Federal Court  Cour fédérale

Date: 20090909

Docket: T-1280-02

Citation: 2009 FC 704

Ottawa, Ontario, September 9, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

BRIAN NORTON

Applicant

and

VIA RAIL CANADA INC.

Respondent

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

[1] By this application under section 77 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (the OLA), the applicant, Mr. Brian Norton, challenges the legality of VIA Rail Canada Inc. (VIA)'s bilingual requirements for the Service Manager (SM) and Assistant Service Coordinator (ASC) positions on train routes that have not been designated as bilingual by the Treasury Board Secretariat (TBS).

[2] The application is dismissed. For ease of reference, relevant legislative or regulatory provisions referred to in these reasons are reproduced in an Annex.

I. COMPLAINT TO THE COMMISSIONER

[3] The applicant has been employed by VIA since May 4, 1981. He works as an on-board service employee and is based in Winnipeg. In Western Canada, VIA services consist of the *Canadian,* its legendary transcontinental train running between Vancouver and Toronto (the Western Transcontinental), which caters mainly to the domestic and foreign tourism markets. VIA also operates four "remote routes", which include the runs between Winnipeg and Churchill (the Hudson Bay), and Jasper and Prince Rupert (the Skeena). On or around January 20, 2000, the applicant made a complaint under section 58 of the OLA to the present intervener, the Commissioner of Official Languages (the Commissioner).

[4] In his complaint, the applicant alleged that he had been discriminated against by VIA because he was an English-speaking unilingual employee. His complaint reads as follows:

> I am writing to lodge a complaint against VIA Rail Canada Inc. which has discriminated against me based on language.
>
> Since 1986, VIA Rail has imposed a bilingual hiring policy on its new employees and has established two positions as bilingual which has prevented me from obtaining promotion within the company. The two positions by which I am affected are Assistant Service Coordinator and Service Manager. When VIA Rail adopted the policy of bilingualism, they failed to provide to myself, a unilingual employee, training, so that I might upgrade my language abilities and have opportunity to qualify for these bilingual positions.

Although the Assistant Service Coordinator replaced the former Passenger Services Assistant, the new position was placed in the dining car and caused the removal of a unilingual position from that work area.

VIA Rail offered French language training to employees prior to 1988, the last classes ended in 1987. Classes were substituted by a correspondence course which comprised of 7 levels and books to be completed on my own time with teachings being regulated over the phone every six weeks. This form of course does not enable one to be fully immersed in the French language in order to efficiently converse and qualify as bilingual within a reasonable period of time. The course takes approximately 4-6 years to complete.

My wages have been affected since the opportunity for career advancement have precluded failure by this correspondence course. Junior bilingual employees have held full time, year round positions which are between $3.00-$8.00 greater than a unilingual position and I have either been laid off annually or prevented from occupying bilingual positions because of language.

In recent years, VIA Rail reclassified its Service Manager position making it also bilingual. In doing so, the corporation reclassified unilingual positions once again in favour of the French language. Although training is being offered in the classroom this time, to be eligible for the French training for the Service Manager, one must already be a Service Manager. In negotiations for our contract in 1998, it was agreed that unilingual employees would have the opportunity to qualify as Service Managers then go on to French language training in order to qualify for the position. In Western Canada, VIA management would not permit unilinguals to interview for this position (even though the training application still states preference given to) and only accepted bilingual even though French language training would have been offered to successful unilingual candidates.

I have been prevented in every way, since VIA Rail went bilingual, from achieving the highest pay scale one can reach and been denied the opportunity for acceptable language training. My income and pension is suffering because of this discriminatory act of this corporation and my self-esteem and pride I generally exhibit for this crown corporation is diminishing.

> It is my understanding that when the bilingual laws of the land came into effect, that those working under federal jurisdiction would be given French language training and that the new jobs would be phased in objectively with minimal impact so that opportunity in the workplace would not be denied.
>
> My opportunities have been denied and I feel that I have been discriminated against on the basis of language. I respectfully request that you assist me in taking VIA Rail to task for the wrong which they have committed against me.

[5] The SM and ASC positions mentioned in the complaint are two front-line positions staffed by on-board service personnel. Similar complaints have been made by 38 other English-speaking on-board service employees based in Winnipeg or Vancouver. All are bound by the terms of "Collective Agreement No. 2 Covering On-Board Service Employees" (the on-board collective agreement) between VIA and the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW).

[6] The applicant's complaint is identical to that of Margaret Temple. Ms. Temple, who made a similar application, Court file T-1165-02, was at the time the local chairperson of the CAW in Winnipeg. In her oral presentation to the Court, she explained that a group of unsatisfied unilingual employees got together and she, in collaboration with Mr. Stan Pogorzelec, who was acting as the Regional Bargaining Representative of the CAW, covering all of Western Canada, drafted a formal complaint. The facts leading to their dispute with VIA are set out in the following section.

II. FACTS LEADING TO THE DISPUTE

[7] VIA was created in 1978 as a Crown corporation to provide Canadians with year-round safe and efficient passenger rail services to both large and small communities, including many where rail travel is the only transportation available. Contrary to its private sector counterparts, VIA is an important instrument of government policy in transportation, employment and promotion of linguistic duality and bilingualism in Canada.

[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.

[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.

[10] In 1986, with the encouragement of the Commissioner, VIA introduced a policy of hiring bilingual persons in front-line positions. Its purpose was to increase bilingual capacity amongst personnel and the availability of bilingual services to its clientele. Since then, VIA has maintained its corporate commitment to providing uniform service throughout Canada, and to protecting the safety and welfare of its passengers by ensuring a bilingual presence on its trains. On this issue, VIA has historically taken a pragmatic approach which consists of designating specific front-line positions as bilingual only when the *status quo* has failed to fulfill bilingual needs across the system, as reflected in Appendix 6 of the on-board collective agreement.

[11] Thus, the majority of front-line positions on-board trains have not been designated bilingual by VIA. Indeed, prior to 1998, only one position, that of the ASC, had been designated bilingual since its creation in 1986 in order to assure a minimum bilingual presence on VIA trains for safety reasons.

[12] Among the front-line positions that have never been designated bilingual are the former position of SM, whose duties were substantially affected in 1998 by the New ERA Passenger Operations (NEPO) initiative described below, and the positions of Service Coordinator (SC), Activity Coordinator (AC), Senior Service Attendant (SSA) and Service Attendant (SA). In addition

to being qualified as an AC, a SC and a SSA, the applicant is also qualified as chef and cook, two positions which are not front-line positions.

[13] Traditionally, Canadian railway employees in the “running trades” - those engaged in the operation of trains - were grouped, for purposes of collective bargaining, into two broad categories: locomotive engineers and conductors. For decades, these crafts were represented by different bargaining agents; the engineers by the International Brotherhood of Locomotive Engineers (the BLE) and the conductors by the United Transportation Union (the UTU). Each was party to a series of collective agreements and other arrangements negotiated with the Canadian Pacific Railway (CPR), Canadian National (CN), and their successor in providing passenger services, VIA. Other office and train employees were members of different bargaining units, one of which is the train service employees of on-board services, including corporate employees engaged in the preparation of food and beverage for service on trains, which are currently represented by CAW.

[14] In the nineties, despite its bilingual hiring policy and the bilingual designation of the ASC position, VIA continued to be under considerable external pressure, notably from the Commissioner, to provide adequate bilingual services to the travelling public in stations and trains. In 1991, an action for a mandatory order was brought to this Court by the Commissioner to correct alleged deficiencies in the French language services offered to the travelling public in the Montreal-Ottawa-Toronto triangle: *Commissioner of Official Languages v. VIA Rail Canada Inc.*, Federal Court file T-1389-91. At that time, VIA claimed that seniority provisions in various collective agreements prevented it from acting. Indeed, rigid assignment or organizational work rules

negotiated with trade unions or inherited from its predecessors were restraining VIA's provision of bilingual services in different parts of Canada. In 1997, the Court's proceeding was suspended to give VIA the opportunity to negotiate new work rules with the unions and reach a satisfactory resolution.

[15] In 1998, VIA implemented the NEPO initiative as part of its corporate commitment to provide uniform service in both official languages throughout Canada and ensure adequate bilingual presence on its trains. As a result, train crews were re-organized; more specifically, the NEPO initiative merged the train conductors' operating responsibilities with those of the locomotive engineer and assigned safety responsibilities to the person occupying the position of SM. The crewing initiatives implemented as a result of NEPO were nationwide and were not limited to the Western region. NEPO involved not only on-board service employees represented by CAW but other groups of employees represented by other trade unions as well.

[16] VIA's efforts to provide better bilingual services came to fruition with the NEPO initiative, as subsequently reported by the Commissioner in her annual report, where it is noted that the role of seniority in designating the members of a work unit was diminished in favour of ensuring that members of the public could be served in either French or English (see *Language Rights 1999-2000*, Commissioner of Official Languages, Minister of Public Works and Government Services Canada, 2001, website: <http://www.ocol.gc.ca>). Indeed, some eight years after the institution of the action for a mandatory order against VIA, as appears from the Court's record, a Notice of discontinuance was filed by the Commissioner on June 21, 1999.

[17] In view of the NEPO initiative, the former unilingual position of SM was abolished and VIA and CAW agreed in a Memorandum of Agreement dated March 11, 1998 (the 1998 Memorandum) to the creation of three new bilingual SM classifications (SM-Transcontinental, SM-Corridor and SM-Remote) (see articles 2, 3, 4, 5 and 6 of the 1998 Memorandum). Furthermore, there was the introduction of a second ASC position on-board the Western Transcontinental to ensure a bilingual presence while the SM is on night rest (see article 12 of the 1998 Memorandum).

[18] Upon implementation of the NEPO initiative in July 1998, VIA had 24 regular assignments: 31 employees had been trained as SM. By the end of 1998, it had 37 trained employees. The applicant was not one of those employees. That said, in regard to French language training, VIA and the CAW agreed in the most recent round of negotiations that 10 language training opportunities per year would be made available to Union members system-wide for 2005 and 2006, with specific reference to employees seeking to work as SMs on the Skeena.

[19] Thus, for the on-board service employees who could qualify for the newly created positions, the NEPO initiative meant additional work opportunities and a salary increase. Conversely, it represented in turn a loss of work or reduction of responsibilities for the running trade employees whose positions and bargaining units had been merged (locomotive engineers and train conductors). In particular, for train conductors whose responsibilities in respect of safety were transferred to the SMs, the NEPO initiative had dramatic effects. Indeed, a group of former train conductors (formerly represented by the UTU) made a complaint of unfair representation against BLE (their new

bargaining agent) to the Canada Industrial Relations Board (the Board), following the negotiation with VIA of the 1998 crewing agreement which severely limited their chances of being qualified to occupy the new position of locomotive engineer.

[20] The Board's decisions to accept the complaint and to order corrective actions against both VIA and the BLE resulted in a long and complex legal battle (see *VIA Rail Canada Inc. (Re)* (1998), 45 C.L.R.B.R. (2d) 150, 107 di 92; *VIA Rail Canada Inc. v. Cairns*, [2001] 4 F.C. 139 (C.A.), leave to appeal to the S.C.C. refused [2001] C.S.S.R. No. 338 (QL) (*Cairns 1*); (*Cairns (Re)*, [2003] CIRB No. 230, [2003] C.I.R.B.D. No. 20 (QL); *VIA Rail Canada v. Cairns*, [2005] 1 F.C.R. 205 (C.A.), leave to appeal to the S.C.C. refused [2004] S.C.C.A. No. 358 (QL) (*Cairns 2*)).

[21] In sharp contrast, after more than ten years, no complaint of unfair representation has been filed by on-board service employees against the CAW as a result of the NEPO initiative or the conclusion of the 1998 Memorandum. That said, Ms. Temple indicated to the Court last April 2009 that applicants could file to the Board a complaint of unfair representation if this Court were to conclude that the bilingual requirements for the SM and ASC positions were contrary to the linguistic rights of unilingual employees in 1998.

III. INVESTIGATION AND REPORT BY THE COMMISSIONER

[22] Before the Commissioner, the 39 complainants directly questioned the validity of bilingual designations made under the 1998 Memorandum, which was expressly negotiated and agreed to by the CAW in the course of mediation conducted in April 1998 by former arbitrator George W.

Adams. In their concerted attack against both VIA's hiring policy and the bilingual requirements for the SM and ASC positions on all trains running in Western Canada, including the Western Transcontinental, the complainants nevertheless acknowledged that VIA had linguistic obligations to the travelling public.

[23] However, the complainants submitted that up to 75% of employees on the Western Transcontinental were already bilingual (a figure which has been challenged by VIA). In their view, bilingual capacity among trained crews had reached a point where VIA could ensure the availability of services to passengers in both official languages without adversely affecting the advancement and employment opportunities of unilingual employees. While recognizing that VIA was taking certain measures to assist unilingual employees, most notably in relation to second-language training, they considered the measures inadequate.

[24] Given that the employment policies and practices that were the subject of the 39 complaints affected only Anglophone employees and given that train crew assignments were deemed to constitute staffing actions, the allegations made by the 39 complainants were investigated by the Commissioner on the basis of sections 39 and 91 of the OLA, taking into account VIA's linguistic obligations to the travelling public in Western Canada.

[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.

[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 polices 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 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.

[27] Moreover, with respect to the scope of linguistic obligations, the Commissioner heavily relied on Burolis, which is the Government of Canada's database that lists those offices outside the National Capital Region that the TBS considers to meet the criteria of "significant demand" under the *Official Languages (Communications with Services to the Public) Regulations*, SOR/92-48 (the Regulations). At the time of the complaints, the Western Transcontinental was designated by TBS

as a “bilingual office”, apparently on the basis that it was on an interprovincial route that started in, finished in or passed through a province that had an English or French linguistic minority population that was equal to at least five per cent of the total population in the province (see subparagraph 7(4)(*d*)(i) of the Regulations). On the other hand, the Western remote routes were not designated by TBS as bilingual, apparently on the basis that there was less than 5% of the demand from the travelling public for services in the French minority language (see subsection 7(2) of the Regulations).

[28] The Commissioner took two years or so to complete its investigation.

[29] On or around June 12, 2002, the applicant was notified of the release of the Commissioner’s final report entitled “Final Investigation Report on Language Requirements and Related Issues concerning VIA Rail in Western Canada”, May 2002 (the final report). Except in one case not related to this application, there is no specific finding with respect to the merits of any individual complaint or any particular staffing action. The complainants are treated as a group, as are their allegations. The Commissioner found in this regard that some of the common allegations about VIA’s policies and practices related to language requirements on trains in Western Canada were well-founded, while others were not.

[30] The common unfounded allegations concerned the Western Transcontinental’s SM position and participation levels in the region. Indeed, the Commissioner considered that both VIA’s linguistic obligations to the travelling public and the SM’s role and duties supported the position’s

bilingual requirements on the Western Transcontinental. VIA's linguistic obligations also accounted for a relatively high level of Francophone participation among the employees in question, given the demographic of the region's population.

[31] The Commissioner also supported the need for bilingual capacity for at least one ASC position on the Western Transcontinental; however, the bilingual requirements for a second ASC position on the Western Transcontinental were to a certain extent, in the Commissioner's view, contrary to section 91 and Part VI of the OLA.

[32] Moreover, the Commissioner was also of the opinion that bilingual requirements on SM and ASC positions assigned to remote routes that had not been designated as bilingual by TBS were to a certain extent contrary to section 91 and Part VI of the OLA and second language training should be provided if needed. The Commissioner also invited VIA to pursue discussions with TBS to have those routes designated as bilingual on other regulatory grounds that the significant demand criteria (such as for safety reasons).

[33] Other related issues discussed in the final report of the Commissioner concerned VIA's hiring policy and the limited number of language training openings in French since 1986.

[34] The Commissioner considered that VIA's obligations to the travelling public justified its policy of hiring only bilingual candidates for front-line positions and supported its continuation to

the extent that it was still necessary to meet its linguistic obligations, as well as other needs such as passenger safety.

[35] With respect to the alleged lack of language training opportunities, the Commissioner considered that the programme directed at former unilingual SMs affected by the NEPO initiative was consistent with the incumbents' linguistic rights. However, other language training initiatives had been misguided due to the strict application of the seniority principle (which notably had for effect that language courses were offered to employees who were not occupying front-line positions or were too close to retirement).

[36] As Ms. Temple, the former local chairperson of the CAW, explained in her oral presentation in Winnipeg, following the issuance of the Commissioner's final report, five days before the expiration of the 60 day delay to make an application to the Court, the CAW, at the national level, decided to "withdraw their support [to the 39 complainants] because they did not want to be involved in a dispute between the company and the Official Languages Act".

[37] On August 9, 2002, the applicant made the present application.

IV. APPLICATION FOR REMEDY TO THE COURT

[38] The present proceeding is not an application for judicial review. It is a *sui generis* application in regard to a "remedy" specifically provided for by section 77 of the OLA

(*Marchessault v. Canada Post Corp*., 2003 FCA 436, [2003] F.C.J. No. 1723 (QL) at paragraph 10) and is designed:

(a) to verify the merits of a complaint before the Commissioner in view of an alleged breach of the rights and duties provided under the OLA; and

(b) to secure relief, where applicable, that is appropriate and just in the circumstances.

[39] Before this Court, the applicant has considerably narrowed the scope of his original complaint by limiting his attack to the legality of the ASC and SM bilingual requirements on the Western remote routes (the challenged staffing actions). The applicant essentially submits today that VIA acted in a discriminatory or arbitrary manner in 1998 and did not use objective criteria in taking the challenged staffing actions, which are contrary to sections 39 and 91 of the OLA. In this respect, the applicant submits that VIA's linguistic obligations to the travelling public in Western Canada are limited to the Western Transcontinental, which is designated bilingual by TBS, in contrast to the Western remote routes, which are not designated bilingual by TBS (see Burolis). Where bilingual requirements for the staffing of a position are not based on VIA's linguistic obligations, it is therefore unfair to exclude otherwise qualified unilingual employees without providing them with appropriate language training that would allow them to fulfill the corporation's other responsibilities, such as safety. This includes the SM-Remote position and the ASC position on the Western remote trains, as well as the second ASC position on the Western Transcontinental, which the applicant submits he would have held from 1998 through to the present, because of his seniority rank.

[40] With respect to the remedies sought by the applicant, only the first, third and fourth recommendations of the Commissioner's report are relevant. They are that VIA:

> 1. Take the necessary steps to enable otherwise qualified unilingual employees to apply for bilingual Service Manager positions on non-designated routes and provide second-language training where needed;
>
> 3. In accordance with section 91 of the Official Languages Act and taking into account bilingual capacity among crews and existing flexibility, identify opportunities for assigning qualified unilingual employees to one of the two Assistant Service Co-ordinator positions on the Western Transcontinental while providing appropriate second-language training; and,
>
> 4. While pursuing discussions with the Treasury Board Secretariat concerning non-designated routes, take the necessary steps to enable otherwise qualified unilingual employees to apply for Assistant Service Co-ordinator positions on these routes and provide second-language training where deemed needed.

[41] Thus, the applicant confirmed at the hearing that he seeks the following remedies:

(a) a declaration that VIA has violated sections 39 and 91 of the OLA;

(b) an order enjoining VIA to comply with recommendations 1, 3 and 4 of the Commissioner's final report by providing the applicant with ASC and SM training, as well as French language training;

(c) monetary compensation for lost wages and reduced pension;

(d) damages for the humiliation and embarrassment suffered; and

(e) any other remedial order the Court considers appropriate and just in the circumstances.

[42] The application is opposed by the respondent. Subject to its objection that a labour arbitrator has exclusive jurisdiction or is better placed than the Court to hear and decide the matter in dispute, VIA submits that language requirements for the SM and ASC positions, which were agreed to by CAW in 1998, were objectively required and did not infringe sections 39 or 91 of the OLA, due in particular to the nature of VIA's operations, the specific functions and responsibilities associated with those positions, and the consequent service and safety considerations that arise. In any event, the remedies sought today by the applicant under subsection 77(4) of the OLA are not appropriate and just in the circumstances.

[43] The intervener has limited her submissions to two issues. First, the Commissioner takes the position that the Court has jurisdiction to hear and decide the matter under subsection 77(1) of the OLA. Second, while not addressing the actual merits of the applicant's particular case, the Commissioner nonetheless submits that if a breach of section 91 of the OLA is found (which was one of the Commissioner's assumptions in her final report), the Court has broad powers under subsection 77(4) of the OLA to remedy the situation, including by ordering VIA to indemnify the applicant for lost wages and reduced pension and awarding damages for the humiliation and embarrassment suffered.

[44] Along with the present proceeding, other similar applications by four on-board service VIA employees who had complained to the Commissioner were heard concurrently with this application in Winnipeg from April 20 to 24, 2009 (T-1165-02, T-1167-02, T-1795-02 and T-1915-02).

Although the applications were not consolidated, the Court granted on April 24, 2009 a motion made by the applicants to join the factual evidence of all five proceedings.

V. ISSUES IN DISPUTE AND DETERMINATION

[45] Three issues are raised by the parties in this case:

(a) Does the Federal Court have jurisdiction under subsection 77(1) of the OLA to hear and decide this application (or any part of same)?

(b) If so, are the bilingual requirements for the SM and the ASC positions in issue "objectively required" under section 91 of the OLA?

(c) If the bilingual requirements for the above positions are not "objectively required", what constitutes an "appropriate and just remedy" within the meaning of section 77(4) of the OLA?

[46] For the reasons which will be found in the following sections of this judgment, the Court's answers to the questions above are as follows.

[47] First, insofar as the challenged staffing actions are concerned, the Court has jurisdiction to hear and decide the matter.

[48] Second, based on the evidence in the record, the bilingual requirements for the SM and ASC positions were objectively required under section 91 of the OLA in order for VIA to perform the functions for which the challenged staffing actions have been taken.

[49] Third, even if the bilingual requirements for the SM and ASC positions were not objectively required, the Court would not have granted any of the remedies sought by the applicant in his application, except that of declaring the bilingual requirements to be illegal and ordering VIA to post a bulletin inviting all employees to bid for training in the existing ASC and SM positions on Western remote routes, and reserving jurisdiction to finally determine the amount of compensation or damages to be awarded to the applicant if he was chosen for training and found ultimately to be qualified for an assignment in any of these positions.

VI. JURISDICTIONAL ISSUE

[50] From the outset, it has been VIA's submission that the present application should be dismissed on the ground that the subject matter of the dispute is governed by the on-board collective agreement and falls within the exclusive jurisdiction of the grievance arbitrator.

[51] The prothonotary granted VIA's motion to strike the application (2002 FCT 1175) and his decision was upheld by a Judge of this Court (2004 FC 406). However, the Federal Court of Appeal overturned these two decisions (*Norton v. Via Rail Canada Inc.*, 2005 FCA 205, [2005] F.C.J. No. 978 (QL) (*Norton*)). On December 8, 2005, the Supreme Court of Canada dismissed VIA's application for leave to appeal (*Norton v. Via Rail Canada Inc.*, [2005] S.C.C.A. No. 362 (QL)).

[52] Justice Sharlow, speaking for the majority of the Federal Court of Appeal, noted in *Norton*, above, that the appellants had the right to submit their complaints to the Commissioner under

section 58 of the OLA (*Norton* at paragraph 6) and that "[t]he subject matter of the applications is within subsection 77(1) of the OLA" (*Norton* at paragraph 9)", which means that "it will be for the judge who finally hears this application to interpret the complaints and assess their merits" (*Norton* at paragraph 20). Moreover, she expressed "some doubt about the proposition that all differences related to matters listed in subsection 57(1) of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the Labour Code), that is, the interpretation, application, administration or contravention of a collective agreement, are exclusively within the jurisdiction of a labour arbitrator" (*Norton* at paragraph 19 [my emphasis]), while "the substance of the complaint may be that the language rights of the appellants were breached when the terms of the Collective Agreement were agreed to, either because of what is in the Collective Agreement, or because of what is not in the Collective Agreement" (*Norton* at paragraph 20). In a case where "the Collective Agreement is intended to bar the appellants from all recourse to section 77 of the OLA", this raises the issue of "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" (*Norton* at paragraph 21). That said, Justice Sharlow nevertheless left open "the possibility that, after a hearing, a judge may determine that the language rights of the appellants have not been breached, or that their language rights are most appropriately dealt with in the context of the grievance procedure set out in the Collective Agreement, or that there is no remedy that could be granted by the Federal Court without infringing on the jurisdiction of a labour arbitrator" (*Norton* at paragraph 22).

[53] Since the judgment rendered in 2005 by the Federal Court of Appeal in *Norton*, above, VIA has not abandoned its claim that the Court does not have jurisdiction to hear and decide the matter

on the merits or to craft a remedy, in view of the grievance arbitrator's general jurisdiction over labour disputes. The parties made full argument on the jurisdictional issue in the *Norton* application on April 20 and 21, 2009. It was agreed that it would not be necessary to re-argue this issue in the four other related applications.

[54] Leaving for now the issue of the legality under the OLA of the challenged staffing actions, there are a number of parallel issues raised in the original complaint or in the material submitted by the parties in this file or related files which clearly fall under the exclusive jurisdiction of, or would be better resolved, by a labour arbitrator or another specialized tribunal, in view of the limited jurisdiction granted to this Court under subsection 77(1) of the OLA. These issues entail deciding whether VIA's hiring policy or practices are discriminatory on the basis of language; whether the bilingual capacity of VIA has reached such a level that it is no longer necessary to designate bilingual positions on trains; whether the applicant has been personally discriminated against by VIA on the basis of language since 1986; whether the applicant has been harassed or humiliated in the workplace because he is a unilingual employee; whether VIA has provided adequate language training to unilingual employees, including the applicant; whether VIA's evaluation of the language level of the applicant is proper; whether under the 1998 Memorandum, bilingualism was a pre-requisite in order to be selected for training in the cases of unilingual candidates who were not already qualified as SM; whether the provisions of Appendix 6 of the on-board collective agreement applied in respect of the crewing initiatives taken as a result of the implementation of the NEPO initiative, including the creation or designation of additional bilingual ASC positions; whether the training bulletins posted as a result of the implementation of the NEPO initiative complied to the

1998 Memorandum or the on-board collective agreement; and whether VIA could legally ask unilingual employees previously not qualified as SM or ASC to occasionally perform their functions – just to name a few situations where this Court cannot or should not be involved because the matters are regulated in an exhaustive manner by the on-board collective agreement.

[55] That said, in view of competing statutory grants of jurisdiction under the OLA and the Labour Code, and given the complexity of this matter as well as the further implications of this Court's ruling on its own jurisdiction, we shall refrain from hastily and mechanically applying the exclusive jurisdiction model to the challenged staffing actions (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),* [2004] 2 S.C.R. 185 at paragraph 11 (*Morin*)) and proceed to the two-step analytical approach developed by the Supreme Court in *St. Anne Nackawic Pulp and Paper Co. v. Canadian Paper Workers Union, Local 219,* [1986] 1 S.C.R. 704 at paragraphs 15, 16, 19 and 20, as refined in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at paragraphs 43-46, 50-67 (*Weber*) and more recently reaffirmed in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 (*Regina Police Assn.*) and *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666 (*Bisaillon*).

The essential character of the dispute

[56] In deciding which of the competing statutory regimes should govern the dispute, the Court should first consider the nature of the dispute to determine its essential character, the key question being whether in its factual context the essential character of the dispute arises either expressly or inferentially from a statutory scheme (*Regina Police Assn.*).

[57] VIA submits that in the present case, the essential character of the proceedings concerns the refusal of the applicant's bids to be trained and qualified for bargaining unit positions as per the procedures and criteria set out in the on-board collective agreement, which include, but are not limited to, language requirements. Thus, the essential character of the dispute would arise explicitly from the interpretation and application of Appendix 9 of the on-board collective agreement, which lists the duties and responsibilities of the SM and ASC positions giving exclusive jurisdiction to the arbitrator pursuant to a grievance procedure set out in Appendix 6 of the on-board collective agreement.

[58] With respect to the on-board service employees, the bilingualism policy of VIA is expressed in Appendix 6 of the on-board collective agreement. Representatives of CAW and VIA will meet to discuss the bilingual requirements of the System before any changes are implemented. Both parties recognize in this regard that there are already many employees with bilingual skills. Where bilingual employees are already available in the positions required, and are prepared to serve in a bilingual capacity, formal designation is unnecessary. Accordingly, attention will be focused on identifying specific positions only when the *status quo* has failed to fulfill the needs. After a position has been designated bilingual, efforts to staff it with a bilingual employee will be made with and when the regularly assigned position becomes vacant. Appendix 6 also provides for an expedited dispute resolution procedure in the event of a disagreement between the CAW and VIA over the linguistic designation of a specific position on the ground that it does not comply with the OLA.

[59] As far as the legality of the challenged staffing actions under section 91 of the OLA is concerned, the Court disagrees with VIA's characterization of the essential character of the dispute as being one that arises exclusively under the on-board collective agreement. Indeed, between VIA and CAW there was no dispute with respect to the bilingual designation of the SM and ASC positions, as appears from the 1998 Memorandum. Quite the contrary, the substance of the applicant's complaint is that VIA and CAW negotiated in 1998 an agreement that allegedly had the effect of breaching their language rights under the Charter and the OLA. The present situation is therefore akin to the facts considered by the Supreme Court of Canada in *Morin*, where the alleged discrimination suffered by a group of unionized employees led to the filing of a complaint to the Human Rights Tribunal that had jurisdiction over the dispute because it resulted from the negotiation of the collective agreement

The intention of the legislature

[60] Secondly, in addition to determining whether the facts of the dispute fall within the ambit of the collective agreement, the Court must also determine if the legislature intended the dispute to be governed by the collective agreement or by the OLA, as revealed by the relevant legislation.

[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 (see *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 at page 386 (C.A.), *Beaulac v. The Queen*, [1999] 1 S.C.R. 768

at pages 790 to 792; *Forum des maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263 at paragraphs 16 and 17 (*Forum des maires*); *Desrochers v. Canada (Industry)*, [2009] 1 S.C.R. 194 at paragraphs 32-35).

[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).

[63] With respect to particular staffing actions, the Federal Court has, on numerous occasions, been seized of and assumed jurisdiction over disputes arising in the federal employment context and involving the application of section 91 of the OLA: *Professional Institute of the Public Service v. Canada*, [1993] 2 F.C. 90 (*Professional Institute of the Public Service*); *Canada (Attorney General) v. Viola*, above; *Côté v. Canada* (1994), 78 F.T.R. 65 (F.C.T.D.); *Canada (Attorney General) v. Asselin* (1995), 100 F.T.R. 309 (F.C.T.D.); *Rogers v. Canada (Department of National Defence)* (2001), 201 F.T.R. 41 (F.C.T.D.); *Rogers v. Canada (Correctional Services)*, [2001] 2 F.C. 586 (T.D.); *Marchessault v. Canada Post Corp.*, 2002 FCT 1202.

[64] Against this quasi-constitutional legal framework is the general labour relations scheme, which is said by the Supreme Court of Canada to provide a comprehensive code governing all aspects of labour relations; the essence of which also operates in favour of the stability and consistency of labour dispute resolutions within the procedures set out by the collective agreement under the exclusive jurisdiction of labour arbitrators (*Noël v. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, at paragraph 44; *Bisaillon*, at paragraph 27, sections 56, 57 and 58 of the Labour Code).

[65] Moreover, as discussed in Justice Malone's dissent in the Federal Court of Appeal decision rendered in *Norton*, above, the labour relations scheme implemented by section 56 and subsections 57(1) and 58(1) of the Labour Code, confirms the legislator's intent that disputes arising out of the interpretation, application or violation of a collective agreement should be finally settled under the grievance procedure established in accordance with the on-board collective agreement (*Norton*, above, at paragraph 37).

[66] The judgment of the Supreme Court of Canada in *Parry Sound (District) Social Services Administrative Board v. O.P.S.E.U. Local 324*, [2003] 2 S.C.R. 157 (*Parry Sound*) expanded the scope of an arbitrator's jurisdiction to include human rights and other employment related legislations.

[67] Indeed, *Weber* and *Parry Sound* mark a trend in the jurisprudence toward conferring on arbitrators broad remedial and jurisdictional authority. As stated by Justice Iacobucci for a

unanimous Supreme Court in *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, at paragraph 41, "[a]rming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes".

[68] That said, while the labour arbitrator certainly has legal authority to interpret and apply both the Charter and external statutes (including the OLA) in the case of staffing actions coming under the collective agreement, the ultimate question is which forum is a "better fit", taking into account the intent of the legislator and the particular nature of the dispute. Here, the issue raised by the applicant is whether VIA can impose, with the concurrence of CAW, bilingual requirements in the staffing of front-line service positions on-board trains not "designated" bilingual by TBS. This goes far beyond the simple interpretation or application of the text of the on-board collective agreement or the 1998 Memorandum. In the case at bar, VIA's policies and staffing actions are to be measured against any applicable provisions of the OLA and the Regulations. This certainly exceeds the usual expertise of the grievance arbitrator in labour relations matters.

[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.

[70] As a final note on the jurisdictional issue and as affirmed by the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 27, "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". Accordingly, I would like to clarify that, but for the attack by the applicant on the legality of the 1998 Memorandum or applicable provisions of the on-board collective agreement, I am not certain that the Federal Court would otherwise constitute, in Parliament's view, the preferred forum of resolution with respect to the legality of staffing actions in a collective bargaining context. As noted in *Forum des maires*, above, at paragraph 17:

> … 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 above, Parliament has created a "remedy" in the Federal Court that the Commissioner herself (section 78) or the complainant (section 77) may use. …

[71] However, the rights enjoyed by VIA's employees under applicable collective agreements go far beyond the rights of the general public or linguistic minorities, who indeed need a legal recourse under the OLA to have their rights, notably under Part IV, recognized and enforced if no action is taken by a federal institution. Indeed, staffing actions taken by federal institutions can always be reviewed, for alleged lack of objectivity, through normal arbitral legal mechanisms, such as the grievance arbitration process under the Labour Code.

VII. THE STAFFING ACTIONS ISSUE

[72] The second issue for this Court to determine pertains to the objectivity of the bilingual requirements for the two positions in issue, which must be compatible with applicable provisions of the Charter, the OLA or the Regulations, as the case may be.

General principles

[73] The OLA creates a set of language rights based on the duties imposed on the Federal Government by the Charter. In its preamble, the OLA 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, the enhancement of the development of English and French linguistic minority communities, and the enhancement of the bilingual character of the National Capital Region.

[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. As to Part V, it creates rights and duties with respect to the language of work. In the case at bar, there is no allegation that any right conferred on the applicant by Part V has been infringed. Indeed, in Western Canada, on VIA's trains, the language of work is English and not French. Thus, where Western on-board service

employees may be called to speak French, it is exclusively in respect of communications with and services to French-speaking passengers travelling on the Western Transcontinental or on the Western remote routes. On the other hand, Part VI where section 39 invoked by the applicant is found, reflects the in-house requirement that the government provide equal opportunities to its French and English-speaking employees in matters of appointment and advancement institutions "with due regard to the principle of selection of personnel according to merit". In the case at bar, once an employee is qualified in a position covered by the on-board collective agreement, staffing actions are not taken according to merit but according to seniority.

[75] As we can see, Parts IV, V and VI mentioned above create a set of different and distinct rights. Accordingly, there may be a balancing of conflicting rights (e.g. rights conferred on the public at Part IV versus rights conferred on the employees by Part V or Part VI, and whose resolution will be dependent on legislative intent). In this respect, section 82, which is found in Part XI, ensures the primacy of Parts I to V over other legislative or regulatory enactments, save the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 and its regulations.

[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.

[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, [2007] F.C.J. No. 404 (QL) (*Thibodeau*)).

[78] This brings us to an examination of section 91 which is also found in Part XI of the OLA. As appears from its wording, this provision is essentially a clarification which must be read, under the circumstances, in conjunction with Part IV or Part V to which it refers:

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

[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.

[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).

Duties and responsibilities

[83] Some of SM's key duties and responsibilities are set out in Appendix 9 of the on-board collective agreement. The duties and functions of SMs, which in the Court's opinion justify the bilingual requirements of the position, include:

- At major terminals, receives sleeping car passengers at reception desk;
- Entrains and detrains in sleeping cars and dayniters as and when required;
- Collects transportation and sells cash fares in sleeping cars and dayniters as and when required and turns same over to Service Coordinators (when operated) to include with his/her remittance;
- Supervises entraining and detraining en route;
- At regular intervals, patrols train (incl. coaches) and obtains passenger reaction to services offered, taking immediate action, if warranted, and/or passes this

information along to management for further handling (i.e. service discrepancies, employee performance, product offerings);

- Coordinates the dissemination of information regarding train delays, time changes, etc. to employees and passengers;
- Collaborates with Service Coordinator to ensure service to passengers available in both “Official Languages”;
- Resolves, to the best of his/her ability, all matters related to customer complaints and/or potential complaints as well as employee-customer and/or employee-employee differences.

[84] In addition to the duties listed in Appendix 9, there are the important responsibilities in respect of safety and security previously exercised by train conductors which were transferred in 1998 to the SMs as result of the implementation of the NEPO initiative. These also objectively justify the designation of the SM positions as bilingual in the Court’s opinion.

[85] The ASC’s duties and responsibilities are set out in Appendix 9 of the on-board collective agreement. Those that justify, in the Court’s opinion, the bilingual requirements of the position, include:

- At major terminals, assists Service Manager with reception of sleeping car passengers at reception desk and collects transportation for turnover to Service Coordinator;

- Collects transportation and sells cash fares in sleeping cars and dayniters as and when required;
- Entrains and detrains in sleeping cars and dayniters as and when required;
- Canvasses and takes reservations for meal sittings for meal service cars as directed by Service Coordinator;
- Makes all bilingual announcements regarding train delays, time changes and meal sittings throughout train;
- Assists Service Manager and Service Coordinator with provision of service to passengers in both “Official Languages”;
- Administers first-aid and/or oxygen, when required to passengers or employees;
- Assists with reception of passengers and service of meals and refreshments in meal service cars;
- Patrols sleeping cars and dayniters when Service Attendants on rest periods;
- Provides snack and/or refreshment service in relief of Senior Service Attendants during their meal and/or regular rest periods;
- Assumes duties of Service Coordinator in meal service cars when the latter is required in other areas of the train.

[86] The ASC’s duties are highly service oriented. In addition to assisting coach passengers throughout a trip, they are directly responsible for first-aid services to passengers and crew. There is currently one ASC on each train on the Western Transcontinental and on the Hudson Bay. There is no ASC on the Skeena. The ASC generally reports directly to the SM. Bilingualism has always

been a requirement for the position of ASC, as well as for the earlier designation of Passenger Service Assistant (PSA), which existed prior to the creation of the ASC position on June 1, 1986. The safety features of the ASC's duties and responsibilities have notably constituted a justification for their past designation as a bilingual position.

[87] At the hearing held in Winnipeg, one of the applicants, Ms. Brenda Bonner, Court file T-1167-02, explained to the Court that prior to 1986, the PSA would "go right through the train speaking to everybody in the coaches, everybody in the sleeping car. He would do the meals. He would see who wanted French service. And also, he was like the understudy, in theatrical terms, for the service manager". Thus, in 1986, when VIA decided to abolish the position of the first waiter in the dinner car, who was unilingual, and replace it with that of an ASC, and make it bilingual, it came as a surprise to Ms. Bonner "because you'd think that [VIA] would be promoting these PSAs to service manager. If [VIA] wanted the service manager bilingual, they could have waited until these senior guys, who were unilingual [retire], and promoted the PSA, who's been working with the service manager for all these years, since 1977, but, no, [VIA] took that PSA and they put him in the dining car to do first waiter job."

[88] The question of whether the staffing actions taken in 1986 constituted a "demotion" for the PSAs and an obstacle for advancement for unilingual SSAs, such as Ms. Bonner who "wanted to be that first waiter", has become academic and is not the issue that this Court is seized with, which strictly relates to the objectivity of the bilingual requirements for the ASC position. Again, the Court is not here to decide whether there has been a breach of section 39 of the OLA or whether there has

been group discrimination on the basis of language. Section 91 is exclusively focused on individual staffing actions.

[89] Since 1998, in addition to the duties and responsibilities mentioned in Appendix 9 of the on-board collective agreement, the ASC is also called to relieve the SM who rests at night. There has been no evidence suggesting that the nature and frequency of contacts all ASCs have with train passengers, whether on the Western Transcontinental, the Skeena or the Hudson Bay, have diminished. This appears to be so even if the ASCs are no longer assigned to the dining car but to the coaches to replace the former train conductors. Again, the issue before this Court is not whether the changes made in 1998 amounted to the creation of a new ASC position or whether the movement of personnel from the dining car to the coaches was permissible under the terms of the on-board collective agreement. Those are matters to be decided exclusively by a labour arbitrator. As properly framed, the issue today before the Court is narrower and consists of determining whether the bilingual requirements for the ASC position were still sustainable after the implementation of the NEPO initiative, which has been deemed to constitute a particular staffing action by the Commissioner as far as the creation of a second ASC on the Western Transcontinental is concerned.

Reasonable bilingual requirements

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

find, based on the evidence in the record, that the bilingual requirements for the new SM-Transcontinental, SM-Corridor and SM-Remote were not unreasonable.

[91] In her report, which I accept in part, the Commissioner acknowledged without reservation that the bilingual requirements for all of the SMs, and at least one of the two ASCs on the Western Transcontinental, were objectively justified in light of their duties, which involved extensive dealings with the travelling public. Moreover, the Commissioner dismissed the complainants' argument that "bilingual capacity among trained crews have reached a point where VIA could ensure the availability of services to passengers in both official languages without adversely affecting the advancement and employment opportunities of unilingual employees". I find this evidence conclusive for the purpose of the present application.

[92] More particularly, with respect to the bilingual positions on the Western Transcontinental, the Commissioner found at page 11:

> Our review of the SM position found sufficient evidence to support the bilingual requirement for those positions assigned to the Western Transcontinental on which VIA Rail is legally obliged to ensure that both English-speaking and French-speaking passengers are served in their preferred language. We note in particular that the SM is in a unique position with significant operational impact and plays an indispensable role in meeting passenger needs in the context of complaint resolution. While VIA and complainants have different viewpoints on the extent to which the SM on a given train otherwise deal with passengers, we accept the Corporation's position that the incumbent is expected to deal extensively with passengers in a public relations' capacity. Given these circumstances, bilingual capacity among other train personnel does not alter the need for a bilingual SM on the Western Transcontinental.

[93] With regard to the second ASC on the Western Transcontinental, the Commissioner concluded that there was some flexibility, but did not overtly reject the objective justification for the language requirement. At pages 12 and 13 of the final report, the Commissioner noted:

> The investigation revealed that the ASC's duties are heavily service oriented. In addition to assisting coach passengers throughout a trip, they are directly responsible for first-aid services to passengers and crew. Our review of train crews assigned to the Western Transcontinental during a four-month period in 2000 revealed that the passenger load in the coach cars varied from 16 to 189. No other train crew position is normally assigned to the coaches. We were told that an ASC may be asked to assist in a dining car, although we understand that this rarely occurs.
>
> Under NEPO, an ASC is the designated relief employee for the SM. This ASC is in charge of passenger service during a six-hour shift at night when a Service Attendant elsewhere on the train is also on duty.

[94] At page 14 of the final report, the Commissioner concluded:

> Our review of the ASC positions leads us to conclude that VIA is justified in ensuring bilingual capacity among ASCs assigned to the Western Transcontinental, given their responsibility for coach passengers, first aid and night relief. The evidence nonetheless suggests that some flexibility exists which was not found in the case of the SM position. For example, whereas there is only one SM per train, each train on the Western Transcontinental has two ASCs assigned to the same section. In addition, a Service Attendant, many of whom are bilingual, can be called upon to assist in the coach if required. Under these circumstances, we deem it excessive to restrict all ASC assignments on the Western Transcontinental to those employees who already meet the position's bilingual requirements. It is incumbent upon VIA to make ASC assignments accessible to otherwise qualified unilingual employees by providing appropriate second-language training.

[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.

Train routes not designated bilingual by TBS

[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.

[99] As early as 1967, the Laurendeau-Dunton Commission (Canada, *Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967)) suggested that Crown corporations providing transportation services to the travelling public should offer them in both official languages across the country:

> 277. […] The administration in Ottawa must be able to communicate adequately with the public in both languages. […] Federal government offices and Crown corporations across the country must be able to deal with people in either French or English. For example, in the immigration and customs offices at all ports of entry, in important transportation terminals, on Canadian National's trains, and on Air Canada's airplanes - everywhere, even in the completely unilingual sections of the country, where there is contact with the travelling public – services should be available in both languages as a matter of course.
>
> [my emphasis]
>
> (Canada, *Royal Commission on Bilingualism and Biculturalism*, Ottawa: Queen's Printer, 1967, Book 1: The Official Languages (1967), Chapter V Governments and Language Regimes)

[100] The wishes expressed above by the Laurendeau-Dunton Commission are not surprising in view of the particular importance of railways in the building of this country, and their unifying role and their profound cultural symbolism for all Canadians. In 1969, Parliament adopted its *Official Languages Act*, S.C. 1968-69, c. 54, R.S.C. 1970, c. O-2 (the 1969 Act) following the studies and recommendations of the Laurendeau-Dunton Commission. The 1969 Act was repealed in its entirety and replaced by the OLA, which was proclaimed in force on September 15, 1988, save and except for certain provisions not relevant in the present proceeding. Today, the train remains a privileged and extraordinary instrument of national unity permitting Canadians travelling all around the country to discover their country and to exchange ideas with its people.

[101] It must be remembered that prior to the introduction of the first passenger train in British North America, transportation was a difficult undertaking; little known areas of the country were being revealed to its population. Historically, the CPR, including the *Canadian*, is perhaps the best

known railway to Canadians. It was the CPR, unifying the country geographically and politically, that constituted John A. MacDonald's "national dream". Indeed, connection to the national railway was a promise made to both the British Columbia and Prince Edward Island to ensure their entrance into Confederation (*Canada by Train, Ties that Bind: A Brief History of Railways in Canada*, Library and Archives Canada, http://www.collectionscanada.gc.ca/trains/h30-1000-e.html). It is likely that the train encouraged many French-speaking Canadians living in the Province of Quebec at the time of Confederation to move out west.

[102] I will now briefly address the safety issue which is also one of the reasons invoked by VIA for designating the ASC and SM positions as bilingual. Under paragraph 24(1)(*a*) of the OLA, every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services in either official language from any of its offices in any circumstance prescribed by regulation that relates to the health, safety or security of members of the public, the location of the office, or the national or international mandate of the office. Under paragraph 24(1)(*b*), the same obligation extends to federal institutions in other circumstances prescribed by regulation, where "due to the nature of the office", it is reasonable that communications with and services from that office be available in both official languages. The circumstances that relate to the health, safety or security of members of the public are described by the Regulations as 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; or uses signage that includes words or standardized public announcements regarding health, safety or security in respect of passengers on aircraft, trains or ferries or members of the public at airports, railway stations or

ferry terminals, or members of the public in or on the grounds of federal buildings (see section 8 of the Regulations).

[103] The fact that the former SM position had not been designated bilingual is not a determinative element, as there may have existed a number of reasons not related to the actual performance of duties and responsibilities of SMs for not taking any action before the implementation of the NEPO initiative.

[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.

Treasury Board Directive on the Staffing of Bilingual Positions

[107] It has been suggested by the Commissioner in her final report as well as by some applicants that the *Treasury Board Directive on the Staffing of Bilingual Positions* should be looked at when determining whether or not particular staffing actions are in breach of section 91 of the OLA. In the Public Service of Canada – which does not include VIA – there is a distinction between "imperative staffing" and "non-imperative staffing". In the case of imperative staffing, only applicants who meet all the position's requirement, including the language requirements, are considered. These applicants suggest that this would be the case of the incumbents presently occupying the SM or ASC positions, on the Western Continental. Conversely, non-imperative staffing allows the consideration of applicants who meet all essential requirements except for the requisite language skills; the institution will then provide language training to allow the incumbent to meet the language requirements of the position. Again, these applicants suggest that this would be the case of otherwise qualified unilingual employees who should be able to occupy the SM or ASC positions on the Skeena and the Hudson Bay.

[108] Under the Treasury Board staffing directive, managers are responsible for organizing their human resources. They must ensure that an office required to provide services in both languages, does it at all times. For that purpose, a manager will be required to staff certain bilingual positions imperatively. This obligation follows when the positions are linguistically indispensable, because the provision of service depends on direct spoken or written communications by persons; the quality or availability of service in either of the official languages would be inadequate without this capacity. Such exercise of managerial discretion is dependent on an evaluation of the overall

bilingual capacity, the duties and responsibilities of each front-line position and the available options in terms of crewing arrangements. As can be seen, the process described in the Treasury Board directive, while not binding on VIA, is not dissimilar to or incompatible with the bilingual designation process described in Appendix 6 of the on-board collective agreement.

[109] Here, the particular staffing actions were not taken at the managerial level. They followed in a direct way the implementation of the NEPO initiative after broader based negotiations and a mediation exercise with all trade unions. Be that as it may, the Treasury Board directive provides that imperative staffing should be used, for example, when the bilingual position is one of the very few in an office that provides services to the public; when the bilingual position is the only one that provides certain services; when the bilingual position is one of several providing similar services but there are not enough incumbents who meet language requirements to ensure service in both official languages at all times; or, when the functions of the position require the capacity to communicate promptly and accurately in both languages in situations where the communication has a direct bearing on the health, safety or security of the public or the occupants of the office (e.g. a position responsible for communicating instructions within the context of internal security services or for the management of emergency situations).

[110] In the case at bar, the Court notes that the SM is responsible for managing all passenger services on the train and is in charge of all on-board service personnel. Thus, the SM is the highest-ranking on-board service employee and reports directly to the Manager, Customer Experience. Each train is assigned only one SM. On the Skeena, the SM-Remote is the only service employee on the

train in off-peak season, which typically runs from October 1st to May 14th. There is no ASC on the Skeena.

[111] Both the SM and ASC are front-line positions. They are staffed on each train by only one incumbent (there are no longer two ASCs on the Western Transcontinental). In the Court's opinion these designations by VIA meet the criteria for "imperative staffing". Other front-line positions, such as the SSA position, would also have to be imperatively staffed if there would not be enough incumbents who meet language requirements to ensure service in both official languages at all time. (However, this seems not to be the case in view of VIA's policy of hiring bilingual candidates).

No breach of section 91

[112] Throughout the Commissioner's investigation, as well as in these proceedings, VIA has maintained that its language requirements for the positions of SM and ASC were objectively required due, in particular, to the nature of VIA's operations, the specific functions and responsibilities associated with those positions, and the consequent service and safety considerations that arise. Based on the evidence in the record, VIA's position is not unreasonable in the Court's opinion.

[113] The evidence submitted by the applicant, including the final report of the Commissioner and Burolis, does not permit the Court to conclude that VIA's rationale for imposing bilingual language requirements for the SM and ASC positions on the Western Transcontinental and on the remote lines in Western Canada were not objectively required. Given the heightened safety considerations

associated with VIA's operations, as well as its mandate as an independent Crown corporation and the diverse national and international clientele that it serves, it was not unreasonable, in the Court's view for VIA to designate on its trains running across the country certain key positions as requiring bilingual skills.

[114] The duties and responsibilities of the incumbents in the challenged SM and ASC positions in the Western region, and elsewhere in Canada, justified a bilingual designation. Accordingly, section 91 of the OLA was not breached by VIA when these positions were staffed by on-board service employees more junior than the applicant, but who possessed the requisite level of bilingual skills under the on-board collective agreement (Level D).

VIII. THE REMEDY ISSUE

[115] In view of the findings made above, even if the bilingual requirements for the ASC and SM positions were not objectively justified, I would not have granted any of the remedies sought by the applicant in his application, except for declaring the bilingual requirements to be illegal and ordering VIA to post a bulletin inviting all employees to bid for training in the existing ASC and SM positions on Western remote routes, and reserving jurisdiction to finally determine the amount of compensation or damages to be awarded to the applicant if he was ultimately chosen for training and found to be qualified for an assignment in any of these positions.

The Commissioner's recommendations

[116] A major difficulty in this case is distinguishing the recommendations in the Commissioner's final report made with respect to section 91 from those made with respect to section 39. This is particularly true for the remedies sought today by the individual applicants. Moreover, the question of whether VIA should provide second language training where needed, as mentioned in recommendations 1, 3 and 4, may be relevant in the context of a section 39 group complaint but not in the context of assessing a particular staffing action under section 91 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), 221 F.T.R. 81 at paragraph 65, affirmed (2003), 303 N.R. 92, 2003 FCA 149).

[118] Moreover, language training opportunities are limited under the on-board collective agreement. At the hearing before this Court, Commissioner's counsel recognized that no compelling obligation to offer second language training existed under the OLA, although the provision of such training would promote its objectives. The Commissioner also acknowledged in her final report that VIA had already taken and was continuing to take steps to assist unilingual employees affected by the creation of the new bilingual positions. However, because their seniority prevails, only those

employees closest to retirement undergo intensive second-language training. More junior unilingual employees who have less seniority have, therefore, very few chances of being chosen where second-language training bulletins are posted. If the union acted in an arbitrary or discriminatory manner toward more junior employees, the proper recourse was to make a complaint of unfair representation to the Board and not to come to this Court to seek remedy (see *Cairns, 1 and 2*).

[119] With respect to the recommendation made by the Commissioner to "identify opportunities for assigning qualified unilingual employees to one of the two ASC positions on the Western Transcontinental" (recommendation number 3), under the circumstances, no compellable order can be made today since this position no longer exists. According to the non-contradicted evidence on record, as of March 11, 2003, the number of bilingual ASC positions on the Western Transcontinental line was reduced from 18 to 9 to provide further opportunities for unilingual employees to hold regularly assigned positions. The legality of this action under both the on-board collective agreement and the 1998 Memorandum was confirmed by Arbitrator Michel Picher in an award dated July 14, 2003 (Arbitration Award, Case No. 3347, Canadian Railway Office of Arbitration, Arbitrator Michel Picher, July 14, 2003).

Applicant's entitlement for damages

[120] In the case at bar, the applicant claims compensatory damages. This claim covers the whole period between March 1998 and April 2006 and is based on the difference between the wages he earned during this period and the salary a regularly assigned SM would have earned during the same

period. Some figures were provided at the hearing by the applicant but have not been attested to in an affidavit by the applicant in support of his application for a remedy.

[121] VIA's counsel has referred the Court to the two affidavits of Mr. Edward G. Houlihan, dated December 14, 2006 and June 21, 2007, respectively. There is no serious reason to discard or ignore this highly relevant evidence which has not been seriously challenged by the applicant. As of June 21, 2007, there were nine Western service employees holding regular SM assignments on the Western Transcontinental line. There were eight Western service employees holding regular SMR assignments on the remote lines, more specifically, four on the Churchill line and four on the Skeena. There is currently one ASC on each of the trains on the Western Transcontinental and Churchill lines. There is no ASC on the Skeena.

[122] Of the Western service employees who were fully qualified to work as SM, 21 were senior to the applicant and, of those, five did not have the seniority required to hold a regular SM assignment. From 1998 to that date, there were at any given time no fewer than 48 unilingual Western service employees who were senior to the applicant and who otherwise satisfied the basic requirements to apply for SM training. Moreover, as of June 21, 2007, of the Western service employees who were fully qualified to work as ASC, 30 were senior to the applicant. From 1998 to that date, there were, at any given time, no fewer than 48 unilingual Western service employees who were senior to the applicant and who otherwise satisfied the basic requirements to apply for ASC training.

[123] As can be seen, the monetary remedies sought by the applicant would entail an *ex post facto* determination by the Court, on an hypothetical basis, of whether the applicant would have successfully qualified for training and bidding in the SM or ASC positions, were bilingual requirements for any of these positions to be declared illegal retroactively. In this regard, should the date used be that of the applicant's complaint to the Commissioner, the date the applicant first applied to training or the date of the implementation of the NEPO initiative?

[124] No up-to-date evidence was filed by the parties at the hearing held last April 2009. The Court, as of today, cannot determine the exact number of unilingual Western service employees who are more senior to the applicant. However, given the figures already provided by Mr. Houlihan in his second affidavit of June 21, 2007, absent any bilingual requirements, any claim that the applicant would otherwise have qualified to hold a SM or ASC position during the time period indicated at the hearing (March 1998 to April 2006) appears highly speculative in the circumstances. The Court simply cannot assume, as suggested by the applicant at the hearing, that more senior employees would not have bid for training on these positions, nor that the applicant would have passed the tests and examinations. The only just and reasonable remedy in the circumstances would be to make a declaration of right and order VIA to conduct a new bidding process.

[125] According to the evidence, at the time the NEPO initiative was implemented, that is in the summer of 1998, the applicant had 17 years of service. The applicant, who is also qualified as cook, chef and SSA, was regularly occupying the position of SC and reported directly to the SM.

However, the applicant would not have been allowed to qualify for training under the 1998 Memorandum in a SM position, because of the transitional nature of its provisions. By award of arbitration dated April 23, 2002, it was decided by labour arbitrator Ted Weatherhill that the intent of paragraph 6 of the 1998 Memorandum was to allow unilingual employees to access SM positions only during the initial implementation period of the initiative, until the full complement of employees had been achieved (see Award of Arbitration dated April 23, 2002, filed as exhibit C to the affidavit of Edward Houlihan).

[126] Moreover, in crafting a just and reasonable remedy, the Court would also have to consider the provisions of the on-board collective agreement. The latter exhaustively regulate bids for training or assignments, limit the number of training positions or assignments available and regulate the whole selection process, which is notably based on the relative seniority of each candidate. For example, with respect to SM positions, once the initial selection of candidates is made (i.e. based on seniority) each candidate is individually evaluated by VIA's management through a formal interview process, as well as theoretical and practical testing. The major component of the practical testing consists of an exercise called "In-Basket Testing", which requires the candidate to resolve a series of problems based on a hypothetical or 'role-play' scenario. It is only if a candidate successfully completes all of the components of the selection process that he or she is invited to participate in SM training. Only candidates who have successfully completed the training are deemed qualified SM and are thereby entitled to bid on SM or work from the spareboard in that position.

[127] Indeed, in March 2006, the applicant was initially selected for SM training based on his seniority. However, due to a poor evaluation on the In-Basket testing component of the selection process, the applicant's candidacy for training was ultimately rejected by VIA. This may seem unjust or unfortunate from the point of view of the applicant who told the Court how qualified he was with all his years of practical experience, but any appropriate redress would now need to come from a labour arbitrator and not from this Court.

[128] Finally, there is no evidence of bad conduct such that VIA should be condemned to pay punitive damages for the humiliation or stress, if any, personally caused to the applicant as a result of the implementation of the NEPO initiative or the taking of the challenged staffing actions.

IX. COSTS

[129] Section 81 of the OLA provides:

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.** (1) Les frais et dépens sont laissés à l'appréciation du tribunal et suivent, sauf ordonnance contraire de celui-ci, le sort du principal.
(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.	(2) Cependant, dans les cas où il estime que l'objet du recours a soulevé un principe important et nouveau quant à la présente loi, le tribunal accorde les frais et dépens à l'auteur du recours, même s'il est débouté

[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.

[131] This is a proper case to award to the applicant a lump sum in lieu of any assessed costs. The sum of $2,000, considering all relevant factors and the particular circumstances of the case, is reasonable and shall be paid by the respondent (*Thibodeau*, above; *Sherman v. Canada (Minister of National Revenue)*, 2003 FCA 202, [2003] F.C.J. No. 710 (QL); *Rahman v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 137, [2002] F.C.J. No. 198 (QL)).

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed with costs in favour of the applicant; and

2. The sum of $2,000 in lieu of any assessed costs, payable by the respondent, is attributed to the applicant.

"Luc Martineau"
Judge

ANNEX

Relevant Legislative or Regulatory Provisions

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

Legislative instruments	**Textes d'application**
7. (1) Any instrument made in the execution of a legislative power conferred by or under an Act of Parliament that	**7.** (1) Sont établis dans les deux langues officielles les actes pris, dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale, soit par le gouverneur en conseil ou par un ou plusieurs ministres fédéraux, soit avec leur agrément, les actes astreints, sous le régime d'une loi fédérale, à l'obligation de publication dans la Gazette du Canada, ainsi que les actes de nature publique et générale. Leur impression et leur publication éventuelles se font dans les deux langues officielles.
(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.	
Instruments under prerogative or other executive power	**Prérogative**
(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.	(2) Les actes qui procèdent de la prérogative ou de tout autre pouvoir exécutif et sont de nature publique et générale sont établis dans les deux langues officielles. Leur impression et leur publication éventuelles se font dans ces deux langues.
Exceptions	**Exceptions**
(3) Subsection (1) does not apply to	(3) Le paragraphe (1) ne s'applique pas aux textes suivants du seul fait qu'ils sont d'intérêt général et public :
(a) an ordinance of the Northwest Territories or	a) les ordonnances des Territoires du Nord-

a law made by the Legislature of Yukon or the Legislature for Nunavut, or any instrument made under any such ordinance or 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.

Ouest, les lois de la Législature du Yukon ou de celle du Nunavut, ainsi que les actes découlant de ces ordonnances et lois;

b) les actes pris par les organismes — bande indienne, conseil de bande ou autres — chargés de l'administration d'une bande indienne ou d'autres groupes de peuples autochtones.

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.

Textes de procédures

9. Les textes régissant la procédure et la pratique des tribunaux fédéraux sont établis, imprimés et publiés dans les deux langues officielles.

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

Avis et annonces

11. (1) Les textes — notamment les avis et annonces — que les institutions fédérales doivent ou peuvent, sous le régime d'une loi fédérale, publier, ou faire publier, et qui sont principalement destinés au public doivent, là où cela est possible, paraître dans des publications qui sont largement diffusées dans chacune des régions visées, la version française dans au moins une publication d'expression principalement française et son pendant anglais dans au moins une publication d'expression principalement anglaise. En l'absence de telles publications, ils doivent paraître dans les deux langues officielles dans au moins une publication qui est largement diffusée dans la région.

mainly in French, be printed in both official languages in at least one publication in general circulation within that region.

Equal prominence

(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.

Importance

(2) Il est donné dans ces textes égale importance aux deux langues officielles.

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.

Actes destinés au public

12. Les actes qui s'adressent au public et qui sont censés émaner d'une institution fédérale sont établis ou délivrés dans les deux langues officielles.

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.

Langues des communications et services

22. Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés, pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

Traveling 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

Voyageurs

23. (1) Il est entendu qu'il incombe aux institutions fédérales offrant des services aux voyageurs de veiller à ce que ceux-ci puissent, dans l'une ou l'autre des langues officielles,

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.

communiquer avec leurs bureaux et en recevoir les services, là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

Services provided pursuant to a contract

(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.

Services conventionnés

(2) Il incombe aux institutions fédérales de veiller à ce que, dans les bureaux visés au paragraphe (1), les services réglementaires offerts aux voyageurs par des tiers conventionnés par elles à cette fin le soient, dans les deux langues officielles, selon les modalités réglementaires.

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

Vocation du bureau

24. (1) Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leurs bureaux, tant au Canada qu'à l'étranger, et en recevoir les services dans l'une ou l'autre des langues officielles :

(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

a) soit dans les cas, fixés par règlement, touchant à la santé ou à la sécurité du public ainsi qu'à l'emplacement des bureaux, ou liés au caractère national ou international de leur mandat;

(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

b) soit en toute autre circonstance déterminée par règlement, si la vocation des bureaux justifie l'emploi des deux langues officielles.

reasonable that communications with and services from that office or facility be available in both official languages.

Institutions reporting directly to Parliament

(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.

Institutions relevant directement du Parlement

(2) Il incombe aux institutions fédérales tenues de rendre directement compte au Parlement de leurs activités de veiller à ce que le public puisse communiquer avec leurs bureaux, tant au Canada qu'à l'étranger, et en recevoir les services dans l'une ou l'autre des langues officielles.

Idem

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

Précision

(3) Cette obligation vise notamment :

(a) the Office of the Commissioner of Official Languages;

a) le commissariat aux langues officielles;

(b) the Office of the Chief Electoral Officer;

b) le bureau du directeur général des élections;

(b.1) the Office of the Public Sector Integrity Commissioner;

b.1) le commissariat à l'intégrité du secteur public;

(c) the Office of the Auditor General;

c) le bureau du vérificateur général;

(d) the Office of the Information Commissioner;

d) le commissariat à l'information;

(e) the Office of the Privacy Commissioner; and

e) le commissariat à la protection de la vie privée;

(f) the Office of the Commissioner of Lobbying.

f) le Commissariat au lobbying.

Investigation of complaints

58. (1) Subject to this Act, the Commissioner shall investigate any complaint made to the

Plaintes

58. (1) Sous réserve des autres dispositions de la présente loi, le commissaire instruit toute plainte

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 with in the administration of the affairs of any federal institution.

reçue — sur un acte ou une omission — et faisant état, dans l'administration d'une institution fédérale, d'un cas précis de non-reconnaissance du statut d'une langue officielle, de manquement à une loi ou un règlement fédéraux sur le statut ou l'usage des deux langues officielles ou encore à l'esprit de la présente loi et à l'intention du législateur.

Who may make complaint

(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.

Dépôt d'une plainte

(2) Tout individu ou groupe a le droit de porter plainte devant le commissaire, indépendamment de la langue officielle parlée par le ou les plaignants.

Discontinuance of investigation

(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.

Interruption de l'instruction

(3) Le commissaire peut, à son appréciation, interrompre toute enquête qu'il estime, compte tenu des circonstances, inutile de poursuivre.

Right of Commissioner to refuse or cease investigation

(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

Refus d'instruire

(4) Le commissaire peut, à son appréciation, refuser ou cesser d'instruire une plainte dans l'un ou l'autre des cas suivants :

a) elle est sans importance;

b) elle est futile ou vexatoire ou n'est pas faite de bonne foi;

(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.

c) son objet ne constitue pas une contravention à la présente loi ou une violation de son esprit et de l'intention du législateur ou, pour toute autre raison, ne relève pas de la compétence du commissaire.

Complainant to be notified

(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.

Avis au plaignant

(5) En cas de refus d'ouvrir une enquête ou de la poursuivre, le commissaire donne au plaignant un avis motivé.

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.

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.

Employment 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

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.

appointment and advancement of officers and employees by those institutions and the determination of the terms and conditions of their employment.

Merit principle

(3) Nothing in this section shall be construed as abrogating or derogating from the principle of selection of personnel according to merit.

Principe du mérite

(3) Le présent article n'a pas pour effet de porter atteinte au mode de sélection fondé sur le mérite.

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.

Engagement

41. (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.

Duty of federal institutions

(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.

Obligations des institutions fédérales

(2) Il incombe aux institutions fédérales de veiller à ce que soient prises des mesures positives pour mettre en oeuvre cet engagement. Il demeure entendu que cette mise en oeuvre se fait dans le respect des champs de compétence et des pouvoirs des provinces.

Regulations

(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 Conflict of Interest and Ethics Commissioner, prescribing

Règlements

(3) Le gouverneur en conseil peut, par règlement visant les institutions fédérales autres que le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique et le bureau du commissaire aux conflits d'intérêts et à

the manner in which any duties of those institutions under this Part are to be carried out.

l'éthique, fixer les modalités d'exécution des obligations que la présente partie leur impose.

Powers of Treasury Board

…

46. (2) In carrying out its responsibilities under subsection (1), the Treasury Board may

…

(c) issue directives to give effect to Parts IV, V and VI;

…

(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

…

Attributions

…

46. (2) Le Conseil du Trésor peut, dans le cadre de cette mission :

…

c) donner des instructions pour l'application des parties IV, V et VI;

…

f) informer le public et le personnel des institutions fédérales sur les principes et programmes d'application des parties IV, V et VI;

…

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.

Limitation period

(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

Délai

(2) Sauf délai supérieur accordé par le tribunal sur demande présentée ou non avant l'expiration du délai normal, le recours est formé dans les soixante jours qui suivent la communication au plaignant des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou de l'avis de refus d'ouverture ou de poursuite d'une enquête donné au titre du paragraphe 58(5).

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.

Application six months after complaint

(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.

Autre délai

(3) Si, dans les six mois suivant le dépôt d'une plainte, il n'est pas avisé des conclusions de l'enquête, des recommandations visées au paragraphe 64(2) ou du refus opposé au titre du paragraphe 58(5), le plaignant peut former le recours à l'expiration de ces six mois.

Order of Court

(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.

Ordonnance

(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

Other rights of action

(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.

Précision

(5) Le présent article ne porte atteinte à aucun autre droit d'action.

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:

Primauté sur les autres lois

82. (1) Les dispositions des parties qui suivent l'emportent sur les dispositions incompatibles de toute autre loi ou de tout règlement fédéraux :

(a) Part I (Proceedings of Parliament);

a) partie I (Débats et travaux parlementaires);

(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).

b) partie II (Actes législatifs et autres);

c) partie III (Administration de la justice);

d) partie IV (Communications avec le public et prestation des services);

e) partie V (Langue de travail).

***Canadian Human Rights Act* excepted**

(2) Subsection (1) does not apply to the *Canadian Human Rights Act* or any regulation made thereunder.

Exception

(2) Le paragraphe (1) ne s'applique pas à la *Loi canadienne sur les droits de la personne* ni à ses règlements.

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

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or
(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications entre les administrés et les institutions fédérales

20. (1) Le public a, au Canada, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions du Parlement ou du gouvernement du Canada ou pour en recevoir les services; il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français ou de l'anglais fait l'objet d'une demande importante;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

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

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.
…

(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

(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
…

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

7. (2) Pour l'application du paragraphe 23(1) de la Loi, l'emploi d'une langue officielle fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs lorsque le bureau offre ces services sur un trajet et qu'au moins cinq pour cent de la demande de services faite par les voyageurs sur ce trajet, au cours d'une année, est dans cette langue.
…
(4) Pour l'application du paragraphe 23(1) de la Loi, l'emploi des deux langues officielles fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs, dans l'une ou l'autre des circonstances suivantes :

d) le bureau offre les services à bord d'un train :

(i) soit sur un trajet interprovincial dont la tête de ligne ou le terminus est situé dans une province dont la population de la minorité francophone ou anglophone représente au moins cinq pour cent de l'ensemble de la population de la province, ou qui traverse une telle province,

8. Sont visés à l'alinéa 24(1)a) de la Loi les cas touchant à la santé ou à la sécurité du public qui suivent :

a) lorsqu'un bureau d'une institution fédérale fournit des services d'urgence, notamment les premiers soins, dans une clinique ou une infirmerie située dans un aéroport ou une gare ferroviaire ou de traversiers;

b) lorsqu'un bureau d'une institution fédérale utilise des moyens de signalisation comportant des mots, ou des messages publics normalisés, qui visent la santé ou la sécurité :

(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.

(i) soit des passagers à bord d'aéronefs, de trains ou de traversiers,

(ii) soit du public dans les aéroports ou les gares ferroviaires ou de traversiers,

(iii) soit du public à l'intérieur des immeubles fédéraux ou sur leurs terrains avoisinants;

c) lorsqu'un bureau d'une institution fédérale utilise des avis écrits ou des moyens de signalisation comportant des mots pour mettre en garde le public contre tout danger de nature radioactive, explosive, chimique, biologique ou environnementale ou tout autre danger de nature semblable.

Canada Labour Code, R.S.C., 1985, c. L-2

Effect of collective agreement

56. A collective agreement entered into between a bargaining agent and an employer in respect of a bargaining unit is, subject to and for the purposes of this Part, binding on the bargaining agent, every employee in the bargaining unit and the employer.

Effet de la convention collective

56. Pour l'application de la présente partie et sous réserve des dispositions contraires de celle-ci, la convention collective conclue entre l'agent négociateur et l'employeur lie l'agent négociateur, les employés de l'unité de négociation régie par la convention et l'employeur.

Provision for final settlement without stoppage of work

57. (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

Clause de règlement définitif sans arrêt de travail

57. (1) Est obligatoire dans la convention collective la présence d'une clause prévoyant le mode — par arbitrage ou toute autre voie — de règlement définitif, sans arrêt de travail, des désaccords qui pourraient survenir entre les parties ou les employés qu'elle régit, quant à son interprétation, son application ou sa prétendue violation.

Decisions not to be reviewed by court

58. (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.

Caractère définitif des décisions

58. (1) Les ordonnances ou décisions d’un conseil d’arbitrage ou d’un arbitre sont définitives et ne peuvent être ni contestées ni révisées par voie judiciaire.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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