is not conclusive evidence establishing that the bilingual requirements were not objectively justified.

[98] What constitutes under the *Charter* or the *OLA* "significant demand" or in what circumstances it is reasonable, due to the "nature of the office", to provide bilingual services, is subject to differing interpretations. Regulatory criteria provide greater certainty and uniformity in the application of such opened concepts. For this purpose, regulations established by the Governor

in Council under Part IV of the *OLA* enumerate specific cases where railway stations or train routes are “deemed” to meet the “significant demand” or the “nature of the office” criteria: sections 7, 9, 11 and 12. Thus, the Regulations establish a legal presumption facilitating the proof that the *Charter* or *OLA* criteria are met. This is their basic purpose but they are not exhaustive and should not be rigidly interpreted and applied. Indeed, it must be accepted by the Court that neither the Regulations nor Burolis can supersede or restrain the *OLA* or the *Charter*, but must always be interpreted and applied in a manner consistent with the general objectives of the preamble of the *OLA* and a recognition of the fundamental values of the *Charter* and Canadian policy in the matter of bilingualism. […]

[104] Again, I reiterate that in my opinion, the Regulations only set minimum standards with respect to the provision of bilingual services that the Governor in Council expects rail carriers to meet. Linguistic demand and safety considerations objectively justify bilingual designation of a minimum of front-line positions, to say the least. However, the general purpose of federal linguistic rights legislation is broader. One implied goal is that all transportation services offered by VIA to the travelling public be offered in both official languages, if reasonably feasible, and not merely pieces of the railroad network. To use the analogy made by the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, at paragraph 178 “[a] passenger who buys a ticket to take a VIA train does not ride the entire VIA network of all trains on all routes. He or she takes a specific train on a specific route at a specific time.” For instance, let’s say that this passenger is a unilingual Francophone from the province of Quebec who has used his holidays to visit Western Canada. He is new in Jasper and wishes to take a journey over two days on the Skeena to discover the Rockies that will take him to the Pacific Coast. It is immaterial at that time whether VIA runs a fully bilingual train from Montreal to Toronto. For such a long journey, this traveller will certainly expect to be able to order his drinks and meals in French, and if there is an emergency, a hazard or an accident, to be instructed in French of the situation or the safety measures to be taken. Using the same analogy, a unilingual Anglophone from the Province of Alberta visiting the Province of Quebec who has taken a few days during the summer to discover by train the Gaspé Peninsula, Abitibi or the Saguenay region, will have similar expectations.

[105] As decided in *Professional Institute of the Public Service*, the objectivity test mentioned at section 91 of the *OLA* must be studied not only in respect of an individual designation which might be required to meet a demand for bilingual services, but must also have regard for the "proactive" obligations imposed by section 41 of the *OLA* on federal institutions to promote the use of an official language in a minority setting. As Justice Joyal remarked in *Professional Institute of the Public Service*, the Court shares the view that:

> … a purposive or proactive component in language policies is not only in keeping with statutory obligations, but is conducive to effective practices. In other words, the respondent has to initiate a level of bilingual services and not simply respond to individual or group demands. Otherwise, the syndrome outlined in 1967 would continue indefinitely, and lip service only would increasingly be paid to the statutory duties Parliament has imposed on the respondent.

[106] Therefore, whether or not a particular train route is designated bilingual by the TBS is not conclusive in itself of whether bilingual requirements are objectively required since Burolis does not change the nature of the functions performed by front-line on-board service personnel, nor the requirement that VIA assures the safety of all its passengers through appropriate means which may include communications and services in both official languages.

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

[1] Mr. Don B. Rogers (the applicant) filed a complaint with the Office of the Commissioner of Official Languages on February 16, 1995, challenging the bilingual imperative designation of a job posting for an Administrative Assistant to the Deputy Commissioner at Correctional Services

Canada (CSC), in Kingston. The complaint was filed pursuant to the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 as amended, (the Act), section 91 which provides:

> 91. Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.

[2] Following an investigation, the Commissioner of Official Languages filed a report on December 10, 1996, in which he upheld the complaint filed by Mr. Rogers. Mr. Rogers now applies for a remedy pursuant to subsection 77(1) of the Act.

[...]

[60] In my opinion, the nature of the Act as quasi-constitutional legislation means that a report of the Commissioner, after the conduct of an investigation, can be accepted as evidence that a breach of the Act has occurred. The findings and conclusion of the Commission were not seriously challenged by the respondent. Accordingly, I confirm the findings of the Commission that the staffing mode for the position in question should have been bilingual non-imperative, with a linguistic profile of CBC. Further, I find that the improper designation for the position breached the applicant's language rights.

Rogers v. Canada (Department of National Defence), 2001 FCT 90 (CanLII)

[27] […] [I]t appears that in order to modify the linguistic requirements of a position, this Court must find that there is no evidentiary basis to the designation, that the designation is unreasonable, or that the language requirements are imposed frivolously or arbitrarily. If there is a factual basis for the designation, the Court should not intervene.

[28] It is also clear, in my view, that this Court can only make a determination with regard to the objectivity of the requirements and the manner in which the decision to impose those requirements was taken. This Court should not consider whether the applicant was unjustly treated by his employer, whether he was disliked or liked by his colleagues, whether he was denied the position for reasons other than the language requirements, whether his level of French is good, whether his previous employer was satisfied with his performance, how other positions are designated, how the interview process for the position is conducted or any technical administrative matters or errors relating to the staffing of the position. The only relevant issue, in my view, is whether or not the position objectively requires the linguistic requirements which were designated.

Canada (A.G.) v. Asselin, [1995] F.C.J. No. 846 (FC) [hyperlink not available]

[10] […] It was already settled law, before s. 12.1 [of the *Public Service Employment Act*] was added, that appeal boards may not decide on the level of language skills required.

[11] The *Official Languages Act* creates a set of language rights based on the duties imposed on the federal government by the *Constitution*. It is quasi-constitutional legislation which reflects a social and political compromise, gives the Commissioner the powers of a true language ombudsman and establishes an administrative process for securing relief. In addition, that Act provides for judicial review, empowering the Federal Court to hear complaints relating to language requirements that are applied to staffing actions in the Public Service. Only persons who have complained to the Commissioner may bring proceedings in the Federal Court, and only the Commissioner, not appeal boards, has the power to investigate that issue. […]

[14] Section 91 of the *Official Languages Act*, together with ss. 56 and 58 *et seq.* of the *Act*, provide a legal framework for examining the language requirements of positions in the Public

Service, prior to the enactment of s. 12.1 of the Act. That section does not limit the powers of the Commissioner, in the absence of clear wording to that effect.

[15] What we must take from this is that Parliament decided to confer the power to administer the language guarantees set out in the *Canadian Charter of Rights and Freedoms* on the Commissioner, and not on the Commission's appeal boards. […]

[16] In the case at bar, the Appeal Board did not assess the merit of the appointment made; rather, it assessed the validity of the language requirements of the position to be filled. In order to examine the validity of those requirements properly, it would have had to consider the other obligations and requirements in respect of language to which the employer is subject under the *Official Languages Act*, and this aspect of the analysis is well beyond its jurisdiction.

[17] In conclusion, jurisdiction to determine whether there has been a breach of the principle of objectivity in the language requirements of a position, having regard to the duties to be performed and to the requirements of the *Official Languages Act* is given exclusively to the Commission, with the exception of the Federal Court. The function of the Appeal Board is to ensure that appointments made under the Act comply with the merit principle. […]

[18] I shall simply say that the effect of the objective criterion imposed by s. 91 of the *Official Languages Act* requires that the applicant had to satisfy the Appeal Board that the staffing action was "patently unreasonable".

Professional Institute of the Public Service v. Canada, [1993] 2 FCR 90, 1993 CanLII 2921 (FC)

[40] The other statute of material importance is the *Public Service Employment Act* which establishes the principles under which, by regulation, the provisions of the *Official Languages Act* in the matter of staffing of positions in the Public Service may be carried out.

[...]

[53] I should first of all elaborate on what the Federal Court of Appeal said in the *Viola* case cited above. On the facts, the Court had to decide whether the Public Service Commission Appeal Board had jurisdiction to find that a bilingual imperative designation was grounds for deciding that such a designation in the circumstances was contrary to the merit principle. In deciding that the Appeal Board was without jurisdiction in the matter, the Court referred to the provi sions of section 91 of the *Official Languages Act* in the following terms (at page 388):

> By stating that language requirements must be imposed "objectively", section 91 expressly confirms what has always been implicit, namely that language requirements cannot be imposed frivolously or arbitrarily. The purpose of this section is to provide comfort and reassurance, rather than create new law ...

[54] The thrust of the applicant's case is that the respondent's designation lacks objectivity. The applicant assumes a fairly heavy burden in establishing this. I would not suggest that this requires, on the applicant's part, evidence that the designation was clearly frivolous or patently arbitrary, but at least, as was suggested by counsel for the Commissioner, it requires a finding that there was no evidentiary base to the designation, or that the designation was evidently unreasonable, or that there was an error of law somewhere. This is a more stringent field of enquiry than that which might be encountered in a section 18 application [*Federal Court Act*, R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 4)].

[55] On review of the evidence, I should find that the case for the respondent meets the objectivity test under section 91 of the *Official Languages Act*. That objectivity test, in my respectful view, must be studied not only in respect of an individual designation which might be required to meet a

demand for bilingual services, but must have regard for the "proactive" obligations imposed on federal institutions to promote the use of an official language in a minority setting.

[56] The applicant, in this regard, does not object to a bilingual designation but to a bilingual imperative designation. This suggests an even narrower test under section 91 and it indicates, in my view, how much lighter is the burden of establishing an objectively based designation. This means that it is not sufficient, under a section 91 challenge, to merely demonstrate that respect for bilingual requirements under the *Official Languages Act* might also be achieved through other measures or other means. There must be, in my mind, a finding that the staffing action proposed has no factual foundation. This implies that the field of enquiry proposed by counsel for the Commissioner has some legitimacy.

[...]

[60] Of particular significance, in the context of that statute, is that institutional policies and commitments must be carried out by public servants. This is when the merit principle requires tender and loving care.

[61] The reality of the two language groups in Canada is that bilingual proficiency is a more inherent feature of French language groups than English language groups. So too in the federal Public Service, where the same inherent feature applies. To foster bilingualism or to meet its statutory duties, the government, through its Public Service Commission, had to designate any number of positions as bilingual, but in so doing, assure that non-bilingual candidates for appointment would not be prejudiced.

[62] Maintaining equilibrium or balance between the tenets of statutory policy and the realities of people in the public sector obviously demanded a particularly deft and delicate touch. I need not comment in detail on how balance was achieved, except to note the provisions in statutes and regulations respecting “grand-father” rights, exclusion orders, language training at public expense, security of position if language proficiency is not achieved within prescribed delays, and other measures of similar nature.

[...]

[64] This brings me to comment on what I view is the second duty which the statute imposes on federal institutions. If there is imposed a tight line in designations of individual positions to protect the majority language group in the Public Service, the other duty is reflected in the preamble to the Act and in section 41 of the Act. My interpretation of section 41 gives credence to the proposition that policy requires the respondent not only to react or respond to pressures for more or better bilingual services, but to initiate programmes to offer these services where there is a perceived need for them, a need which might not be fully reflected in a statistical analysis of the number of enquiries, the number of files, or the current incidence of French and English cases in any particular public office.

[65] Although these factors are relevant to a proper application of the designation rules, they are not exclusive. To hold otherwise would go against sociological profiles of minority language groups drawn in the Report of the *Royal Commission on Bilingualism and Biculturalism*, Book I (1967), at page XXX, which stated that there are many French Canadians "so accustomed to the inferior status of their own language that they are unaware of it ...", and which concluded in Chap. V, No. 260 [at page 89], that "When it becomes usual for the language of the minority to receive little or no recognition in a given region, the minority reluctantly falls into line."

[66] On that premise, a purposive or proactive component in language policies is not only in keeping with statutory obligations, but is conducive to effective practices. In other words, the respondent has to initiate a level of bilingual services and not simply respond to individual or

group demands. Otherwise, the syndrome outlined in 1967 would continue indefinitely, and lip service only would increasingly be paid to the statutory duties Parliament has imposed on the respondent.

[...]

[86] I should add another comment. The carrying on of statutory duties and obligations of the *Official Languages Act* in the strongly English-speaking environment of the Halifax Office, as well as in other similar places, must not always be easy. Language, as is often noted, includes strong cultural ties and characteristics, and there are historical discordant notes still being heard over language duality in Canada. No matter his background, the individual manager must remain publicly discreet, yet there must come to his ears, from time to time, negative observations from colleagues and friends, which add to the constraints of his office and which impose upon him many conflicting pressures. He often faces ignorance of the law, which in turn breeds fear, and which in turn breeds resentment. The manager must cope with all this and still run a happy ship.

[87] As I said, his role is not an easy one. And yet, those who harbour grievances from time to time might consider that the dynamics of the Public Service, which is comprised of some 75% English-speaking Canadians, should *prima facie* provide some assurance that position designations, as a rule, will be objectively founded and not frivolously or arbitrarily imposed.

Conclusion

[88] I have no hesitation in concluding that the staffing action taken by the respondent in 1989, in calling for an AU-02 bilingual imperative designation, meets the test imposed by section 91 of the *Official Languages Act*. In reaching this conclusion, I do not wish to imply that the challenge made to this Court by the applicant is devoid of merit. There are always two sides to an issue, and the enquiry opened the door to two divergent perceptions and views, and two opposing analyses of the factual bases on which designations are founded.

[89] I repeat, however, that curial scrutiny of staffing actions must of necessity be circumscribed. I agree with the view expressed by the Court of Appeal in the *Viola* case (*supra*) that the test would be the same without the objectivity test imposed by section 91 of the statute and that, of course, no frivolous or arbitrary approach to bilingual staffing can be countenanced. The "spirit and intent" of the Act, as set out in subsection 56(1) must always be respected.

[90] So long, however, as there is a factual basis on which a particular staffing action is taken, and so long as that action is in conformity with relevant statutes and more discrete regulations, this Court cannot and should not intervene. That a court might have reached another conclusion, or that a court might have preferred an alternative to the staffing action taken, are no grounds, in my view, for judicial intervention. To define more extensively this somewhat narrow scope of review would only lead to obfuscation or semantic confusion.

Côté v. Canada (Department of the Environment), [1992] F.C.J. No. 469 (FC) [hyperlink not available]

[7] At the outset, we must recall that section 91 of the *Official Languages Act* demands objectivity in the application of official languages requirements to a particular staffing action. In other words, there must be an objective necessity for designating a position as bilingual imperative, which can be effectively measured against the real requirements of the position in question.

Boulanger v. Commissioner of the Correctional Service of Canada et al., 2008 PSST 31 (CanLII)

[35] [T]o determine whether the requirements were imposed objectively, the OCOL examines the facts related to the language requirements of the position in relation to the demand for service in

both official languages, as well as the obligations imposed on federal institutions concerning the promotion of an official language in a minority community (see *Professional Institute of the Public Service v. Canada*, [1993] 2 F.C. 90, and *Rogers v. Canada (Department of National Defence)*, [2001] 103 A.C.W.S. (3d) 715; [2001] F.C.A. No. 222).

[36] The OCOL ensures that language requirements are not established frivolously or arbitrarily in terms of complying with the *OLA*, the *Directive on the Linguistic Identification of Positions or Functions, the Directive on the Staffing of Bilingual Positions* (the *Directives*) and the *Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48* (the *Official Languages Regulations*). The OCOL's investigation is therefore limited and does not extend beyond this framework […].

[42] It is true that the OCOL determined that the language requirement had been objectively required in accordance with section 91 of the *OLA*; however, the Tribunal's mandate is broader than the OCOL's. The Tribunal must go beyond the fact that the *OLA* was complied with and go further in its analysis to determine whether there was an abuse of authority, such as bad faith, personal favouritism or discrimination, for example, when the respondent decided to establish the linguistic qualification. In addition, if the complaint is founded, the Tribunal may revoke the appointment; take any corrective action that it considers appropriate or both. The *OLA* does not grant this authority to the OCOL with regard to staffing.

[43] In addition, the fact that Parliament expressly referred to official languages in subsection 30(2) of the *PSEA* [*Public Service Employment Act*] shows that it intended to grant the Tribunal the power to decide all abuse of authority matters concerning official languages.

SEE ALSO:

Re Headley and Public Service Commission appeal board, [1987] 2 FCR 235, 1987 CanLII 5362 (FCA)

Rogers v. Canada (Correctional Service), [2001] 2 FCR 586, 2001 CanLII 22031 (FC)

Canadian Union of Postal Workers and Canada Post Corporation Re: National Grievance Imperative Staffing of Bilingual Wicket Positions, [1994] C.L.A.D. No. 1045, 35 L.A.C. (4th) 300 [hyperlink not available]

Gariepy v. Canada, [1987] F.C.J. No. 1013 (FC)(QL) [hyperlink not available]

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92. References in Acts of Parliament to the "official languages"

92. In every Act of Parliament, a reference to the "official languages" or the "official languages of Canada" shall be construed as a reference to the languages declared by subsection 16(1) of the *Canadian Charter of Rights and Freedoms* to be the official languages of Canada.

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93. Regulations

93. The Governor in Council may make regulations

(a) prescribing anything that the Governor in Council considers necessary to effect compliance with this Act in the conduct of the affairs of federal institutions other than the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner or the Parliamentary Protective Service; and

(b) prescribing anything that is by this Act to be prescribed by regulation of the Governor in Council.

R.S., 1985, c. 31 (4th Supp.), s. 93; 2004, c. 7, s. 30; 2006, c. 9, s. 25.

Part XII – Related Amendments

94 to 99. [Amendments]

Part XIII – Consequential Amendment

100 to 103. [Amendments]

Part XIV – Transitional Provisions, Repeal and Coming into Force

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104. and 105. Transitional

104. and 105. [Repealed, R.S. 1985, c. 31 (4th Supp.), s. 106]

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106. [Amendment]

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107. Commissioner remains in office

107. The person holding office as Commissioner on the coming into force of Part IX shall continue in office as Commissioner and shall be deemed to have been appointed under this Act but to have been appointed at the time he was appointed under the *Official Languages Act*, being chapter O-2 of the Revised Statutes of Canada, 1970.

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108. (1) Payments to Crown corporations

108. (1) In respect of the four fiscal years immediately following the date this section comes into force, the President of the Treasury Board may make payments to Crown corporations to assist them in the timely implementation of this Act.

108. (2) Appropriation

108. (2) Any sums required for the purpose referred to in subsection (1) shall be paid out of such moneys as may be appropriated by Parliament for that purpose.

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109. Repeal

109. The *Official Languages Act*, chapter O-3 of the Revised Statutes of Canada, 1985, is repealed.

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110. Coming into force

110. This Act or any provision thereof shall come into force on a day or days to be fixed by proclamation.

Official Languages (Communications with and Services to the Public) Regulations – Official Languages Act, SOR/92-48

Official Languages (Communications with and Services to the Public) Regulations.

Whereas, pursuant to section 84 of the *Official Languages Act*, the President of the Treasury Board has sought the views of members of the English and French linguistic minority communities and members of the public generally on the proposed Regulations concerning communications with and services to the public in either official language;

Whereas, pursuant to section 85 of the said Act, the President of the Treasury Board has laid a draft of the proposed Regulations before the House of Commons on November 8, 1990, which date is at least thirty days before a copy of the proposed Regulations was published in the *Canada Gazette* under section 86 of the said Act;

And Whereas, pursuant to section 86 of the said Act, the proposed Regulations were published in the *Canada Gazette* on March 23, 1991, which date is at least thirty days before the proposed effective date thereof, and a reasonable opportunity was thereby afforded to interested persons to make representations to the President of the Treasury Board with respect thereto;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Treasury Board, pursuant to section 32 of the *Official Languages Act*, is pleased hereby to make the annexed Regulations respecting communications with and services to the public in either official language.

R.S. c. 31 (4th Supp.)

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1. Short Title

1. These Regulations may be cited as the *Official Languages (Communications with and Services to the Public) Regulations*.

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2. Interpretation

2. In these Regulations,

"Act" means the *Official Languages Act;* (Loi)

"CMA" means a census metropolitan area, excluding Ottawa-Hull, as used by Statistics Canada for the purposes of the census referred to in section 3; (*région métropolitaine de recensement*)

"CSD" means a census subdivision, excluding any CSD or any part thereof within the National Capital Region, as used by Statistics Canada for the purposes of the census referred to in section 3; (*subdivision de recensement*)

"immigration services" means services that are provided, powers that are exercised and duties and functions that are performed by an immigration officer under the *Immigration Act*, other than services provided, powers exercised or duties or functions performed under that Act by an officer as defined in section 2 of the *Customs Act*; (*services d'immigration*)

"Method I" means the method of estimating first official language spoken that is described as Method I in *Population Estimates by First Official language Spoken*, published by Statistics Canada in September 1989, which method gives consideration, firstly, to knowledge of the official languages, secondly, to mother tongue, and thirdly, to language spoken in the home, with any cases in which the available information is not sufficient for Statistics Canada to decide between English and French as the first official language spoken being distributed equally between English and French; (*méthode I*)

"route" means

> **(a) for the purposes of paragraphs 7(4)(*c*) and (*d*), a route on which a federal institution provides the travelling public with a transportation service by aircraft or train that is carried out by a single conveyance, and**
>
> **(b) for the purposes of subsection 7(2) and paragraph 7(4)(*e*), a route on which a federal institution provides the travelling public with a two-way transportation service by aircraft, train or ferry between the starting and finishing points of a flight, train run or ferry crossing that is carried out by a single conveyance between those two points, with or without intermediate stops. (*trajet*)**

ANNOTATIONS – DEFINITION OF "METHOD I"

Fédération des communautés francophones et acadienne du Canada v. Canada (Attorney General), 2010 FC 999 (CanLII)

[42] It must be noted that the *Official Languages Act* does not prescribe any obligations that require the government to use a specific methodology such as the mandatory long-form questionnaire census. In fact, when Parliament wishes to proceed in such a way, it does so by way of regulations. Such was the case with the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48, which requires that a census be held as a tool to

determine sufficient numbers for the purposes of implementing Part IV of the *Official Languages Act*.

Part I – Significant Demand

3. Definition of English or French Linguistic Minority Population

3. "English or French linguistic minority population" means that portion of the population in a province in which an office or facility of a federal institution is located that is the numerically lower official language population in the province, as determined by Statistics Canada under Method I on the basis of

> **(a) for the purposes of paragraphs 5(1)(*a*), (*b*) and (*d*) to (*r*), subsection 5(2) and paragraph 7(4)(*a*),**
>
> > **(i) before the results of the 1991 census of population are published, the 1986 census of population taken pursuant to the *Statistics Act*, and**
> >
> > **(ii) after the results of the 1991 census of population are published, the most recent decennial census of population for which results are published; and**
>
> **(b) for the purposes of paragraphs 5(1)(*c*) and 6(1)(*d*) and (2)(*c*), subparagraphs 6(2)(*d*)(i) and 7(4)(*c*)(ii) and (iii) and paragraph 7(4)(*d*), the 1986 census of population taken pursuant to the *Statistics Act*.**

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4. Calculation of Population Numbers

4. (1) For the purposes of this Part, the number of persons of the English or French linguistic minority population in a province, CMA, CSD or service area is equal to the estimated number of persons of that population in that province, CMA, CSD or service area as determined by Statistics Canada under Method I on the basis of the census referred to in section 3.

4. (2) For the purposes of this Part, the total population in a province, CMA, CSD or service area is equal to the estimated total population, excluding institutional residents as defined in *Population Estimates by First Official language Spoken*, published by Statistics Canada in September 1989, in that province, CMA, CSD or service area as determined by Statistics Canada on the basis of the census referred to in section 3.

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5. General Circumstances

5. (1) For the purposes of paragraph 22(*b*) of the Act, there is significant demand for communications with and services from an office or facility of a federal institution in both official languages where

> **(a) the office or facility is located in a CMA that has at least 5,000 persons of the English or French linguistic minority population and is the only office or facility of the institution in the CMA that provides a certain service;**

(b) the office or facility is located in a CMA that has at least 5,000 persons of the English or French linguistic minority population, the office or facility is one of two or more offices or facilities of the institution in the CMA that provide the same services and those services are not available in both official languages at a proportion of those offices or facilities that is at least equal to the proportion of that population in the CMA to the total population in the CMA or, if the number representing that proportion of offices is equal to less than one, at at least one of those offices or facilities, the choice of which depends on

(i) the distribution of the linguistic minority population within the CMA, and

(ii) the function of the offices or facilities that provide those services, their clientele and their location within the CMA;

(c) the office or facility is located in a province in which the English or French linguistic minority population is equal to at least 5 per cent of the total population in the province and is located in a CMA that has a population of at least 1,000,000 persons, the office or facility is one of two or more offices or facilities of the institution in the CMA that provide any of the services referred to in subparagraphs (*f*)(i) to (vi) and those services are not available in both official languages at one office plus at a proportion of those offices or facilities that is at least equal to the proportion of that population in the CMA to the total population in the CMA or, if the number representing that proportion of offices is equal to less than one, at at least two of those offices or facilities, the choice of which depends on

(i) the distribution of the linguistic minority population within the CMA, and

(ii) the function of the offices or facilities that provide those services, their clientele and their location within the CMA;

(d) the office or facility is located in a CMA that has fewer than 5,000 persons of the English or French linguistic minority population and does not provide any of the services referred to in subparagraphs (*f*)(i) to (vi), and at that office or facility over a year at least 5 per cent of the demand from the public for services is in the official language of that population;

(e) the office or facility is located in a CMA that has fewer than 5,000 persons of the English or French linguistic minority population and the service area of the office or facility has at least 5,000 persons of the linguistic minority population;

(f) the office or facility is located in a CMA that has fewer than 5,000 persons of the English or French linguistic minority population and is the only office or facility of the institution in the CMA that provides

(i) services related to income security programs of the Department of National Health and Welfare,

(ii) services of a post office,

(iii) services of an employment centre of the Department of Employment and Immigration,

(iv) services of an office of the Department of National Revenue (Taxation),

(v) services of an office of the Department of the Secretary of State of Canada, or

(vi) services of an office of the Public Service Commission;

(g) the office or facility is located in a CMA that has fewer than 5,000 persons of the English or French linguistic minority population, the office or facility is one of two or more offices or facilities of the institution in the CMA that provide any of the services referred to in subparagraphs (*f*)(i) to (vi) and those services are not available in both official languages at a proportion of those offices or facilities that is at least equal to the proportion of that population in the CMA to the total population in the CMA or, if the number representing that proportion of offices is equal to less than one, at at least one of those offices or facilities, the choice of which depends on

(i) the distribution of the linguistic minority population within the CMA, and

(ii) the function of the offices or facilities that provide those services, their clientele and their location within the CMA;

(h) the office or facility is located outside a CMA and within a CSD and

(i) the service area of the office or facility has at least 500 persons of the English or French linguistic minority population and the number of those persons is equal to at least 5 per cent of the total population of that service area,

(ii) the service area of the office or facility has at least 5,000 persons of the English or French linguistic minority population,

(iii) the office or facility serves the CSD and is the only office or facility of the institution in the CSD that provides a certain service, the CSD has at least 500 persons of the English or French linguistic minority population and the number of those persons is equal to at least 5 per cent of the total population in the CSD, or

(iv) the service area of the office or facility includes all or part of two or more provinces in which the languages of the English or French linguistic minority populations are not the same;

(i) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 500 persons of the English or French linguistic minority population, the number of those persons is equal to at least 5 per cent and less than 30 per cent of the total population in the CSD, the office or facility is one of two or more offices or facilities of the institution in the CSD that provide the same services and those services are not available in both official languages at a proportion of those offices or facilities that is at least equal to the proportion of that population in the CSD to the total population in the CSD or, if the number representing that proportion of offices is equal to less than one, at at least one of those offices or facilities, the choice of which depends on

(i) the distribution of the linguistic minority population within the CSD, and

(ii) the function of the offices or facilities that provide those services, their clientele and their location within the CSD;

(j) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 500 persons of the English or French linguistic minority population, the number of those persons is equal to at least 30 per cent of the total population in the CSD and the office or facility is one of two or more offices or facilities of the institution in the CSD that provide the same services;

(k) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 500 persons of the English or French linguistic minority population, the number of those persons is equal to less than 5 per cent of the total population in the CSD, the office or facility does not provide any of the services referred to in subparagraphs (*l*)(i) to (vii) and at that office or facility over a year at least 5 per cent of the demand from the public for services is in the official language of the linguistic minority population;

(l) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 500 persons of the English or French linguistic minority population, the number of those persons is equal to less than 5 per cent of the total population in the CSD and the office or facility is the only office or facility of the institution in the CSD that provides

> **(i) services related to income security programs of the Department of National Health and Welfare,**
>
> **(ii) services of a post office,**
>
> **(iii) services of an employment centre of the Department of Employment and Immigration,**
>
> **(iv) services of an office of the Department of National Revenue (Taxation),**
>
> **(v) services of an office of the Department of the Secretary of State of Canada,**
>
> **(vi) services of a detachment of the Royal Canadian Mounted Police, or**
>
> **(vii) services of an office of the Public Service Commission;**

(m) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 500 persons of the English or French linguistic minority population, the number of those persons is equal to less than 5 per cent of the total population in the CSD, the office or facility is one of two or more offices or facilities of the institution in the CSD that provide any of the services referred to in subparagraphs (*l*)(i) to (vii) and those services are not available in both official languages at a proportion of those offices or facilities that is at least equal to the proportion of that population in the CSD to the total population in the CSD or, if the number representing that proportion of offices is equal to less than one, at at least one of those offices or facilities, the choice of which depends on

> **(i) the distribution of the linguistic minority population within the CSD, and**
>
> **(ii) the function of the offices or facilities that provide those services, their clientele and their location within the CSD;**

(n) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 200 and fewer than 500 persons of the English or French linguistic minority population, the number of those persons is equal to at least 5 per cent of

the total population in the CSD, the office or facility does not provide any of the services referred to in subparagraphs (*l*)(i) to (vii) and at that office or facility over a year at least 5 per cent of the demand from the public for services is in the official language of the linguistic minority population;

(o) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has at least 200 and fewer than 500 persons of the English or French linguistic minority population, the number of those persons is equal to at least 5 per cent of the total population in the CSD, the office or facility provides any of the services referred to in subparagraphs (*l*)(i) to (vii) and those services are not available in both official languages at at least one office or facility of the institution in the CSD;

(p) the office or facility is located outside a CMA and within a CSD that it serves, the CSD has fewer than 200 persons of the English or French linguistic minority population, the number of those persons is equal to at least 30 per cent of the total population in the CSD and the office or facility provides any of the services referred to in subparagraphs (*l*)(i) to (vii);

(q) the office or facility is located outside a CMA and within a CSD that it serves, the number of persons of the English or French linguistic minority population in the CSD has not been determined by Statistics Canada under Method I on the basis of the census referred to in section 3, or cannot be disclosed by Statistics Canada for reasons of confidentiality, and at that office or facility over a year at least 5 per cent of the demand from the public for services is in the official language of that population; or

(r) the office or facility is located outside a CMA and within a CSD, the number of persons of the English or French linguistic minority population in the service area of the office or facility cannot be determined by Statistics Canada under Method I on the basis of the census referred to in section 3 because of the nature of the service area or cannot be disclosed by Statistics Canada for reasons of confidentiality, and at that office or facility over a year at least 5 per cent of the demand from the public for services is in the official language of that population.

5. (2) For the purposes of paragraph 22(*b*) of the Act, there is significant demand for communications with and services from an office or facility of a federal institution in the official language that is not the official language of the English or French linguistic minority population where the office or facility is located in Canada and is not an office or facility at which there is significant demand in both official languages under subsection (1).

5. (3) For the purposes of paragraph 22(*b*) of the Act, there is significant demand for communications with and services from an office or facility of a federal institution in an official language where the office or facility is located outside Canada and at that office or facility over a year at least 5 per cent of the demand from the public for services is in that language.

5. (4) Subsections (1) to (3) do not apply in respect of

(a) services described in paragraph 6(1)(*a*); or

(b) an office or facility described in any of paragraphs 6(1)(*b*) to (*e*), subsection 6(2) or section 7.

ANNOTATIONS

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[80] I allow the plaintiff's claim in part. I declare subparagraph 5(1)(h)(i) of the *Official Languages (Communications with and Services to the Public) Regulations*, *SOR/92-48*, adopted pursuant to section 32 of the *OLA*, inconsistent with paragraph 20(1)(a) of the *Charter* in that the right to use French or English to communicate with an institution of the Government of Canada should not solely depend on the percentage of Francophones in the census district. Consideration must also be given to the number of Francophones who use or might use the services of the institution, as illustrated by the circumstances in this case, along Highway 104 near Amherst, Nova Scotia. In my view, it is reasonable to give the Governor in Council 18 months to correct the problem identified in the *Regulations*.

SEE ALSO:

Marchessault v. Canada Post Corp., 2002 FCT 1202 (CanLII)

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6. Specific Circumstances

6. (1) For the purposes of paragraph 22(*b*) of the Act, there is significant demand for communications with and services from an office or facility of a federal institution in an official language where

(a) the services provided by the office or facility are provided to a restricted clientele, the members of which are identifiable, those services are specifically intended for that clientele and at that office or facility over a year at least 5 per cent of the demand from that clientele for those services is in that language;

(b) the office or facility provides ship-to-shore communications services, including coast radio station services and vessel traffic services, and at that office or facility over a year at least 5 per cent of the demand from the public for those services is in that language;

(c) the office or facility provides immigration services and is located at a place of entry into Canada, and at that office or facility over a year at least 5 per cent of the demand from the public for those services is in that language;

(d) the office or facility provides services other than immigration services and is located at a place of entry into Canada, other than an airport or a ferry terminal, in a province in which the English or French linguistic minority population is equal to at least 5 per cent of the total population in the province, and at that office or facility over a year at least 5 per cent of the demand from the public for services is in that language; or

(e) the office or facility provides search and rescue services from a vessel that has long-range capabilities or from an aircraft, the vessel or aircraft from which the service is provided is distinctively marked by the Department of National Defence or the Canadian Coast Guard as a search and rescue vessel or aircraft or is crewed by the Department of National Defence with personnel specially trained for search and rescue operations, and at that office or facility over a year at least 5 per cent of the demand from the public for those services is in that language.

(f) the office or facility is a Royal Canadian Mounted Police detachment that provides services in a province to sections of the Trans-Canada Highway where there is a

point of entry to another province that is officially bilingual, and over a year at least 5 per cent of the demand from the public for those services is in that language.

6. (2) For the purposes of paragraph 22(*b*) of the Act, there is significant demand for communications with and services from an office or facility of a federal institution in both official languages where

(a) the office or facility provides ship-to-shore communications services, including coast radio station services and vessel traffic services, and the service area of the office or facility includes all or a portion of the Bay of Fundy, the St. Lawrence River or the Gulf of St. Lawrence up to the innermost limit of Cabot Strait, but not including Cabot Strait, and up to the southern limit of the Strait of Belle Isle, but not including the Strait of Belle Isle;

(b) the office or facility provides air traffic control services and related advisory services in circumstances in which either official language may be used pursuant to the *Aeronautical Communications Standards and Procedures Order*;

(c) the office or facility provides services other than immigration services and is located at a place of entry into Canada, other than an airport or ferry terminal, in a province in which the English or French linguistic minority population is equal to at least 5 per cent of the total population in the province, and at that place of entry at least 500,000 persons come into Canada in a year; or

(d) the office or facility provides search and rescue services from a vessel that has long-range capabilities or from an aircraft, the vessel or aircraft from which the service is provided is distinctively marked by the Department of National Defence or the Canadian Coast Guard as a search and rescue vessel or aircraft or is crewed by the Department of National Defence with personnel specially trained for search and rescue operations, and the office or facility provides those services

(i) in or over a province in which the English or French linguistic minority population is equal to at least 5 per cent of the total population in the province,

(ii) in or over Hudson Bay, Hudson Strait or James Bay, or

(iii) in or over an area that falls within the boundaries of the Halifax Search and Rescue Region as set out in Annex 3B of the *National Search and Rescue Manual*, published by the Department of National Defence and the Canadian Coast Guard, as amended from time to time.

ANNOTATIONS

Doucet v. Canada, [2005] 1 FCR 671, 2004 FC 1444 (CanLII)

[38] Sections 5, 6 and 7 of the Regulations set out various situations that correspond to the concept of "significant demand". Sections 8, 9, 10 and 11 define what is meant by "national mandate". None of these definitions corresponds to the circumstances at issue in this case, namely the right of motorists driving on highways patrolled by the Amherst detachment to services and communications in French. […]

[42] Fort Lawrence, at a border crossing, in Nova Scotia, where over four million vehicles enter Nova Scotia annually, is within the area patrolled by the RCMP, Amherst detachment. The defendant sought to dispute the evidence submitted by the plaintiff on these figures but, in my opinion, although they are not absolute or complete, they are sufficiently persuasive to support

my analysis. In my view, the demand by the travelling public for services in French from the RCMP is established by the evidence, and especially the testimony of Ms. Gilbert and Staff Sgt. Hastey. […]

[44] Patrolling Highway 104, an interprovincial highway, is one of the realities facing the RCMP, Amherst detachment. Though Amherst does not have a large population, it is, however, situated close to New Brunswick, where 32% of the population is Francophone (according to the 2001 census) and, even more significant, near a region where, according to the evidence, 38% of the population is Francophone. The evidence has established that there is significant traffic coming from New Brunswick in the Amherst area. In her expert testimony, Ms. Gilbert testified about the proximity of Francophone communities and persuasively demonstrated the likelihood that a large number of Francophones from New Brunswick travel on highways in the Amherst area, including the main artery which is part of the Trans-Canada Highway. In my opinion, her testimony was strengthened rather than contradicted by the testimony of Staff Sgt. Hastey, a witness for the defendant. I refer to the following facts which emerge from Ms. Gilbert's uncontradicted expert evidence:

- in 1998, four million travellers entered Nova Scotia via the Trans Canada Highway in the area of Amherst, 20% of whom--i.e. more than 800,000--were Francophone;

- of these four million, almost two million came from New Brunswick, approximately one-third of whom--i.e. more than 650,000--were Francophone;

- of the two million of those coming from New Brunswick, 70% came from within an 80-kilometre radius of Amherst, i.e. close to 1,200,000;

- within an 80-kilometre radius of the point of entry, 20.1% of the population reported French as their mother tongue.

[46] In summary, the *Regulations* do not cover the situation of a busy highway, patrolled by the RCMP, on which a large number of members of the minority language group are likely to be travelling. In my view, the evidence has established, on a balance of probabilities, that there is a significant demand for minority language services in French on the section of Highway 104 crossing the service area of the RCMP, Amherst detachment. By analogy, I note that the Regulations do set out other circumstances, namely in respect of airports and ferry terminals, where the number of travellers determines whether the federal institution must offer services in both official languages. […]

[49] Thus, it is clear that there is a void in the *Regulations*. Notwithstanding a "significant demand", the Regulations do not provide for services to a linguistic minority travelling on a major highway. In my view, the Regulations do not comply with subsection 20(1) of the *Charter*, because they infringe the right of individuals to communicate with a federal institution in the official language of their choice, although a significant demand exists. For this reason alone, the *Regulations* do not meet the requirements of sections 22 and 23 of the *OLA*, section 22 providing for the right of members of the public to communicate with the office of a federal institution in the official language of their choice where a "significant demand" exists, and section 23 providing for services to the travelling public in the official language of their choice, if there is a significant demand for the use of that language.

[73] In the case at bar, however, the infringement is real and the *Regulations* are too seriously flawed to stand as drafted. The Court has the duty to intervene when it finds a constitutional breach. That being said, it is not my place to decide for the executive on how the *Regulations* should be amended. In my opinion, that is not the Court's role and, in any event, such a decision is not within its expertise. I will, however, point out the deficiencies that must be remedied for the *Regulations* to be consistent with their enabling Act and the *Charter*.

[74] The plaintiff asked the Court to make a ruling on the government's obligations to ensure bilingual police services all along the Trans-Canada Highway, by analogy with the national parks where bilingualism is required by reason of the "mandate of the office". I do not feel I am in a position to decide on a measure of such a scale, based on the evidence before me. The evidence before this Court dealt solely with the territory served by the RCMP, Amherst detachment, and with the Regulations in general. I cannot rule on the situation of the Trans-Canada Highway which, as everyone knows, extends for thousands of kilometres across Canada.

[75] Moreover, I am somewhat sceptical in face of the plaintiff's argument. It is true that the Trans-Canada Highway unites this great country and it is true that Anglophones and Francophones use it to visit other provinces, but I recognize that it is likely that in many regions much of the traffic on the Trans-Canada Highway remains quite local. Consequently, I will not rule on this point. The choice of offering services in both official languages in accordance with a "significant demand" or "the mandate of the office" is, in my opinion, an eminently political one. Parliament has mandated the Governor in Council to choose which institutions will be covered by the notion of "mandate of the office", and it is not for the judiciary to make that choice.

[76] I cannot, however, disregard a significant demand that is not recognized by the authorities, but which clearly exists. The RCMP is a federal institution, whose central office is required by law to offer services in both official languages. An RCMP detachment is regarded as an "office" for the purposes of the *Charter* and the *OLA*. When an RCMP detachment provides policing services in Canada, it is important to consider the function it is charged with in the community in which it is located. In the case at bar, one of the RCMP's important duties is to patrol a busy highway, where there is undoubtedly a demand for services in French.

[77] The *Regulations* should, therefore, be amended to take into account circumstances such as those present in this case: a major highway, used significantly by people of a minority official language, and patrolled by a police force under the authority of the Canadian government. Under such circumstances, defining the "significant demand" in terms of the demographics of the detachment's location is clearly inadequate, since the RCMP is expected not only to deal with residents of the area, but also to serve all non-residents who use the highway. Given the geographic location of Amherst, Nova Scotia, bordering New Brunswick, and the large French population nearby, it is clear that the RCMP must take into account the need to offer services in French, the minority official language.

[78] It is the responsibility of the Governor in Council to find the appropriate language to resolve this problem. It is clear that the expression "travelling public" under section 23 of the *OLA* must be defined more broadly than to include only travellers using airports, railway stations or ferry terminals, and that travellers using major highways must also be considered when they number in the millions

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7. (1) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public, other than air traffic control services and related advisory services, from an office or facility of a federal institution in an official language where the facility is an airport, railway station or ferry terminal or the office is located at an airport, railway station or ferry terminal and at that airport, railway station or ferry terminal over a year at least 5 per cent of the demand from the public for services is in that language.

7. (2) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public from an office or facility of a federal institution in an official language where the office or facility provides those services on a route and on that route over a year at least 5 per cent of the demand from the travelling public for services is in that language.

7. (3) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public, other than air traffic control services and related advisory services, from an office or facility of a federal institution in both official languages where the facility is an airport or the office is located in an airport and over a year the total number of emplaned and deplaned passengers at that airport is at least 1,000,000.

7. (4) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public from an office or facility of a federal institution in both official languages where

(a) the facility is a railway station that serves the travelling public and

(i) is located in a CMA that has at least 5,000 persons of the English or French linguistic minority population, or

(ii) is located outside a CMA and within a CSD that has at least 500 persons of the English or French linguistic minority population and the number of those persons is equal to at least 5 per cent of the total population of the CSD;

(b) the facility is a ferry terminal located in Canada and over a year the total number of arriving and departing passengers at that ferry terminal is at least 100,000;

(c) the office or facility provides those services on board an aircraft

(i) on a route that starts, has an intermediate stop or finishes at an airport located in the National Capital Region, the CMA of Montreal or the City of Moncton or in such proximity to that Region, CMA or City that it primarily serves that Region, CMA or City,

(ii) on a route that starts and finishes at airports located in the same province and that province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province, or

(iii) on a route that starts and finishes at airports located in different provinces and each province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province;

(d) the office or facility provides those services on board a train

(i) on an interprovincial route that starts in, finishes in or passes through a province that has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province, or

(ii) on a route that starts and finishes at railway stations located in the same province and that province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province; or

(e) the office or facility provides those services on board a ferry on a route on which over a year there are at least 100,000 passengers.

SEE ALSO:

Norton v. Via Rail Canada, 2009 FC 704 (CanLII)

Part II – Nature of the Office

8. Health, Safety and Security of the Public

8. For the purposes of paragraph 24(1)(*a*) of the Act, the circumstances that relate to the health, safety or security of members of the public are the following:

(a) where an office or facility of a federal institution provides emergency services, including first aid services, in a clinic or health care unit at an airport, railway station or ferry terminal;

(b) where an office or facility of a federal institution uses signage that includes words or standardized public announcements regarding health, safety or security in respect of

(i) passengers on aircraft, trains or ferries,

(ii) members of the public at airports, railway stations or ferry terminals, or

(iii) members of the public in or on the grounds of federal buildings; and

(c) where an office or facility of a federal institution uses written notices or signage that includes words for alerting the public to hazards of a radioactive, explosive, chemical, biological or environmental nature or to other hazards of a similar nature.

9. Location of the Office

9. For the purposes of paragraph 24(1)(*a*) of the Act, the circumstances that relate to the location of an office or facility of a federal institution are the following:

(a) where the office or facility is located in a park as defined in the *National Parks Act* or on land set aside as a National Historic Park in accordance with Part II of that Act and the office or facility does not provide the services referred to in paragraph (*b*);

(b) where the office or facility is located in a park or on land referred to in paragraph (*a*), the office or facility is one of two or more offices or facilities in the park or on the land that provide the services of a post office and those services are not available in both official languages at least one of those offices or facilities;

(c) where the office or facility is located in such proximity to a park or land referred to in paragraph (*a*) that it provides specific services for visitors to the park or land and those services are not available in that park or on that land;

(d) where the office or facility is located in the Yukon Territory, serves the public generally and, of all offices or facilities of the institution in the Yukon Territory, is the office or facility at which over a year there is the greatest number of persons using the French language to request services; and

(e) where the office or facility is located in the Northwest Territories, serves the public generally and, of all offices or facilities of the institution in the Northwest Territories, is the office or facility at which over a year there is the greatest number of persons using the French language to request services.

SEE ALSO:

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

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10. National or International Mandate of the Office

10. For the purposes of paragraph 24(1)(*a*) of the Act, the circumstances that relate to the national or international mandate of an office of a federal institution are the following:

(a) where the office is a diplomatic mission or consular post;

(b) where the office is responsible for organizing or hosting an exposition, fair, exhibition, competition or game of national or international scope that is open to the public;

(c) where the office participates in an event referred to in paragraph (*b*);

(d) where the office is located in a province at a place of entry into Canada and is, of all offices located at a place of entry in that province, the office that in a year provides immigration services to the greatest number of persons seeking to come into Canada; and

(e) where the office provides services other than immigration services and is located in a province at a place of entry into Canada, other than an airport, that is the place of entry, other than an airport, where in that province the greatest number of persons come into Canada in a year.

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11. Other Circumstances

11. For the purposes of paragraph 24(1)(*b*) of the Act, the circumstances in which it is reasonable that communications with and services from an office or facility of a federal institution be available in both official languages are the following:

(a) where the office or facility serves one or more entire provinces and those services are

(i) correspondence services,

(ii) toll-free long-distance telephone services, or

(iii) local telephone services, if the office or facility provides the same services by toll-free long-distance telephone;

(b) where those communications and services are made available by the office or facility through an automated system accessible to the public and the communications and services are directly related to the operation of the system or consist of providing material or information that originated with the institution; and

(c) where those communications and services are the provision in an airport, railway station or ferry terminal of signage, including information display systems with respect to aircraft, train or ferry transportation services or baggage pick-up.

Part III – Contract for Services to the Travelling Public (section 12)

12. (1) For the purposes of subsection 23(2) of the Act, services to the travelling public are the following:

(a) restaurant, cafeteria, car rental, travel insurance, ground transportation dispatch, foreign exchange, duty free shop and hotel services;

(b) self-service equipment, including automated banking machines and vending machines, and the provision of instructions for the use of public telephones and electronic games; and

(c) passenger screening and boarding services, public announcements and the provision of other information to the public, and carrier services, including counter services for tickets and check-in but excluding carrier services in respect of buses provided at railway stations or ferry terminals.

12. (2) Where a service referred to in subsection (1) is provided by means of printed or pre-recorded material, such as signs, notices and menus, car rental contracts and travel insurance policies for the travelling public, the material shall be provided in both official languages.

12. (3) Where a service referred to in subsection (1) is provided by means other than those referred to in subsection (2), the service shall be offered to the travelling public by such means as will enable any member of that public to obtain those services in the official language of his or her choice.

Part IV – Effective Date (section 13)

13. (1) Sections 1 to 4, paragraphs 5(1)(*a*) to (*c*), (*e*) to (*j*), (*l*), (*m*), (*o*) and (*p*), subsections 5(2) and (4), paragraphs 6(2)(*b*) and (*c*), subsections 7(3) and (4), section 8, paragraphs 9(*a*) to (*c*) and sections 10 and 11 shall come into force one year after the date of registration of these Regulations by the Clerk of the Privy Council.

13. (2) Paragraphs 5(1)(*d*), (*k*), (*n*), (*q*) and (*r*), subsection 5(3), paragraphs 6(1)(*a*), (*c*) and (*d*), subsections 7(1) and (2) and paragraphs 9(*d*) and (*e*) shall come into force two years after the date of registration of these Regulations by the Clerk of the Privy Council.

13. (3) Paragraphs 6(1)(*b*) and (*e*) and (2)(*a*) and (*d*) and section 12 shall come into force three years after the date of registration of these Regulations by the Clerk of the Privy Council.