

**Date: 20061117**

**Docket: A-451-05**

**Citation: 2006 FCA 374**

**CORAM: RICHARD C.J.  
LÉTOURNEAU J.A.  
NADON J.A.**

**BETWEEN:**

**RAYMOND DESROCHERS and  
CORPORATION DE DÉVELOPPEMENT  
ÉCONOMIQUE COMMUNAUTAIRE CALDECH**

**Appellants**

**and**

**DEPARTMENT OF INDUSTRY OF CANADA,  
GOVERNMENT OF CANADA and  
ATTORNEY GENERAL OF CANADA**

**Respondents**

**and**

**THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA**

**Intervener**

Hearing held at Ottawa, Ontario, October 4, 2006.

Judgment delivered at Ottawa, Ontario, November 17, 2006.

**REASONS FOR JUDGMENT:**

**LÉTOURNEAU J.A.**

**CONCURRING:**

**RICHARD C.J.**

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**POINTS IN ISSUE AND RELEVANT STATUTORY PROVISIONS**

[1] This is an appeal from a decision of Mr. Justice Harrington of the Federal Court (the judge) dismissing the appellants' application for relief made pursuant to subsection 77(1) of the

*Official Languages Act*, R.S.C. 1985, c. 31 (4<sup>th</sup> Supp.), as amended (the OLA). This application was made on October 27, 2004.

[2] The points at issue are easier to identify than to resolve. The appellants have succinctly formulated them and I will just quote the relevant portion of their Amended Memorandum of Fact and Law:

[TRANSLATION]

- (a) In matters of community economic development in the Huronia region, are the respondents in breach of their obligations to provide services in French of equal quality to the services provided in English:
  - (i) under Part IV of the OLA?
  - (ii) under the constitutional principle of protection of and respect for minorities?
- (b) Are the respondents in breach of their obligations to enhance the vitality of the Francophone community in the Huronia region under Part VII of the OLA?
- (c) What is the fair and appropriate remedy in the circumstances?
- (d) Should the Court award the appellants their costs in the court below, irrespective of the outcome of the case, under subsection 81(2) of the OLA?

[3] To facilitate the reader's perusal of these reasons, I include a table of contents that identifies and locates the topics addressed and analysed herein.

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[4] Before relating the facts and proceedings in this case, I quote the relevant provisions of the OLA and the *Department of Industry Act*, S.C. 1995, c. 1 (the DIA):

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

*Preamble*

WHEREAS the Constitution of Canada provides that English and French are the official languages of

**Loi concernant le statut et l'usage des langues officielles du Canada**

*Préambule*

Attendu :  
que la Constitution dispose que le

Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada;

français et l'anglais sont les langues officielles du Canada et qu'ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada;

...

[...]

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

qu'elle prévoit en outre des garanties quant au droit du public à l'emploi de l'une ou l'autre de ces langues pour communiquer avec les institutions du Parlement et du gouvernement du Canada ou pour en recevoir les services;

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

qu'il convient que les agents des institutions du Parlement ou du gouvernement du Canada aient l'égalité de possibilité d'utiliser la langue officielle de leur choix dans la mise en œuvre commune des objectifs de celles-ci;

...

[...]

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

qu'il s'est engagé à favoriser l'épanouissement des minorités francophones et anglophones, au titre de leur appartenance aux deux collectivités de langue officielle, et à appuyer leur développement et à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne;

...

[...]

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

qu'il reconnaît l'importance, parallèlement à l'affirmation du statut des langues officielles et à l'élargissement de leur usage, de maintenir et de valoriser l'usage des autres langues,

*Purpose*

*Objet*

2. The purpose of this Act is to

2. La présente loi a pour objet :

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

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

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

#### *Definitions*

3. (1) In this Act,

“*federal institution*”  
« *institutions fédérales* »

“federal institution” includes any of the following institutions of the Parliament or government of Canada:

- (a) the Senate,
- (b) the House of Commons,
- (c) the Library of Parliament,
- (c.1) the office of the Senate Ethics Officer and the office of the Ethics Commissioner,
- (d) any federal court,
- (e) any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of Parliament or by or under the authority of the

a) d’assurer le respect du français et de l’anglais à titre de langues officielles du Canada, leur égalité de statut et l’égalité de droits et privilèges quant à leur usage dans les institutions fédérales, notamment en ce qui touche les débats et travaux du Parlement, les actes législatifs et autres, l’administration de la justice, les communications avec le public et la prestation des services, ainsi que la mise en œuvre des objectifs de ces institutions;

b) d’appuyer le développement des minorités francophones et anglophones et, d’une façon générale, de favoriser, au sein de la société canadienne, la progression vers l’égalité de statut et d’usage du français et de l’anglais;

c) de préciser les pouvoirs et les obligations des institutions fédérales en matière de langues officielles.

#### *Définitions*

3. (1) Les définitions qui suivent s’appliquent à la présente loi.

« *institutions fédérales* »  
“ *federal institution* ”

« institutions fédérales » Les institutions du Parlement et du gouvernement du Canada, dont le Sénat, la Chambre des communes, la bibliothèque du Parlement, le bureau du conseiller sénatorial en éthique et le commissariat à l’éthique, les tribunaux fédéraux, tout organisme — bureau, commission, conseil, office ou autre — chargé de fonctions administratives sous le régime d’une loi fédérale ou en vertu des attributions du gouverneur en conseil, les ministères fédéraux, les sociétés d’État créées sous le régime d’une loi fédérale et tout autre

Governor in Council,  
(f) a department of the Government of Canada,  
(g) a Crown corporation established by or pursuant to an Act of Parliament, and  
(h) any other body that is specified by an Act of Parliament to be an agent of Her Majesty in right of Canada or to be subject to the direction of the Governor in Council or a minister of the Crown, but does not include  
(i) any institution of the Council or government of the Northwest Territories or of the Legislative Assembly or government of Yukon or Nunavut, or  
(j) any Indian band, band council or other body established to perform a governmental function in relation to an Indian band or other group of aboriginal people;

organisme désigné par la loi à titre de mandataire de Sa Majesté du chef du Canada ou placé sous la tutelle du gouverneur en conseil ou d'un ministre fédéral. Ne sont pas visés les institutions du conseil ou de l'administration du Yukon et des Territoires du Nord-Ouest, celles de l'assemblée législative ou de l'administration du Nunavut, ni les organismes — bande indienne, conseil de bande ou autres — chargés de l'administration d'une bande indienne ou d'autres groupes de peuples autochtones.

#### **PART IV**

#### **COMMUNICATIONS WITH AND SERVICES TO THE PUBLIC**

##### **Communications and Services**

*Rights relating to language of communication*

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

*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

#### **PARTIE IV**

#### **COMMUNICATIONS AVEC LE PUBLIC ET PRESTATION DES SERVICES**

##### **Communications et services**

*Droits en matière de communication*

**21.** Le public a, au Canada, le droit de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie.

*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



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.

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.

...

[...]

**Services Provided on behalf of Federal Institutions**

**Services fournis par des tiers**

*Where services provided on behalf of federal institutions*

*Fourniture dans les deux langues*

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

**25. Il incombe aux institutions fédérales de veiller à ce que, tant au Canada qu'à l'étranger, les services offerts au public par des tiers pour leur compte le soient, et à ce qu'il puisse communiquer avec ceux-ci, dans l'une ou l'autre des langues officielles dans le cas où, offrant elles-mêmes les services, elles seraient tenues, au titre de la présente partie, à une telle obligation.**

...

[...]

**General**

**Dispositions générales**

*Obligations relating to communications and services*

*Obligation : communications et services*

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

**27. L'obligation que la présente partie impose en matière de communications et services dans les deux langues officielles à cet égard vaut également, tant sur le plan de l'écrit que de l'oral, pour tout ce qui s'y rattache.**

*Active offer*

*Offre active*

**28. Every federal institution that is**

**28. Lorsqu'elles sont tenues, sous le**

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

...

*Relationship to Part V*

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

**PART VII**

**ADVANCEMENT OF ENGLISH AND FRENCH**

*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.

...

*Specific mandate of Minister of Canadian Heritage*

régime de la présente partie, de veiller à ce que le public puisse communiquer avec leurs bureaux ou recevoir les services de ceux-ci ou de tiers pour leur compte, dans l'une ou l'autre langue officielle, il incombe aux institutions fédérales de veiller également à ce que les mesures voulues soient prises pour informer le public, notamment par entrée en communication avec lui ou encore par signalisation, avis ou documentation sur les services, que ceux-ci lui sont offerts dans l'une ou l'autre langue officielle, au choix.

[...]

*Incompatibilité*

**31.** Les dispositions de la présente partie l'emportent sur les dispositions incompatibles de la partie V.

**PARTIE VII**

**PROMOTION DU FRANÇAIS ET DE L'ANGLAIS**

*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.

[...]

*Mise en œuvre*

**43.** (1) The Minister of Canadian Heritage shall take such measures as that Minister considers appropriate to advance the equality of status and use of English and French in Canadian society and, without restricting the generality of the foregoing, may take measures to

(a) enhance the vitality of the English and French linguistic minority communities in Canada and support and assist their development;

(b) encourage and support the learning of English and French in Canada;

(c) foster an acceptance and appreciation of both English and French by members of the public;

(d) encourage and assist provincial governments to support the development of English and French linguistic minority communities generally and, in particular, to offer provincial and municipal services in both English and French and to provide opportunities for members of English or French linguistic minority communities to be educated in their own language;

(e) encourage and assist provincial governments to provide opportunities for everyone in Canada to learn both English and French;

(f) encourage and cooperate with the business community, labour organizations, voluntary organizations and other organizations or institutions to provide services in both English and French and to foster the recognition and use of those languages;

(g) encourage and assist organizations and institutions to project the bilingual character of Canada in their activities in Canada or elsewhere;

## **PART X**

### **COURT REMEDY**

**43.** (1) Le ministre du Patrimoine canadien prend les mesures qu'il estime indiquées pour favoriser la progression vers l'égalité de statut et d'usage du français et de l'anglais dans la société canadienne et, notamment, toute mesure :

a) de nature à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement;

b) pour encourager et appuyer l'apprentissage du français et de l'anglais;

c) pour encourager le public à mieux accepter et apprécier le français et l'anglais;

d) pour encourager et aider les gouvernements provinciaux à favoriser le développement des minorités francophones et anglophones, et notamment à leur offrir des services provinciaux et municipaux en français et en anglais et à leur permettre de recevoir leur instruction dans leur propre langue;

e) pour encourager et aider ces gouvernements à donner à tous la possibilité d'apprendre le français et l'anglais;

f) pour encourager les entreprises, les organisations patronales et syndicales, les organismes bénévoles et autres à fournir leurs services en français et en anglais et à favoriser la reconnaissance et l'usage de ces deux langues, et pour collaborer avec eux à ces fins;

g) pour encourager et aider les organisations, associations ou autres organismes à refléter et promouvoir, au Canada et à l'étranger, le caractère bilingue du Canada;

## **PARTIE X**

### **RECOURS JUDICIAIRE**

*Definition of “Court”*

**76.** In this Part, “Court” means the Federal Court.

*Définition de « tribunal »*

**76.** Le tribunal visé à la présente partie est la Cour fédérale.

*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.

...

[...]

*Costs*

**81.** (1) Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

*Frais et dépens*

**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.

*Idem*

(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.

*Idem*

(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.

**PART XI**

**PARTIE XI**

**GENERAL**

**DISPOSITIONS GÉNÉRALES**

*Primacy of Parts I to V*

*Primauté sur les autres lois*

**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:

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

a) partie I (Débats et travaux

- (a) Part I (Proceedings of Parliament);
- (b) Part II (Legislative and other Instruments);
- (c) Part III (Administration of Justice);
- (d) Part IV (Communications with and Services to the Public); and
- (e) Part V (Language of Work).

- parlementaires);
- 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).

[Emphasis added]

**An Act to establish the Department of Industry and to amend and repeal certain other Acts**

...

**PART I**

**POWERS, DUTIES AND FUNCTIONS OF THE MINISTER**

*Powers, duties and functions*

- 4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to**
- (a) industry and technology in Canada;
  - (b) trade and commerce in Canada;
  - (c) science in Canada;
  - (d) consumer affairs;
  - (e) corporations and corporate securities;
  - (f) competition and restraint of trade, including mergers and monopolies;
  - (g) bankruptcy and insolvency;
  - (h) patents, copyrights, trade-marks, industrial designs and integrated circuit topographies;
  - (i) standards of identity, packaging

**Loi constituant le ministère de l'Industrie et modifiant ou abrogeant certaines lois**

[...]

**PARTIE I**

**POUVOIRS ET FONCTIONS DU MINISTRE**

*Compétence générale*

- 4. (1) Les pouvoirs et fonctions du ministre s'étendent de façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés :**
- a) à l'industrie et à la technologie au Canada;
  - b) au commerce au Canada;
  - c) à la science au Canada;
  - d) à la consommation;
  - e) aux personnes morales et aux valeurs mobilières;
  - f) à la concurrence et aux pratiques commerciales restrictives, notamment les fusions et les monopoles;
  - g) à la faillite et à l'insolvabilité;
  - h) aux brevets, droits d'auteur, marques de commerce, dessins industriels et topographies de circuits

and performance in relation to consumer products and services, except in relation to the safety of consumer goods;

(j) legal metrology;

(k) telecommunications, except in relation to

(i) the planning and coordination of telecommunication services for departments, boards and agencies of the Government of Canada, and

(ii) broadcasting, other than in relation to spectrum management and the technical aspects of broadcasting;

(l) the development and utilization generally of communication undertakings, facilities, systems and services for Canada;

(m) investment;

(n) small businesses; and

(o) tourism.

*Additional powers, duties and functions*

(2) The powers, duties and functions of the Minister also extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to regional economic development in Ontario.

**PART II**

**REGIONAL ECONOMIC DEVELOPMENT IN ONTARIO**

*Objectives in relation to regional development in Ontario and Quebec*

**8.** The Minister shall exercise the powers and perform the duties and functions assigned by subsection 4(2) in a manner that will

(a) promote economic development

intégrés;

i) aux normes d'identification, d'emballage et de rendement des produits et services destinés aux consommateurs, sauf en ce qui concerne la sécurité de ces produits;

j) à la métrologie légale;

k) aux télécommunications, sauf en ce qui a trait à la planification et à la coordination des services de télécommunication aux ministères et aux organismes fédéraux et à la radiodiffusion — à l'exception de la gestion du spectre et des aspects techniques de la radiodiffusion;

l) au développement et à l'utilisation, d'une façon générale, d'entreprises, d'installations, de systèmes et de services de communications pour le Canada;

m) aux investissements;

n) aux petites entreprises;

o) au tourisme.

*Extension*

(2) Ils s'étendent également, dans les mêmes conditions, aux domaines liés au développement économique régional en Ontario.

**PARTIE II**

**DÉVELOPPEMENT ÉCONOMIQUE RÉGIONAL EN ONTARIO**

*Objectifs*

**8.** Le ministre exerce les pouvoirs et fonctions que lui confère le paragraphe 4(2) de manière à :

a) promouvoir le développement économique des régions de l'Ontario

in areas of Ontario where low incomes and slow economic growth are prevalent or where opportunities for productive employment are inadequate;

(b) emphasize long-term economic development and sustainable employment and income creation;

(c) focus on small and medium-sized enterprises and the development and enhancement of entrepreneurial talent.

*Duties in relation to regional development in Ontario*

**9.** (1) In exercising the powers and performing the duties and functions assigned by subsection 4(2), the Minister shall, with respect to regional economic development in Ontario,

(a) in cooperation with other concerned ministers and boards and agencies of the Government of Canada, formulate and implement policies, plans and integrated federal approaches;

(b) coordinate the policies and programs of the Government of Canada;

(c) lead and coordinate the activities of the Government of Canada in the establishment of cooperative relationships with Ontario and with business, labour and other public and private bodies; and

(d) collect, gather, by survey or otherwise, compile, analyse, coordinate and disseminate information.

*Coordination*

(2) In exercising the powers and performing the same duties and functions, the Minister may

(a) provide and, where appropriate, coordinate services promoting regional economic development in Ontario including services to develop

à faibles revenus et faible croissance économique ou n'ayant pas suffisamment de possibilités d'emplois productifs;

b) mettre l'accent sur le développement économique à long terme et sur la création d'emplois et de revenus durables;

c) concentrer les efforts sur les petites et moyennes entreprises et sur la valorisation des capacités d'entreprise.

*Attributions*

**9.** (1) Dans le cadre de la compétence visée au paragraphe 4(2), le ministre, en ce qui touche le développement économique régional en Ontario :

a) en collaboration avec les autres ministres ou organismes fédéraux compétents, formule et met en œuvre des orientations, des projets et une conception intégrée de l'action fédérale;

b) coordonne les politiques et les programmes de mise en œuvre du gouvernement fédéral;

c) dirige et coordonne les activités du gouvernement fédéral en ce qui concerne l'établissement de relations de coopération avec l'Ontario, ainsi qu'avec les milieux d'affaires, les syndicats et autres organismes publics ou privés;

d) assure la collecte — notamment par sondage — la compilation, l'analyse, la coordination et la diffusion de l'information.

*Coordination*

(2) Dans le même cadre, le ministre peut :

a) fournir des services favorisant le développement économique régional de l'Ontario, notamment en vue de promouvoir les capacités d'entreprise, de stimuler les

entrepreneurial talent, support local business associations, stimulate investment and support small- and medium-sized enterprises in that province or any part of that province; and  
(b) initiate, recommend, coordinate, direct, promote and implement programs and projects in relation to regional economic development in Ontario.

investissements et de soutenir les associations commerciales locales et les petites et moyennes entreprises dans l'ensemble ou dans une région précise de cette province, et, au besoin, coordonner leur prestation;  
b) concevoir, recommander, coordonner, diriger, favoriser et mettre en œuvre des programmes et des opérations en ce qui touche le développement économique régional en Ontario.

*Regulations*

**10.** The Governor in Council may make regulations  
(a) relating to policies, programs and projects referred to in section 9; and  
(b) generally for carrying out the purposes and provisions of sections 8 and 9.

*Pouvoir réglementaire*

**10.** Le gouverneur en conseil peut, par règlement :  
a) régir les orientations, les programmes et les opérations mentionnés à l'article 9;  
b) prendre toute autre mesure d'application des articles 8 et 9.

[Emphasis added]

## **FACTS AND PROCEEDINGS**

[5] Under subsection 4(2) of the DIA, the powers, duties and functions of the Minister of Industry (the Minister) extend to and include all matters relating to regional economic development in Ontario. Essentially, these subsection 4(2) duties and functions consist in the promotion of economic development in areas of Ontario where incomes are low and economic growth is slow or where opportunities for productive employment are limited.



[6] Sections 9 and 10 of the DIA indicate that, in this regard, the Minister plays a role of defining and implementing policies and plans, and initiates, coordinates, directs and implements programs and projects in relation to economic development in Ontario. The Minister's leadership and coordination role also extends to the federal government's activities in its relations with the various stakeholders.

[7] Finally, the Minister may provide and, where appropriate, coordinate services promoting regional economic development in Ontario (paragraph 9(2)(a)).

[8] In this context, the Department of Industry (the Department) has established a Community Futures Program (the Program) the objective of which is to support economic development by helping communities promote and diversify themselves. Some 61 Community Futures Development Corporations (CFDCs) exist in Ontario. They provide strategic community economic planning services, support to small and medium-sized businesses and access to capital. These are autonomous organisations of the federal government, constituted as not-for-profit organisations under provincial law: see paragraph 6 of the respondents' Memorandum of Fact and Law.

[9] In the rural areas, this program is managed by the Federal Economic Development Initiative in Northern Ontario, or FedNor. It is funded pursuant to section 8 of the DIA.

[10] The residents of the northern part of Simcoe county are serviced by the North Simcoe CFDC (North Simcoe). This CFDC is “Anglo-dominated”, according to the appellants. Its mandate is to provide advice, information and funding to small businesses, and strategic planning for community economic development.

[11] North Simcoe has existed since 1986. It is small: five full-time employees, assisted by a number of volunteers who are either directors or members of the Francophone or Anglophone loans committee. The agency’s director is a unilingual Anglophone. The five employees, two of whom have French as their mother tongue, are fluent in English.

[12] The applicant, Mr. Raymond Desrochers, is the president of the co-appellant the Corporation de développement économique communautaire CALDECH (CALDECH). Created in 1995, CALDECH remained on the back-burner for three years until it obtained funding, including \$22,000 from the Department’s program. Mr. Desrochers says it was created in order to establish and maintain the necessary institutions and programs to enable the members of the Francophone minority to resist an increasing rate of assimilation: Appeal Book, Vol. 1, at page 83, affidavit of Mr. Desrochers, at paragraphs 2 and 3. It has clearly had some success with the Francophone community and its services have been retained many times.

[13] On March 15, 2000, the appellants filed a complaint with the Commissioner of Official Languages (the Commissioner). They criticized North Simcoe’s dearth of services in French. The complaint resulted in a report by the Commissioner dated September 2001.

[14] The Commissioner's investigation focused on North Simcoe's ability to provide services in French to the area's Francophone population. It was conducted in the light of Parts IV and VII of the OLA. At page 14 of her report, the Commissioner concluded that North Simcoe was not in full compliance with the provisions of the language clause in its agreement with the Department and that the Department had failed in its commitment to support the development of the Francophone community in Simcoe county. She held the Department responsible for ensuring that appropriate corrective action be taken in the short term and that, in the long term, measures be taken to guarantee a lasting and satisfactory solution: Appeal Book, Vol. 1, at page 126.

[15] The Department expressed its willingness to abide by the recommendation of the Commissioner, and the latter followed up on the former's action. At the end of two follow-up reports dated June 2003 and August 2004, the Commissioner concluded, on the basis of the evidence she had at her disposal, that:

[TRANSLATION]

The French-language services provided by [North Simcoe] are not equal in quality to those provided in English. Furthermore, there is no evidence that Industry Canada/FedNor has determined the economic and community development needs of the Francophone community or responded to them. We conclude that notwithstanding the efforts made by [North Simcoe] and Industry Canada/FedNor, the latter is still not in full compliance with Parts IV and VII of the *Official Languages Act* in regard to the provision of CFDC services in North Simcoe.

[16] Following this the appellants decided to file the application provided for in subsection 77(1) of the OLA.

## **DECISION OF THE FEDERAL COURT JUDGE**

[17] The judge said that in his opinion North Simcoe was implementing a specific governmental policy or program. Therefore, it was acting on behalf of the Department within the meaning of section 25 of the OLA. The Department thus had a duty to ensure that equal services were provided in both official languages exactly as if the services were provided by Industry Canada itself. This it had not done: see paragraph 38 of his decision. According to the judge, this breach occurred in the year 2000. At paragraph 44 of his decision, he found that “if the proceedings had been instituted in 2000, Industry Canada would clearly have been found in breach of the duty imposed upon it by section 25.”

[18] But the judge said that, in his opinion, North Simcoe, at the time the proceedings were instituted, in 2004, was providing equal services and was capable of communicating in French: see paragraph 73 of his decision. This finding essentially flowed from the following findings, at paragraph 44 of his decision:

If the proceedings had been instituted in 2000, Industry Canada would clearly have been found in breach of the duty imposed upon it by section 25. At that time, North Simcoe had difficulty even answering the telephone in French. However, by the time the proceedings were taken, it had hired a bilingual receptionist, had a French-speaking loan officer, created a French-speaking loan committee and had a number of French-speaking directors. It also has a bilingual library and website. Its French component is far greater than the community as a whole. French speakers are a definite minority comprising only about 6% of the population.

[19] The judge rejected the appellants' argument that Part VII of the OLA creates rights and obligations giving rise to remedial measures. He appropriately followed *Forum des maires v. Canada*, [2004] 4 F.C.R. 276, a decision of this Court.

[20] The judge also ruled that it was not warranted to grant the appellants the relief they sought, having ruled that their claim for relief was without merit. The appellants had sought an order:

[TRANSLATION]

- a. declaring that the respondents have violated and continue to violate Parts IV and VII of the *Official Languages Act*, R.S.C. 1985, c. 31 (4<sup>th</sup> Supp.) (hereinafter "OLA");
- b. declaring that the respondents have violated and continue to violate subsections 16(1) and 20(1) of the *Canadian Charter of Rights and Freedoms* (hereinafter "Charter");
- c. declaring that the respondents have violated and continue to violate the unwritten constitutional principle of respect for and protection of minorities;
- d. enjoining the respondents to:
  - i. comply with Part IV of the OLA in the application of the *Department of Industry Act*, S.C. 1995, c. 1 and the Community Futures Program;
  - ii. comply with Part VII of the OLA in the application of the *Department of Industry Act*, S.C. 1995, c. 1 and the Community Futures Program;
  - iii. comply with the constitutional obligations set out in subsections 16(1) and 20(1) of the Charter in the application of the *Department of Industry Act*, S.C. 1995, c. 1 and the Community Futures Program;
  - iv. comply with the unwritten constitutional principle of respect for and protection of minorities in the application of the *Department of Industry Act*, S.C. 1995, c. 1 and the Community Futures Program;
  - v. to pay to the applicants the sum of \$2,450,000 in damages;

- vi. to grant the Corporation de développement économique communautaire CALDECH permanent and stable funding that includes, *inter alia*:
  - A. annual operational funding in the amount of \$300,000; and
  - B. an investment fund in the amount of \$1,500,000; and
- e. granting the applicants:
  - i. costs on this application, and
  - ii. any further remedy that this Honourable Court might consider appropriate.

[21] Finally, he did not make any order in favour of either party concerning costs, although the application for relief had been dismissed and although subsection 81(2) of the OLA allowed him to grant costs to the appellants notwithstanding the dismissal of their application.

### **RELIEF SOUGHT ON APPEAL**

[22] The appellants are seeking on appeal essentially the same relief as before the trial judge, but with some modifications. They are no longer seeking an order declaring that the respondents have violated and continue to violate subsections 16(1) and 20(1) of the *Canadian Charter of Rights and Freedoms* (the Charter). Therefore, they are no longer seeking an order enjoining them to comply with the Charter. In the trial court, those claims were made in paragraph b. and subparagraph d. iii.

[23] Similarly, they have abandoned their claim for \$2,450,000 in damages that is set out in subparagraph d. v.; in lieu thereof, they are seeking a payment of \$25,000 per month for each month that the CALDECH has not been subsidized since March 15, 2000.

[24] Finally, they are no longer claiming an investment fund of \$1,500,000.

**RESPONSIBILITY OF THE GOVERNMENT OF CANADA FOR THE PROGRAM UNDER THE DIA**

[25] It is not disputed that the program initiated by the Department to promote regional economic development in Ontario is a program of the Government of Canada. As mentioned earlier, the Minister is given powers and is subject to duties under the DIA in regard to economic development in Ontario, including regional economic development.

[26] The appellants submitted that the services promoting regional economic development in Ontario provided pursuant to sections 8 and 9 of the DIA to the majority Anglophone and minority Francophone communities must be of equal quality. Now, they claimed, the services available to the Francophone minority are inferior in quality. They alleged that there are no services of equal quality for the Francophones in the region of Huronia. The services do not result in projects culturally adapted to the minority: see paragraphs 9 and 10 of the Amended Memorandum of Fact and Law of the appellants, where they wrote: [TRANSLATION] “The minority communities, such as the aboriginal and Francophone communities, because of their cultures, have a relatively more collective and community-oriented approach. It is essential that a provider of economic development services take this difference into consideration.”. They deplored a lack of knowledge of the communities being serviced, their needs and their special features. In the appellants’ view, this means that there has to be a Francophone institution, such as the CALDECH, that defines the economic needs of the Francophone minority, participates in or supervises the programming of the services available to Francophones and has a Francophone loan committee. As the Federal Court judge said at paragraphs 69 and 70 of his decision, this



means replacing an agency of the Anglophone majority with an agency of the Francophone minority.

[27] The appellants based their legal arguments on the unwritten constitutional principle of protection of and respect for minorities: see paragraph c. and subparagraph d. iv. of their claims.

[28] It may be that the appellants' complaint about the actual quality of the economic development services provided by the Department under the DIA is founded. Indeed, it may be that some services that are of good quality for the Anglophone community and well adapted to its situation are deficient with respect to the Francophone minority and fail to adequately meet their needs. However, it is also conceivable that the services provided, although objectively equal for either community, are intrinsically deficient or inadequate for both communities. It is therefore possible, from more than one angle, that the economic development services offered by the Department fail to meet the requirements of the DIA. But that is not the legal issue raised before the Federal Court and that now comes to us on appeal.

[29] Indeed, the appellants' application is based on the OLA and not on the DIA. It is an application for a remedy made under subsection 77(1) of the OLA in relation to a complaint that the respondents have breached their obligations under Parts IV and VII of the OLA. It is therefore necessary to refer to the rights set out in these two parts of the OLA and to the concomitant obligations. I will begin with those rights and obligations in Part IV.

## **RIGHTS AND OBLIGATIONS IN PART IV OF THE OLA**

[30] The program (i.e. the Community Futures Program) developed, implemented and sponsored by the Department is a federal government program. As such, emanating from a federal institution, it is subject to the OLA and the official languages policies of the Treasury Board. This means that the provision of services under this program must be guaranteed in both official languages where there is significant demand for them.

[31] The North Simcoe area has been identified as an area with an official language minority population representing at least 5% of the total population within its service area: see Appeal Book, Vol. VII, at pages 219 and 220. The area's Francophone minority is thus entitled to the rights conferred by Part IV of the OLA.

[32] Part IV of the OLA is entitled "Communications with and services to the public". It deals with rights in matters of communications and the language of communications and services. In *Schreiber v. Her Majesty the Queen in right of Canada*, Federal Court No. T-1770-94, October 21, 1999, at paragraphs 113 and 114, Madam Justice McGillis summarized the rights and obligations in Part IV in these words:

Part IV of the *Official Languages Act*, entitled "Communications with and Services to the Public", creates certain rights and corresponding duties in relation to communications and the provision of services in the official languages. In particular, section 21 accords to any member of the public the right to communicate with and to receive available services from federal institutions in either official language in accordance with the provisions in Part IV. To implement and give practical effect to that general right, sections 22 to 26 inclusive impose various duties on federal institutions. For the purposes of the present proceeding, only section 22 is relevant, requiring that the

communications and services of federal institutions must be in both official languages in certain areas of the country, including the National Capital Region.

...

The remaining provisions of Part IV are not directly relevant for the purposes of the present proceeding, but nevertheless underscore the need for federal institutions to take the necessary steps to ensure, from a practical perspective, that the communications and services are provided in a manner that respects and enhances the language rights created in the enactment.

[Emphasis added]

[33] It seems clear from the provisions in this part of the OLA that the equality that is provided for therein is equality at the level of communication with federal institutions and equality at the level of receipt of services in either language, in this case the French language. In other words, the services offered, whether by a federal institution or by a third party acting on its behalf, must be available in both official languages, and communications with this institution or this third party must also be possible in both these languages. In still more schematic terms, Part IV of the OLA provides for equal linguistic access to regional economic development services in Ontario, and not access to equal regional economic development services. It may be that the right to equal economic development services claimed by the appellants exists under the DIA, but we need not address that. For the right and the remedy at stake are those provided for by the OLA: both are defined and constrained by that legislation.

[34] Therefore, with all due respect, Part IV of the OLA does not have the scope that the appellants ascribe to it. Thus, even if there is no doubt that it is strongly desirable, in terms of elaborating community programs development policy, to consult the local communities affected

by these programs and involve them in the determination of their needs, Part IV of the OLA does not grant any right of participation in the definition of the content of those programs.

[35] In short, the appellants claim in effect that the Francophone minority has some special and specific needs in terms of regional economic development and that these needs are not satisfied by the programs established and the services offered under these programs. In my opinion, Part IV of the OLA is of no assistance to them on this aspect of their claim.

[36] Counsel for the intervening party laid great stress on paragraph 2(b) of the OLA which, she says, embodies a principle of substantive, and not simply formal, equality in the use and status of the two official languages. She cited *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paragraph 22, where Mr. Justice Bastarache stated that substantive equality is the correct norm to apply in Canadian law. She also drew particular attention to the comment by Bastarache J. that language rights must be liberally construed and be interpreted “as a fundamental tool for the preservation and protection of official language communities where they do apply”: *ibid.*, at paragraph 25.

[37] I have no difficulty with this principled approach. Paragraph 2(a) of the OLA provided for equality of status and use for both official languages. Paragraph 2(b) is meant to support the development of English and French linguistic minority communities and advance the equality of status and use of the English and French languages. And, needless to say, this cannot be a merely virtual or purely formal equality, without substantive or concrete application. On that basis, I am

willing to subscribe to the opinion of Bastarache J. that “language rights that are institutionally based require government action for their implementation and therefore create obligations for the State”: *ibid.*, at paragraph 24.

[38] However, in my humble opinion, the intervenor’s counsel was mistaken when she argued that, based on this principle of linguistic equality, the respondents had a duty under the OLA to take the necessary steps to ensure that Francophones are considered equal partners with Anglophones in regional economic development, as per a definition of the services that reflect the needs of the minority, and in the provision of equal economic development services. In my view, this is to confuse the rights that may be provided for in, and the duties that may be imposed by, the DIA with the rights and duties that flow from the OLA.

[39] In *Beaulac, supra*, the accused had an absolute right under subsection 530(1) of the *Criminal Code* to equal access to designated courts in the official language that he considered to be his own. Therefore, said Bastarache J. at paragraph 28 of his decision, “[t]he courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.”. It is in relation to the absolute right of an accused to a trial in his own language and institutional bilingualism that Bastarache J., at paragraph 22, spoke of “equal access to services of equal quality for members of both official language communities in Canada”.

[40] This is a very specific context from which it is not possible to infer, as the appellants, supported by the intervenor, have done, that in the case at bar the language rights in the OLA require that [TRANSLATION] “the achievement of the objectives of community economic development necessitate that the services provided be adapted to the unique needs and the cultural reality of the Francophone community”: see paragraph 35 of the appellants’ Amended Memorandum of Fact and Law and paragraph 11 of the intervenor’s Memorandum of Fact and Law. There is nothing in Part IV that would warrant or lead to such an inference. When some services are available, as section 25 provides, Part IV simply gives the appellants the right to receive them in either official language.

[41] To conclude, I am of the view that the appellants are not incorrect to say that federal institutions should take into account the cultural needs of a minority language community in establishing services that are also intended for them. However, I do not think that Part IV of the OLA is the foundation that enables them to demand that the respondents act accordingly. To hold otherwise would amount to distorting the objective of the OLA and doing violence to the language of the statutory enactments. Part IV is meant to help the official language minorities preserve and promote their language and cultural identity by enabling them to have access, in the official language of their choice, to the government services that are available. This is an important objective of Part IV, to be sure, but it is nevertheless a limited objective, and it is not the role of the courts to go beyond Parliament’s express intention.

**WAS NORTH SIMCOE REQUIRED TO PROVIDE THE SERVICES IN FRENCH?**

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

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

[44] Counsel for the respondents argued that the judge erred in finding that North Simcoe was acting on behalf of the respondents within the meaning of section 25. This is because the expression “on behalf of/pour le compte de” implies a notion of prior authorization by the person on whose behalf the third party will act: see the respondents’ Memorandum of Fact and Law at paragraphs 44 and 45. If services made available by a third party are to be subject to the obligations in Part IV of the OLA, it was argued that the third party must necessarily obtain the

prior authorization of the federal institution to provide the services in question, which was not the case here.

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

[46] Similarly, a third party may act on behalf of another person when he exercises powers that the other person has delegated to him: see *Commissioner of Official Languages (Can.) v. Canada (Minister of Justice)* (2001), 194 F.T.R. 181, at paragraph 138 (F.C.), where the Federal Court held that the province of Ontario and the municipal governments that had signed an agreement with Justice were acting on behalf of the federal government in the implementation of the *Contraventions Act*, S.C. 1992, c. 47, when they exercised the powers that were delegated to them by the federal government.

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



[48] Counsel for the respondents referred to *Lavigne v. Canada (Human Resources Development)*, 2003 FCA 203, where this Court confirmed the decision of the Federal Court. The latter had held that there was no delegation of powers in that case because Emploi-Québec had jurisdiction to act in the area of activities related to the labour market and “is not dependent upon federal authorization for its activities and owes nothing to it”.

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

[50] Thirdly, delegation, which both *Lavigne* and *Commissioner of Official Languages (Can.)* accept as proof of acting on behalf of another, and ratification are both modes of authorization. The *Nouveau Petit Robert* defines ratification as a confirmation or approval [*homologation*] (at page 2099) and delegation as a mandate or power of attorney [*procuration*] (at page 646). Synonyms of authorization, or having the same meaning as the verb “to authorize”, are accreditation, confirmation, agreement, approval, consent, acceptance and permission (at

page 184). This applies as well to a partnership, which evokes the notion of agreement and hence of reciprocal authorization (at page 1791).

[51] At the end of the day, the issue is whether, given the facts and circumstances of the case, the third party is providing the services of a federal institution or a federal government program with the accreditation, agreement, confirmation, consent, acceptance or approval of the institution or the government. In the affirmative, it must be held that this third party is acting on behalf of a federal institution within the meaning of section 25 of the OLA. And the third party is required to provide these services in both official languages if, I repeat, the federal institution or federal government were themselves subject to this obligation.

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

[53] Counsel for the respondents submitted that the relationship between the Department and North Simcoe did not go beyond mere financial support to a CFDC that he qualifies as autonomous, acting on behalf of the community and receiving funding from more than one source, including the federal government.

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

[55] The respondents' counsel also referred to the opinion of the Commissioner of Official Languages that North Simcoe was not acting on behalf of the federal government within the meaning of section 25 of the OLA. This opinion was not binding on the Federal Court judge, who did not share it. I think he was right to take his distance from it in this case. I will try to explain why in the next few paragraphs.

[56] The respondents' counsel argues that the judge confused North Simcoe's obligation to account for the funds received with a notion of control allegedly exercised by the federal government over North Simcoe.

[57] I do not disagree with the respondents' proposition that they must themselves account to Parliament for the funds that are allocated to them and therefore that they not only have a right

but an interest in knowing how the funds they pay to North Simcoe are spent, if only in order to satisfy themselves that they are directed to activities that are clearly consistent with the established program. If this case involved only this kind of control, the question would be much harder to resolve. But such is not the case.

[58] The Department's program exercises a general form of control over the definition, nature and scope of the activities of the program and eligible activities, over the costs of these activities and over the results that are sought: see *The Government of Canada's Community Futures Program, Terms and Conditions*, October 3, 2005, Canada.

[59] Thus, we see at page 3 that all policies of the Government of Canada and related legislation, including the OLA, are applicable, "unless otherwise noted in these Terms and Conditions". I found no such exceptions.

[60] The program activities for which the CFDCs may receive support from the federal government are the following:

- a. Fostering strategic community planning and socio-economic development by working with their communities to assess local problems, establish objectives, plan and implement strategies to develop human capital; institutional and physical infrastructure; entrepreneurship; employment; and the economy;
- b. Providing business services by delivering a range of business, counselling and information services to SMEs and Social Enterprises;
- c. Providing access to capital to assist existing SMEs and Social Enterprises or to help entrepreneurs to create new SMEs and Social Enterprises;

- d. Supporting community-based projects and special initiatives by collaborating with other partners in the public sector and civil society to implement strategic community projects or deliver special initiatives targeted to communities. These projects would vary considerably from one community to another and could include a wide range of local initiatives in areas such as tourism, entrepreneurship, economic opportunities for specific client groups such as women, youth, Aboriginal people and members of official language minorities, or projects which respond to specific challenges facing a community such as downturns in important industries.

[61] Among the eligible activities for program recipients, we see that these include, for the local CFDCs:

- strategic and community planning,
- community mobilization and networking,
- provision of information and management tools,
- leadership development,
- opportunity identification and feasibility studies,
- business planning,
- business counselling,
- management training,
- marketing,
- studies,
- skills development, including entrepreneurial training,
- performance measurement and evaluation,
- environmental assessments,
- applied research and development,
- lending to IF Pools to better utilize cash reserves and make collaborative investments,
- business financing in the form of repayable loans, loan guarantees, or equity positions, and
- regional collaborative tourism marketing initiatives.

[62] The Department's control does not end there. In the contract executed between Industry Canada and North Simcoe (I have looked at the 2004 contract, which is only in English), I note that the Department exercises control over the way in which the services are provided, stipulating in clause 8 that North Simcoe must operate in both official languages for the services that it delivers to the public under the program, that these services must be announced and

advertised in both official languages and that communications with the public must comply with the same requirements: Appeal Book, Vol. VII, at page 1929. Clause 8.1 reads:

**8.0 Official Languages**

**8.0 Langues officielles**

**8.1** Where the Recipient communicates with members of the public regarding activities supported by the Contribution, and/or where the Recipient provides services supported by the Contribution to members of the public, the Recipient shall :

**8.1** Lorsque le Bénéficiaire communique avec les membres du public concernant des activités appuyées par la Contribution, ou lorsque le Bénéficiaire fournit aux membres du public des services appuyés par la Contribution, le Bénéficiaire doit :

(a) make available in both official languages any notice, advertisement, announcement, document or publication for the information primarily of members of the public who are resident in the community;

a) rendre disponible dans les deux langues officielles tout avis, annonce publicitaire, communiqué, document ou publication destiné surtout aux membres du public qui sont résidents de la collectivité;

(b) actively offer and provide in both official languages any services to be provided or made available to members of the public who are resident in the community;

b) offrir de façon active et fournir, dans les deux langues officielles, tout service qui sera fourni ou disponible aux membres du public qui sont résidents de la collectivité;

(c) encourage members of both official language communities to participate in its activities; and

c) inciter les membres des deux collectivités de langue officielle à participer aux activités;

(d) organize activities when appropriate to meet the needs of members of both official language communities.

d) organiser, le cas échéant, les activités de manière à répondre aux besoins des deux collectivités linguistiques.

[63] Furthermore, the general terms that are found in Schedule 3 appended to the contract reveal an additional notion of control in terms of the delivery of services by North Simcoe.

Indeed, according to clause 1.4, no significant alteration in North Simcoe's policies or procedures in regard to personnel, operation of the Investment Fund, operation of these small

business counselling and assistance services, general administration and conflicts of interest may be made without prior consultation with the Minister: *ibid.*, volume VII, at page 1934.

[64] Under clause 4.1(c), North Simcoe has undertaken not to enter into any agreement that might jeopardize the full implementation of the contract between the two parties without the approval in writing of the Minister. This attests to a degree of control over the activities of North Simcoe that protects the Department's interest in the implementation of the program itself: *ibid.*, at page 1936.

[65] Through the operation of clauses 8.2 to 8.5, the Minister exercises control over the public disclosure of the agreement between the parties. He may participate in the announcement and display promotional materials of Industry Canada and FedNor: *ibid.*, at page 1939.

[66] Clause 1.3 requires that North Simcoe develop, in consultation with the Minister, a detailed action plan for community strategic planning. The plan shall identify the specific initiatives that North Simcoe intends to take and the anticipated results of these initiatives. It must also contain some performance indicators that are acceptable to the Minister: *ibid.*, at page 1942.

[67] As to the North Simcoe objectives in regard to community strategic planning and small business assistance and counselling, the agreement includes an extensive detailed list of the activities that North Simcoe and the Department have agreed to maintain: *ibid.*, at pages 1943 to

1946. In my humble opinion, these terms of the agreement, by their nature and the characteristics and detail of the activities to be carried out, show that the relationship between North Simcoe and the Department go far beyond a merely distant financial contribution.

[68] Clauses 9.6 and 9.7 of Schedule 3 prohibit North Simcoe from transferring the benefits of the agreement, in whole or in part, to anyone else without the prior approval in writing of the Minister, failing which the transfer will be void: *ibid.*, at page 1940.

[69] Schedule 3 also gives the Minister an important supervisory authority over North Simcoe:

[TRANSLATION]

- (a) The Minister may determine whether North Simcoe has ceased its operations, whether it has failed to comply with the terms of the agreement, whether there has been an adverse change in circumstances that alters the nature of the risk, whether it has failed to act with due diligence in regard to the obligations assumed: *ibid.*, clauses 5.1(c), (e), (f) and (g), at page 1936;
- (b) North Simcoe shall give the Minister reasonable notice of the date and place of all meetings of the official board and other committees. A representative of the Minister shall be entitled to be present at the meetings. Finally, North Simcoe shall send the Minister a copy of the minutes of each meeting of the board as soon as they shall have become available: *ibid.*, clause 6.1, at page 1937;
- (c) North Simcoe must provide the Minister with an annual report of its activities and a report of its audited financial statements and the Minister shall have extensive authority to request information from North Simcoe on the activities and to inspect the Simcoe premises and its books and ledgers: *ibid.*, clauses 6.3, 6.4, 6.6 and 6.8, at page 1938; and
- (d) the Minister shall have a right of access to the files of the clients of North Simcoe and the right to contact these clients for purposes of evaluating the success of the activities: *ibid.*, clause 6.11, at page 1939.

[70] I could go on giving examples of government control over North Simcoe. I will simply add that North Simcoe is an integral component of the program established by the government.



Moreover, according to clauses 2.2, 3.1 and 4.1(a) of Schedule 3, North Simcoe must, in the event of cessation of its operations or dissolution, transfer its property and assets to another CFDC approved by the Minister: *ibid.*, at page 1935. This obligation reflects the fact that North Simcoe is one cog in a larger program, coordinated by Industry Canada, which oversees the approval of all CFDCs. See the definition of CFDC in the North Simcoe contract, where the notion of oversight of approvals appears: *ibid.*, at page 1925.

[71] The judge correctly found that the program was an initiative of Industry Canada and that it was managed by FedNor. In my opinion, the terms and conditions of the program and the agreement between the parties show that North Simcoe acts on behalf of the government in the establishment and implementation of the regional and community economic development program.

[72] To conclude otherwise would allow an important government program, in one of its principal phases, its implementation, to avoid the application of the OLA. It would make a dead letter of section 25, destroy both its letter and spirit and allow the government to do indirectly what it cannot do directly. It would also negate substantive equality in terms of status and use of the minority language in the area in question.

**OLA SUBSECTION 77(1) APPLICATION FOR REMEDY FOR ALLEGED BREACHES  
OF PART VII**

[73] In *Forum des maires v. Canada, supra*, this Court found that the avenue provided for in subsection 77(1) of the OLA was limited to complaints based on the sections and parts enumerated in that subsection. Now, Part VII was not one of the parts referred to therein. Since then, the OLA has been amended by the *Act to Amend the Official Languages Act (Promotion of English and French)*, S.C. 2005, c. 41, to include Part VII in subsection 77(1). As a result, the leave to appeal granted by the Supreme Court of Canada against the decision of this Court became moot. It was therefore withdrawn and declared to be of no effect: *Forum des maires de la péninsule acadienne v. Canada*, [2005] 3 S.C.R. 906.

[74] At the time the appellants made their application, the statutory amendment had not yet been enacted. Moreover, it did not come into force until November 25, 2005, and then without retroactive effect. Therefore, the decision of this Court concerning the language of subsection 77(1), as it stood prior to the amendment, is the one that is applicable in this case: the section 77 application is therefore not available to the appellants for the alleged breaches of Part VII.

**DATE AT WHICH THE ALLEGED BREACHES OF THE OLA SHOULD BE ASSESSED**

[75] At paragraph 43 of his decision, the judge held that the relevant facts for the purpose of determining whether there was a breach of the OLA provisions “are those in place when the proceedings were filed in October 2004”. He cited in support of his holding *Forum des maires v. Canada, supra*, a decision of this Court, but without specific reference.

[76] However, at paragraph 53 of that decision, Décaré J.A. stated that, for the purposes of the application provided for in section 77 of the OLA, the date of filing of the complaint to the Commissioner of Official Languages is the date that is relevant. He wrote:

What the Agency is really disputing, and this is what its memorandum indicates, is not the merits of the complaint at the time it was filed, in October 1999, but the choice of relief ordered by the Judge in September 2003. As the Agency puts it, the evidence before the Court at the time when the case was reserved in June 2003 established that the deficiencies that existed at the time of the complaint had been corrected. And this leads the Agency to conclude that no relief is necessary and that the object of the application is now moot. On this point, the Agency is mistaken about the role of the Judge who hears an application based on section 77 of the *Official Languages Act*. That role is to decide whether the complaint was justified at the time it was filed, not whether it is justified at the time of the trial. If the Judge decides that the complaint was justified at the time it was filed, he must allow the application and then strive to define “such remedy as [the Court] considers appropriate and just in the circumstances” (subsection 77(4)). Needless to say, if the alleged deficiencies have all been remedied at the time of the trial, and if the complaint is then no longer justified, the Judge may choose not to order any relief, except for example in the form of costs.

[Emphasis added]

[77] The judge below has indeed acknowledged in the following paragraph that, in 2000, the date at which the complaint was filed, “Industry Canada would clearly have been found in breach of the duty imposed upon it by section 25.” Had it not been for his mistake, he would have allowed the appellants’ subsection 77(1) application, as dictated by *Forum des maires, supra*. This leads me to discuss the appropriate relief in the circumstances.

### **THE APPROPRIATE RELIEF IN THE CIRCUMSTANCES**

[78] The judge said that, in his opinion, at the date of filing of the section 77 application in October 2004, some corrective measures had been taken and he did not have sufficient evidence to find that Part IV of the OLA had not been complied with in connection with the three incidents that were brought to his attention: see paragraphs 44 and 55 of his decision. Although the judge did not say it in so many words, it is obvious from reading paragraphs 44 to 55 of the decision that he was satisfied that there was sufficient equality in linguistic access within the meaning of the OLA, at that time and when the case was heard, in the services provided by North Simcoe. I am unable to say that this mixed finding of fact and law is without foundation, given the evidence that was before him. It does not appear to me to be so marred by palpable and overriding error in law or in fact as to warrant the intervention of this Court: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[79] Accordingly, in the light of *Forum des maires, supra*, the judge could not, in the exercise of his discretion, grant any of the relief sought by the appellants, with the exception of costs, which I will now address.

### **APPELLANTS' ENTITLEMENT TO COSTS ON THE FEDERAL COURT PROCEEDING**

[80] At the conclusion of his decision, the judge considered the issue of costs and ruled that there was no reason to award them. He wrote in the final paragraph of his reasons:

The application shall be dismissed. I do not consider it appropriate to order costs. Although the applicants did not obtain the result they sought, they did convince me that Industry Canada was statutorily obliged, under section 25 of

the *Official Languages Act*, to see to it that North Simcoe provided equal service in French and in English.

[81] He did not refer to section 81 of the OLA or discuss the possibility that under that provision the costs could be awarded to the appellants although they had been unsuccessful.

[82] The judge should have allowed the appellants' application since, as previously mentioned, it was well founded at the time when the complaint was made in 2000: see paragraph 53, quoted above, from *Forum des maires, supra*. He had the power to award costs to the appellants as relief, since the complaint was no longer warranted at the time of the proceeding and the hearing: *ibid*. He did not exercise it as a result of his mistake as to the time when the facts in support of the allegations of a breach of the OLA were to be assessed.

[83] In the circumstances, I do not think it is useful or necessary to return the matter to him for determination of this issue. Since a section 77 application was appropriately filed and the application must be allowed, I am of the view that the appellants are entitled to their costs, especially since they have prevailed on an important point, the application of section 25 of the OLA to the activities of North Simcoe exercised in the context of the Department's Communities Futures Program.

## **CONCLUSION**

[84] For these reasons, I am of the opinion that the appeal from the judgment of the Federal Court should be allowed for the purposes of correcting the formal judgment. Therefore, I would allow the appeal with costs and set aside his order dated July 15, 2005. Proceeding to deliver the judgment that the judge should have made, I would substitute another order by which I would

allow with costs the appellants' application made under subsection 77(1) of the OLA. I would not allow any further relief than the costs, given the remedial measures that have been taken.

“Gilles Létourneau”

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J.A.

“I agree  
J. Richard C.J.”

“I agree  
M. Nadon J.A.”

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-451-05

**STYLE OF CAUSE:** RAYMOND DESROCHERS et al. v.  
DEPARTMENT OF INDUSTRY OF CANADA et  
al.

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** October 4, 2006

**REASONS FOR JUDGMENT BY:** LÉTOURNEAU J.A.

**CONCURRED IN BY:** RICHARD C.J.  
NADON J.A.

**DATE OF REASONS:** November 17, 2006

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