

Federal Court



Cour fédérale

Date: 20240112

Docket: T-535-23

Citation: 2024 FC 53

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 12, 2024

PRESENT: Madam Justice St-Louis

BETWEEN:

NATIONAL POLICE FEDERATION

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The National Police Federation [the Federation] is applying for a court remedy under subsection 77(1) of Part X of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [the Act] for compensation.

[2] The Federation submits that the policies of the Royal Canadian Mounted Police [RCMP] discourage equal opportunities for advancement for English and French members of the RCMP. Therefore, the Federation is seeking an order that considers the merits of its complaint filed with the Office of the Commissioner of Official Languages on March 12, 2021, and added to on August 18, 2021.

[3] In this complaint, the Federation submits that the RCMP's internal policies, including the *Career Management Manual* [the Manual], are inconsistent with the Treasury Board of Canada's *Directive on Official Languages for People Management* [the Directive] and that these internal policies therefore do not comply with the Act (the relevant provisions of the Manual and Directive are reproduced in the Appendix). In particular, the Federation contends that the RCMP's policy set out in the Manual requiring that candidates in a staffing process meet the language requirements as soon as the advertisement is closed is contrary to the Directive, as the Directive requires that candidates meet the language requirements "at the time that they are appointed". In this complaint, the Federation also alleges that the language requirements of the staffing actions have not been objectively established and that, taking into account the duties and responsibilities associated with the positions, the language profiles for this series of positions should be lowered, thus bringing section 91 of the Act into play.

[4] On January 19, 2023, the Commissioner issued his final report. He concluded that the policy set out in the Manual is not contrary to the Directive because [TRANSLATION] "[a]s per the Directive, staffing a position with a candidate who does not meet the language requirements is only acceptable in limited circumstances" and "staffing positions with an individual who meets the language requirements of the position is the general rule" (Tab 22 of the Affidavit

Stéphane Laframboise sworn on April 28, 2023, Applicant's Record, Volume I at 637). The Commissioner further concluded that the section of the complaint regarding one of the staffing processes is well founded, given the obligations under section 91 of the Act that require that a language profile be objectively required and justified, and the Commissioner recommended that the RCMP review its language requirements for this position. This part of the complaint regarding the objectiveness of language profiles associated with certain positions under section 91 of the Act is not before the Court; it is not the subject of this proceeding.

[5] Both parties agree that this application for a court remedy, filed under subsection 77(1) of the Act, is a *de novo* proceeding.

[6] Before the Court, the Federation submits that this litigation focuses on whether the RCMP is required to implement internal policies that are consistent with the directives issued by the Treasury Board under the Act and adds that this question must be answered in the affirmative. The Federation notes that the applicable Directive in the case at hand requires only that RCMP members meet the language requirements of the position being staffed as of the date of their entry into service, while the RCMP policies included in the Manual state that members must instead meet the language requirements of their position as of the closing date of the advertisement. The Federation therefore submits that the Manual unduly restricts the scope of language rights in staffing rather than giving them the large and liberal interpretation provided for in the Directive.

[7] The Federation submits that the Manual is inconsistent with the Directive and confirms that its remedy is based on alleged violations of paragraph 36(1)(c) of the Act, contained in Part V, and subsection 39(1) of the Act, contained in Part VI. The Federation states in particular that

the Court has jurisdiction to consider the remedy under subsection 39(1) of the Act despite the wording of subsection 77(1) of the Act, which does not include such a remedy, for the following reasons: (1) the dispute relates to language of work, which is covered by Part V of the Act; (2) the Directive has force of law and is the result of a duty imposed on the Treasury Board under subsection 46(3) of the Act as currently written; (3) section 46 of the Act refers to different parts of the Act, including Part VI; (4) because of the language of section 46, a remedy may be sought under section 77 of the Act; and (5) not allowing this remedy would result in bifurcated proceedings based on the same facts.

[8] The Federation requests the following orders under subsection 77(4) of the Act: (1) a declaration that the RCMP has failed to comply with the Act; (2) an order that the RCMP update all its internal policies, including the Manual, to reflect the requirements of the Directive without delay, specifically, that RCMP policies be updated to reflect the Directive, and that RCMP members only be required to meet the language requirements of the staffed position upon appointment to the staffed position; (3) an order that the RCMP send a letter of apology to members of the Federation and that this letter be posted on the RCMP website; (4) an award of costs to the applicant in this application; and (5) any other relief that this honourable Court considers appropriate and fair in the circumstances.

[9] The respondent, the Attorney General of Canada (AGC), responds that (1) the argument based on section 39 of Part VI is inadmissible and unfounded; (2) there is no contravention of Part V of the Act and, more specifically, paragraph 36(1)(c), on which Federation relies; (3) alternatively, the Federation has not demonstrated any inconsistency between the Manual and the

Directive; and (4) the Federation has not demonstrated that such inconsistency, if any, would be a violation of any provision of the Act.

[10] For the following reasons, the court remedy sought by the Federation will be denied. In summary, (1) the Federation has not submitted any evidence to support a remedy for an alleged violation of paragraph 36(1)(c) of the Act, contained in Part V; (2) the remedy sought under subsection 39(1) of the Act, contained in Part VI, is inadmissible since Part VI is not named in subsection 77(1) of the Act; (3) the Federation has not demonstrated that the Manual and Directive are inconsistent; and (4) even if I were to conclude that there is an inconsistency between the Manual and Directive, the Federation has not demonstrated that such an inconsistency violates the Act.

II. Analysis

A. *De novo proceeding*

[11] Through this proceeding, the Federation submits that it is the merits of the complaint filed with the Commissioner that are at issue, not the Commissioner's report (*DesRochers v Canada (Industry)*, 2009 SCC 8 at paras 34–36 [*DesRochers*]; *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, 2004 FCA 263 at paras 15–21 [*Forum des maires*]). Thus, and pursuant to subsection 77(4) of the Act, if the Court considers that the complaint does in fact have merit, it may grant such remedy as it considers appropriate and just in the circumstances.

[12] As for the interpretation principles applicable to language rights, I agree with the parties that language rights must be given a large and liberal purposive interpretation “in a manner

consistent with the preservation and development of official language communities in Canada” (*R v Beaulac*, [1999] 1 SCR 768 at para 25 [Beaulac]; *Mazraani v Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 at para 20; *Caron v Alberta*, 2015 SCC 56 at paras 35–38; *DesRochers* at para 31; *Solski (Tutor of) v Quebec (Attorney General)*, 2005 SCC 14 at para 20;).

[13] The Federation rightly adds that, as stated by the Supreme Court of Canada in *Beaulac*, language rights are positive rights that “can only be enjoyed if the means are provided” (*Beaulac* at para 20). Thus, the state has a duty to provide the means for ensuring equal access and the implementation of institutional bilingualism in federal institutions (*Beaulac* at para 20).

[14] However, the AGC notes that this does not mean that the ordinary rules of interpretation should be disregarded, and the words of the Act should be interpreted 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 v Air Canada*, 2014 SCC 67 at para 112; *Charlebois v Saint John (City)*, 2005 SCC 74 at para 23; *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 25).

[15] As the AGC notes in paragraph 26 of his Memorandum of Fact and Law, for its application to be successful, the Federation must demonstrate that the RCMP has failed to comply with one of the sections referred to in subsection 77(1) of the Act. Therefore, the burden of demonstrating a violation of a right or duty under the Act rests with the Federation.

B. *Remedy sought under subsection 39(1) of the Act*

[16] The Federation unequivocally confirmed at the hearing that its remedy relies on alleged violations of paragraph 36(1)(a) and subsection 39(1) and the Act. Section 39 is contained in Part VI of the Act, entitled *Participation of English-speaking and French-speaking Canadians*. I quote the sections as they were written at the appropriate time in the case at hand, as confirmed by the parties. Section 39 then provides as follows:

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.

Job opportunities

(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.

Merit principle

Engagement

39 (1) Le gouvernement fédéral s'engage à veiller à ce que :

a) les Canadiens d'expression française et d'expression anglaise, sans distinction d'origine ethnique ni égard à la première langue apprise, aient des chances égales d'emploi et d'avancement dans les institutions fédérales;

b) les effectifs des institutions fédérales tendent à refléter la présence au Canada des deux collectivités de langue officielle, compte tenu de la nature de chacune d'elles et notamment de leur mandat, de leur public et de l'emplacement de leurs bureaux.

Possibilités d'emploi

(2) Les institutions fédérales veillent, au titre de cet engagement, à ce que l'emploi soit ouvert à tous les Canadiens, tant d'expression française que d'expression anglaise, compte tenu des objets et des dispositions des parties IV et V relatives à l'emploi.

Principe de mérite

(3) Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit. (3) Le présent article n'a pas pour effet de porter atteinte au mode de sélection fondé sur le mérite.

[17] The Federation has confirmed that its application before the Court is made under subsection 77(1) of the Act:

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.

Recours

77 (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

[18] Thus, according to the clear language of the Act, Part VI, in which section 39 is found, is not among the rights or duties listed in subsection 77(1) and which may serve as a basis for a remedy. At paragraphs 25 to 28 of its decision *Forum des maires*, the Federal Court of Appeal confirms that any court remedy based on provisions not listed in subsection 77(1) of the Act cannot be the subject of an application.

[19] The Federal Court of Appeal confirms as follows at paragraph 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.

[20] The Federation has not satisfied me that it is appropriate to depart from the clear language of the Act by relying on section 46 of the Act to allow it to apply for a remedy under subsection 77(1). In this regard, I note in particular that (1) section 46 was amended in 2023, and the version of section 46 of the Act that applied at the appropriate time does not contain subsection 46(3) cited by the Federation and does not impose a duty on the Treasury Board. This provision therefore cannot be used to support the argument that the Directive has force of law; and (2) section 46 of the Act is contained in Part VIII of the Act, which is also not named in subsection 77(1) of the Act.

[21] Moreover, the case law confirms that section 39 of the Act does not impose a duty on the Government of Canada (*Ayangma v Canada*, 2003 FCA 149 at para 31; *Frémy v Canada*, 2022 FC 750 at para 46 [*Frémy*]; *Norton v Via Rail Canada*, 2009 FC 704 at paras 96, 117; *Lavoie v Canada (Attorney General)*, 2007 FC 1251 at para 40). In *Frémy*, Gagné A.C.J notes that “it is a given that sections 39 and 62 of the OLA should be considered ‘statement[s] of commitment by the Government of Canada’ and not sources of obligation for the government” (*Frémy* at para 46).

[22] Therefore, I conclude that the remedy sought under subsection 39(1) of the Act is inadmissible and unfounded.

C. *Remedy sought under paragraph 36(1)(c) of Part V of the Act*

[23] Paragraph 36(1)(c) of the Act provides as follows:

Minimum duties in relation to prescribed regions

36 (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(a), to

...

(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.

Obligations minimales dans les régions désignées

36 (1) Il incombe aux institutions fédérales, dans la région de la capitale nationale et dans les régions, secteurs ou lieux désignés au titre de l'alinéa 35(1)a) :

...

c) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues.

[24] However, the Federation has submitted no evidence alleging a violation of this provision.

None of the three affidavits filed by the Federation contains an allegation that the affiant was unable to communicate with his managers or supervisors as required by paragraph 36(1)(c). Each of the affiants simply states that the Federation is of the view that the requirements and policies related to the language requirements of the RCMP staffing process do not promote equal opportunities for advancement for English-speaking and French-speaking members (Affidavit of Stéphane Laframboise sworn on April 28, 2023, at paragraph 4; Affidavit of David Lalonde sworn on April 28, 2023, at paragraph 25; and Affidavit of Clay Wortman sworn on April 28, 2023, at paragraph 15; Applicant's Record, Volume I at 9, 647, 1172).

[25] The Federation relies specifically on paragraph 36(1)(c) of the Act to apply for a remedy but does not present evidence of how the RCMP violated a duty set out in that paragraph of the Act. The Federation does not allege any other specific violation of Part V in its Memorandum of Fact and Law, nor did it identify the relevant evidence or raise an argument in this regard at the hearing.

D. *Alleged inconsistency between the Directive and the Manual*

[26] The AGC cites the following definition of inconsistency, that is, the test set out by the Supreme Court of Canada in *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3rd) 1:

In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says “yes” and the other says “no”; “the same citizens are being told to do inconsistent things”; compliance with one is defiance of the other.

[27] In the case at hand, the Federation has not demonstrated that the provisions of the Manual and Directive are directly contradictory. It is possible to comply with both: one of them merely precedes the other as regards the moment by which the language requirements of a position must be fulfilled.

[28] However, in any event, even if the provisions of the Manual and Directive were found to be inconsistent, the Federation bore the burden of demonstrating that the alleged inconsistency constitutes a violation of the rights and duties under the Act, and specifically in the case at hand, that it constitutes a violation of the rights and duties set out in subsection 77(1) of the Act.

[29] The Federation has not demonstrated this in the case at hand. The application for remedy will therefore be dismissed. Costs will be awarded to the AGC and, in accordance with the agreement between the parties, will be set at a lump sum of \$3,500.00.

JUDGMENT in T-535-23

THIS COURT'S ORDER is as follows:

1. The National Police Federation's application for remedy is dismissed.
2. Costs in the amount of \$3,500.00 are awarded to the Attorney General of Canada.

“Martine St-Louis”

Judge

Certified true translation
Michael Palles

III. APPENDIX

A. Relevant provisions of the *Career Management Manual*

CMM – Chapter 3. Transfers and Deployments

13.1.2.4. **Priority I** means the position is designated bilingual, requiring the immediate use of both official languages, and must be staffed with a member who meets the language requirements.

13.1.2.5. **Priority IS** means the position is designated as bilingual and its linguistic profile requires a “C” level in one or more abilities. The member does not have to meet the linguistic profile at the appointment date, but must have valid SLE results at the BBB level at the time of application. If the selected member does not meet the language requirements of the position, he/she must commit to undergo language training in order to attain the required proficiency level within one year from the date of transfer/appointment. The member will be required to sign Statement of Agreement to Become Bilingual, Form 2164.

...

13.1.4. A member will not be considered for a Priority I or Priority IS staffing action unless his/her SLE results are valid on the closing date of the job advertisement, or when the lateral candidate is selected from HRMIS, and remain valid until the transfer notice/appointment is approved by the Delegated Manager for HR/delegate.

CMM – Chapter 4. Promotion

[TRANSLATION] 10.1.10. The results of the member’s second language test must be valid as of the closing date of the Job Opportunity Bulletin, unless the CHRO (or their representative) grants an extension due to mitigating circumstances. See CMM, c 3, Transfers and Deployments, s 13.

...

10.8.12. Members who apply to an advertisement and meet all of the requirements, other than the required competencies, will advance to the competency-validation stage.

CMM – Chapter 5. Job Descriptors and Job Requirements

[TRANSLATION] 6.1.8.2.1. Only members whose last results for the Second Language Evaluation (SLE) are current and valid at the job advertisement closing date and remain valid until the member is selected will be considered. It is the candidate’s responsibility to ensure that their SLE results are up to date.

- B. Relevant provisions of the Treasury Board of Canada's *Directive on Official Languages for People Management*

5.2 Expected results

Appropriate measures are in place to ensure that:

5.2.1 language-of-work rights of employees are respected;

5.2.2 the linguistic identification of positions is based on a consideration of the tasks to be performed or implements predetermined linguistic requirements for executive positions;

5.2.3 bilingual positions are staffed with candidates who meet the language requirements at the time that they are appointed, unless exceptional staffing situations exist;

5.2.4 English-speaking and French-speaking Canadians have equal opportunities for employment and advancement in the institution while respecting the merit principle as set out in section 39 (3) of the OLA.

...

6.3 Staffing bilingual positions

Managers are responsible for the following:

6.3.1 (Identification) Establishing the linguistic identification of the position before beginning a staffing process.

6.3.2 (General rule) Staffing bilingual positions with candidates who meet the language requirements at the time that they are appointed.

6.3.3 (Exception to the general rule) In exceptional staffing situations, applying the following measures when a bilingual position is staffed with a candidate who does not meet the language requirements:

- 6.3.3.1 (Language training) Ensuring language training is provided as soon as possible so the candidate can acquire the second-language skills required.
- 6.3.3.2 (Accommodation) Ensuring steps are taken to accommodate an individual with a disability or an identified learning disability that may hinder learning the other official language.
- 6.3.3.3 (Measures) Putting in place measures to fulfil the tasks and functions linked to the position while the person occupying the position does not meet the language requirements.

6.3.4 (Special cases) Ensuring that bilingual positions are always staffed with a candidate who meets the language requirements of the position in the following cases:

- When the position is staffed for a specified period;
- When the position requires technical or specialized language proficiency;
- When a bilingual position is indispensable for providing services to the public or employees in both official languages

Deputy heads or delegated managers are responsible for:

6.3.5 (Specific requirements) Applying the additional requirements listed at Appendix 2 (Staffing rules) for institutions subject to the PSEA.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-535-23

STYLE OF CAUSE: NATIONAL POLICE FEDERATION v CANADA
(ATTORNEY
GENERAL)

PLACE OF HEARING: OTTAWA, ONTARIO

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DATED: JANUARY 12, 2024

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