Date: 20071128

Docket: T-561-05

Citation: 2007 FC 1251

Ottawa, Ontario, the 28th day of November 2007

Present: the Honourable Mr. Justice Lemieux

BETWEEN:

ANDRÉ LAVOIE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review made pursuant to section 18.l of the *Federal Courts Act*, R.S.C. 1985, c. F-7, from the final report (the report) of the Office of the Commissioner of Official Languages (the Office) on July 14, 2004 by which the applicant's complaint, prepared on March 8, 2002 at a meeting between Mr. Lavoie and the deputy director

of the Investigations Branch of the Office (the deputy director) and investigated pursuant to the *Official Languages Act* (the OLA), was dismissed.

[2] As worded, Mr. Lavoie's complaint concerned four allegations of breaches of the OLA regarding equal opportunities to obtain employment and advancement and equitable participation by Francophones at the Human Resources Centre in the Harry Hayes Building in Calgary of Human Resources Development Canada (HRDC or the Department).

[3] In particular, the breaches identified in the Commissioner's final report are the following.

> [TRANSLATION]
>
> (1) The selection processes, REH-2862SW94-P for a bilingual PM-02 program officer position, and REH-67337SW94-1 for an English essential position of senior development officer at the PM-04 level, infringed the employment opportunities of French-speaking Canadians and did not comply with paragraph 39(1)(*a*) of the *Official Languages Act*.
>
> (2) The appointment of an English-speaking person which was made on August 9, 2001, without a competition, for a PM-02 program officer position, infringed the equality of employment and advancement opportunities of Francophones and was a breach of paragraph 39(1)(*a*) and of subsection 39(2) of the *Official Languages Act*.
>
> (3) Equal participation did not exist in senior positions and this situation was contrary to paragraph 39(1)(*b*) of the *Official Languages Act*.
>
> (4) The fact that the Department did not identify any bilingual positions at the senior levels adversely affected the opportunities for employment and advancement of French-speaking Canadians and so was a breach of paragraph 39(1)(*a*) of the *Official Languages Act*.

[4] The applicant is asking this Court to set aside the decision by the Office and to make an order substituting its decision for that of the Office, and alternatively, to make an order referring the matter back to a different member of the Office for reconsideration.

Factual background

[5] Between October 23, 2000 and April 2001 the Department in Calgary held competition REH-2862SW94-P to fill a program service officer position (PM-02). This competition was open to the public, but limited to persons working or residing within 40 kilometres of Calgary. The language profile of the position was “BBB/BBB”, that is, bilingual imperative.

[6] The applicant André Lavoie applied within the specified deadlines, but his candidacy was not accepted by the Public Service Commission (PSC) on the ground that he had not established in his curriculum vitae that he had knowledge of “PowerPoint” software. Following this rejection, the applicant filed a complaint with the PSC regarding the assessment of his candidacy and that complaint was dismissed.

[7] The Department proceeded with the staffing process as follows:

- the Department received a total of 125 applications, and by a screening process conducted by the PSC, 72 candidates were selected;

- eight of those candidates passed an initial written test and three were chosen for an interview;

- as a result of the interviews only one candidate met the requirements and she was eliminated since she did not meet the language requirements. The competition was accordingly declared non-productive in April 2001. [Emphasis added.]

[8] On March 1, 2001 a new PM-02 position, designated English essential, was created by the Department. To fill this position the Department asked Treasury Board to make an exception to the general rule that Public Service positions be filled following an open, fair and equitable competition. The reason given by the Department for this request was the non-productive nature of its recruiting efforts, including the bilingual imperative PM-02 competition. Treasury Board granted the exception requested by the Department.

[9] On August 9, 2001 Troy Hughes, a unilingual Anglophone, was appointed to the newly created PM-02 position without any competition being held. It should be mentioned that Troy Hughes was not a member of the Public Service at the time of his appointment, but had previously held a position with the Department in Goose Bay and had been hired as a casual employee for a PM-02 position in Calgary.

[10] On October 19, 2001, the applicant filed a complaint with the Office of the Commissioner putting forward several grievances, including discriminatory hiring practices in the bilingual imperative PM-02 competition, non-equitable participation by Francophones at the senior levels of the Department and the inability of the Western Economic Diversification Office (WED) to provide services in French. This complaint was drafted by the applicant himself and contained no reference to legislative provisions.

[11] We should mention how the Office of the Commissioner investigated the complaint of October 19, 2001 filed by Mr. Lavoie. The Office in fact separated from Mr. Lavoie's other grievances that relating to the lack of French service in the WED Office. This was the subject of a separate investigation and a final report on April 7, 2003, in which the Office concluded that it was valid.

[12] In my opinion, the explanation of how the Office investigated the other aspect of Mr. Lavoie's complaint leads to confusion.

[13] First, the affidavit of the deputy director states in paragraph 14 [TRANSLATION] "We informed the complainant in writing on November 15, 2001 that we were refusing to hear his complaint [PM-02 without competition] pursuant to subsection 58(4) of the OLA because the facts alleged did not fall within the scope of the OLA and were not under the Commissioner's jurisdiction".

[14] This letter is Exhibit D of his affidavit, but it is apparent from reading it that it is not a refusal to investigate, but that after investigation [TRANSLATION] "there was no breach of the OLA" because Mr. Hughes was appointed after an <u>internal competition</u>, which as Mr. Lavoie pointed out in his letter of March 12 was incorrect (Exhibit K of André Lavoie's affidavit).

[15] These are the circumstances in which the Office of the Commissioner decided to incorporate in the complaint which resulted from the meeting of March 8, 2002 the applicant's

grievance regarding the competition for the bilingual PM-02 position and the lack of a competition for the PM-02 English essential position.

[16] On March 21, 2002 the Office of the Commisioner wrote the Department telling it of its intention to conduct an investigation into Mr. Lavoie's complaint "that Francophones do not have equal opportunities for employment at the Human Resources Centre in the Harry Hayes Building in Calgary . . . The investigation will take into account, amongst other things, the provisions of Part VI and the spirit of the OLA". [Emphasis added.]

[17] The investigation began on April 15, 2002 when investigator Suzanne Lepage wrote Kathie Everett, HRDC official languages coordinator in Alberta, asking for several items of basic information.

[18] On April 4, 2003 the investigation was transferred to Claire Frenette as Suzanne Lepage went on maternity leave.

[19] On April 17, 2003 the applicant wrote the Office of the Commissioner to object to the delay in processing his complaint.

[20] On July 14, 2004 the Office rendered its preliminary report, which concluded that the Department had not contravened paragraph 39(1)(*a*) of the OLA for the following reasons:

> [TRANSLATION]
>
> - no language group was favoured in the selection process for the PM-02 positions nor in that for the PM-04 position, senior development Officer, English essential, the competition for which was cancelled as the result of budget cuts;
> - there was no exclusion of a language group in any appointment without competition; and
> - the fact that no position designated bilingual could be found among the senior positions did not as such contravene the opportunities for advancement of French-speaking Canadians.

The preliminary report further concluded that the Department had not contravened paragraph 39(1)(*b*) of the OLA regarding equitable participation because the composition of the Department's work-force was appropriate in terms of its mandate, the public served and its location.

[21] The preliminary report based its conclusions on analysis of section 39 of the OLA, which is found in Part VI of the Act. It interpreted this provision as follows:

> [TRANSLATION]
>
> Subsection 39(1) discusses more specifically the two parts of that provision: that is, (1) equal opportunity for English-speaking Canadians and French-speaking Canadians to obtain employment and advancement in federal institutions, without distinction as to ethnic origin or first language learned; and (2) equitable participation by both official language communities in those institutions, taking into account their characteristics, mandates, the public they serve and their location.
>
> Subsection 39(2) states that the implementation of these two aspects shall take into account the duties of federal institutions under Part IV (communications with and services to public) and Part V (language of work) of the *Official Languages Act*.
>
> Finally, subsection 39(3) of the Act provides that selection and promotion of employees in the federal Public Service shall continue to be according to merit.
>
> The first aspect implies that Canadians in both official language groups shall not be the subject of any discrimination on account of their first official language. The Treasury

Board Official Languages Manual (Chapter 3-1) states in this regard that institutions must ensure that:

. the method used to select employees is based solely on merit and that there are no discriminatory practices against, or artificial barriers to, members of either language group;
. its managers take the measures required to attract candidates of both language communities;
. its managers do not set hiring quotas that favour either official language group. Hiring criteria must be based on real job requirements;
. all applicants for positions within departments and agencies subject to the *Public Service Employment Act* may use the official language of their choice during the hiring process.

Paragraph 39(1)(*b*) of the *Official Languages Act* implies equitable participation by Francophones and Anglophones in federal institutions, but recognizes that their participation may vary depending on certain factors such as the mandate of the institution, the target public and the location of offices. Paragraph 39(1)(*b*) therefore does not require that participation rates be the same for all institutions.

The Treasury Board Official Languages Manual indicates in this regard that institutions must ensure that "the participation of the two linguistic groups must normally be reflected in all job categories, occupational groups and hierarchical levels, taking into account the availability of possible candidates in the relevant sector of the labour force".
[Emphasis added.]

[22] A copy of the preliminary report was sent to the applicant and he was asked to make comments. He requested certain additional information, which was sent to him on February 20, 2004, and by a letter dated April 19, 2004 he communicated his comments to the Office. The comments made by the applicant may be summarized as follows:

- he pointed out that he had not filed a new complaint on March 8, 2002, but had rather requested the reopening of the investigation of October 19, 2001 and the review of the conclusions contained in the investigation report of November 15, 2001;

- he alleged that the appointment of Mr. Hughes to a PM-02 position was difficult to explain since at the same time an external recruitment was cancelled for lack of funds; and that this appointment deprived French-speaking Canadians of the opportunity to obtain employment in the Public Service, contrary to sections 21 and 39 of the OLA;

- finally, he alleged that replacing a position designated bilingual by a similar position designated English essential infringed section 91 of the OLA.

[23] The final investigation report was rendered on July 14, 2004.

Impugned decision

[24] The final report stated that it was pursuant to a complaint filed on March 8, 2002, in which the aforesaid offences were listed.

[25] The report mentioned the fact that the comments made by Mr. Lavoie on the preliminary report were not accepted in the final report. It further stated that the investigation did not deal with section 91 of the OLA, since the infringement of this provision was not alleged in the complaint heard.

[26] The report discussed the results of the PM-02 competition in which Mr. Lavoie participated and confirmed that the applicant's candidacy was not accepted, in view of the fact that his curriculum vitae did not establish he had knowledge of "PowerPoint" software, a skill which was considered essential for the position. The report further mentioned that another competition, namely the competition for a PM-04 position, was held publicly, but was then cancelled as the result of budget cuts.

[27] The Office of the Commissioner concluded that in these competitions the Department had not favoured one language group at the expense of another. In support of this conclusion, it noted

in particular the fact that the competitions were posted on Internet sites and advertised in both English and French newspapers. The Office further concluded that in view of the number of bilingual applications received the Department had no duty, as Mr. Lavoie maintained, to broaden the scope of the PM-02 competition.

[28] On the appointment of Troy Hughes to the position of PM-02 program officer, the Office noted that in November 2001 it had refused to hear a complaint on this matter, but following a meeting with the applicant and based on new information another complaint was initiated. It subsequently concluded that the selection process, which involved selecting a specifically designated person, did not have the effect of discriminating against one language group at the expense of another, but rather had the effect of excluding all members of the Public Service as well as other members of the public from the selection process. The Office further noted that there was no evidence to support the applicant's allegation that the bilingual PM-02 position was replaced by the English essential PM-02 position.

[29] As to the equitable participation of representatives of both language groups in the Department at the Human Resources Centre in the Harry Hayes Building in Calgary (the Centre), the Office ruled that eight individuals whose mother tongue was French out of a total of 90 worked there, which represented about 8.9 % of its staff, whereas Francophones were 1.8% of the population in Calgary. It further noted that these eight French-speaking individuals held positions at the CR-04, CR-05, AS-01 and PM-02 levels, and that two-thirds of the Centre's positions were at these levels. With this in mind, the Office observed that the remainder of the Centre's positions were classified at the PM-03 or a higher level <u>and it was impossible to</u>

determine whether French-speaking individuals held those positions since they were positions designated English essential, for which this type of information is not available. Based on this information, the Office considered that section 39 of the OLA had not been infringed, since the presence of one Francophone in a managerial position at the Centre would mean that there would be overrepresentation, while the absence of a Francophone meant that there was Anglophone overrepresentation. Accordingly, the Office concluded that the Department's Centre in Calgary was not a sample which lent itself to this type of calculation and the applicant's allegation was without foundation.

[30] As regards the absence of any position designated bilingual at the senior levels, the Office concluded that under section 91 of the OLA the bilingual designation of a position depended on the requirement of bilingualism in carrying out the duties associated with a position. It pointed out that the fact that a position was at a senior level had nothing to do with this criterion.

[31] Finally, the Office concluded that the complaint was invalid and that the composition of the Centre's work-force was appropriate in view of its mandate, the public served and its location. It also added that the Department had undertaken to include in its questionnaire a question about the official language of staff, so as to be able in future to measure the composition of its work-force according to their language profile.

Issue

[32] This application for judicial review raises the following questions:

- Is section 39 of the OLA purely declaratory and so not triable? This preliminary question was raised by the respondent.
- Did the Office err in concluding that the appointment of Troy Hughes without competition was independent of the non-productive competition in which Mr. Lavoie applied? The applicant argued that the Office had ignored the evidence that the Department replaced the PM-02 bilingual imperative position by an English essential position.
- Did the Office err in concluding that there was equitable participation by Francophones in the Centre? The applicant argued that the Office had made an error in view of the undoubted fact that there were absolutely no bilingual positions at the Centre's senior levels.
- Did the way in which the investigation of the applicant's complaint was conducted raise a reasonable apprehension of bias?

Standard of review

[33] The first question which the Court must decide is one of jurisdiction, and so it is not necessary to stop to consider the standard of review. The same applies to the last question regarding procedural fairness, since it is well settled that if there has been an infringement of procedural fairness the decision will generally be set aside and referred back to the Office for reconsideration.

[34] The other two questions raised in the case at bar deal essentially with findings of fact. In view of the factors mentioned by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, I consider that the standard of review applicable to these questions

is that of patent unreasonableness, to be found in subparagraph 18(1)(*d*)(iv) of the *Federal Courts Act*. I note that the parties admitted at the hearing that they were of the same opinion.

<u>Applicable legislation</u>

[35] Sections 39, 77 and 91 of the OLA are relevant to the questions raised in the case at bar.

39. (1) The Government of Canada is committed to ensuring that	39. (1) Le gouvernement fédéral s’engage à veiller à ce que :
(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	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) 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.	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.
(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	(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

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

objets et des dispositions des parties IV et V relatives à l'emploi.

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

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

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.

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.

(2) An application may be made under subsection (1) within sixty days after
(a) the results of an investigation of the complaint by the Commissioner are reported to the complainant under subsection 64(1),

(b) the complainant is informed of the recommendations of the Commissioner under subsection 64(2), or

(c) the complainant is informed of the Commissioner's decision to

(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).

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.

(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.

(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.

(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.

(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.

(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.

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

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

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

the functions for which the staffing action is undertaken.	s'impose objectivement pour l'exercice des fonctions en cause.

Analysis

Is section 39 of OLA purely declaratory and so not triable?

[36] To begin with, we should consider the preliminary question raised by the respondent, namely that section 39 of the OLA, on which the applicant's complaint was heard, is not triable. The respondent argued that this Court should not hear the case at bar since section 39 only states a commitment and so does not create any right or duty.

[37] This argument was based in particular on the contention that section 39 of the OLA does not create a right or duty and the fact that it is not one of the provisions contemplated by section 77 of the OLA, which gives a complainant the right to bring an action in the Federal Court for the latter to assess the validity of his or her complaint, ensure that the rights and duties recognized by the OLA are observed and see that appropriate and just compensation in the circumstances is awarded.

[38] Much of the respondent's argument was based on *Forum des maires de la Péninsule acadienne* v. *Canada (Canadian Food Inspection Agency)*, [2004] 4 F.C.R. 276 (C.A.) (hereinafter *Forum des maires*) decided by the Federal Court of Appeal. In that case the Federal Court of Appeal considered the nature of the action contemplated by section 77 of the OLA. Although instructive, the comments made there on section 77 of the OLA do not have any direct

bearing on the case at bar, since this is an application for judicial review brought pursuant to section 18.1 of the *Federal Courts Act*. With this in mind, it should be noted that on October 20, 2005 the applicant discontinued a court action he had brought in case T-516-07 pursuant to section 77.

[39] The question that arises here is whether the effect of section 77 of the OLA is to exclude actions under section 18.1 of the *Federal Court Act*. The Federal Court of Appeal has already ruled on this point in *Devinat* v. *Canada (Immigration and Refugee Board)*, [1999] F.C.J. No. 1774 (F.C.A.)(QL) (hereinafter *Devinat*). At that time it held that actions under section 18.1 of the *Federal Courts Act* could be brought for breaches of the provisions of the OLA not covered by subsection 77(1) of the OLA, in view of the fact that subsection 77(5) of the OLA states that nothing in the section "abrogates or derogates from any right of action a person might have other than the right of action set out in this section". The Federal Court of Appeal's analysis on the point was as follows:

> The complaint made by the appellant falls under Part III of the OLA, which contains s. 20. Section 77(5) is linked to s. 77, as the first words in that subsection indicate. In the respondent's submission, s. 77 does not preclude any other right of action in respect of complaints relating to ss. 4 to 7 and 10 to 13 or Parts IV or V, or based on s. 91. However, the situation is different with complaints coming under Part III of the OLA. In the respondent's submission, s. 77(5) is of no assistance to the appellant and complaints covered by Part III may only be dealt with in accordance with the investigation procedure laid down in ss. 56 *et seq.* of the OLA. The Commissioner of Official Languages may, after investigation, report to the President of the Treasury Board (ss. 62(2) and 63(1)) at the same time as he communicates his conclusions to the complainant (s. 64). He may also elect to inform the Governor in Council (s. 65(1)) or Parliament, either in his annual report or in a special report (ss. 66 and 67). However, in the respondent's submission, a court action may not be brought by the appellant.

The respondent said that the OLA contains a complete code. In the cases mentioned in Part X of the OLA, a complainant may bring an action in the courts. In other cases, it is for the Treasury Board, the Governor in Council or Parliament to take action on the report by the Commissioner of Official Languages. In the case at bar, the respondent submitted, the complainant does not have the right to go to the courts.

The appellant submitted, for his part, that the application of s. 77(5) is not limited to s. 77 and he retains his right to bring a court action for any other complaint not covered by the procedure laid down in s. 77.

Regardless of the meaning to be given to s. 77(5), on which it is not necessary for the Court to rule, the respondent's argument in my opinion is not justified. For such a strict interpretation to be accepted, the exclusion would have to be made expressly. It clearly cannot be presumed.

English law is clear on this point. In *Ashby v. White et al.*, Holt C.J. laid down the now well-known rule:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.

In *Board* v. *Board*, the Judicial Committee of the Privy Council also noted:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

This statement by the Judicial Committee of the Privy Council in *Board v. Board* also refers to the theory of "inherent jurisdiction", which has been reiterated by the Supreme Court of Canada on several occasions. In *Canada (Canadian Human Rights Commission) v. Canadian Liberty Net*, Bastarache J. indicated for the majority that the theory in question "arises from the presumption that if there is a justiciable right, then there must be a court competent to vindicate the right".

It is true that this Court is not a successor to the royal courts: but both s. 18.1 of the FCA and *Canadian Liberty Net* recognized that it has clear and complete jurisdiction in matters of judicial review.

However, the respondent submitted that in *Canada (Attorney General) v. Viola* [see note 19 below], this Court stated that the OLA [TRANSLATION] "did not create new powers other than those conferred on the Commissioner of Official Languages and the Federal Court Trial Division, which it laid down expressly". It argued that, apart from this express jurisdiction, the Federal Court of Canada is not empowered to hear a case like the one at bar.

The issue in *Viola* concerned the jurisdiction of an appeal board acting under the *Public Service Employment Act* [see note 21 below] to consider the legality or validity of the language requirements for a position. Noting that the jurisdiction of an appeal board was itself the outcome of a compromise arrived at by the legislature to accommodate the responsibilities assigned to the Treasury Board, the Department concerned and the Public Service Commission, Décary J.A., speaking for the Court, describes as follows his hesitation about augmenting or expanding the appeal board's jurisdiction:

> Just as I would hesitate to diminish it, for fear of putting at risk the balance which was sought and has probably been attained, so I would hesitate to augment it in the absence of any clear invitation to do so by the legislature . . .

Using the language of Fauteux J. in *Goodyear Tire and Rubber Company of Canada*, this Court clearly cannot, in the absence of any such express provision, exclude a "federal board, commission or other tribunal" such as the Board from the application of the general system of the law, such as s. 18.1 of the FCA.

Finally, we should note what Décary J.A. did not decide. Accordingly, in concluding his reasons he wrote:

> The intervener, the Commissioner of Official Languages, put forward an additional argument in response to those of the respondent: he suggested that under the 1988 *Official Languages Act*, he alone has jurisdiction to see that the Act is properly administered. At the hearing, his counsel qualified this to say the least bold proposition and argued that as a consequence of *Gariépy* (*supra*, note 4), and I would add *Kelso* (*supra*, note 3), and in view of the very wording of subsections 77(5) and 78(3), the exclusive jurisdiction claimed by the Commissioner ousted only the jurisdiction of "administrative"

> tribunals and did not preclude that of "judicial" tribunals. Since I conclude that the 1988 *Official Languages Act* has not given the appeal board the power to decide on the validity or legality of the language requirements made by a department, I do not have to decide whether recourse to the Commissioner pursuant to that Act is necessarily the only recourse available in terms of "administrative" tribunals, in every case where a breach of the 1988 *Official Languages Act* is alleged.
> [My emphasis.]

> It goes without saying that Décary J.A. did not rule on the jurisdiction of "judicial" tribunals under the OLA, and did not preclude it.
>
> We accordingly conclude that, with respect, the motions judge wrongly concluded that the OLA did not allow the appellant to bring the action covered by s. 18.1 of the FCA for an alleged breach of s. 20 of the OLA.
>
> *Devinat*, at paragraphs 25 to 38.

[40] It seems important to note that in *Devinat* the issue was an application for *mandamus* made pursuant to section 18.l of the *Federal Courts Act* to ensure compliance with section 20 of the OLA, a section which, though it does not provide for the bringing of an action under section 77 of the OLA, does impose a duty on the government, unlike section 39, which simply consists of a commitment made by the government. In *Ayangma v. Her Majesty the Queen*, 2003 FCA 149, the Federal Court of Appeal held at paragraph 31 that section 39 of the OLA is "a statement of commitment by the Government of Canada".

[41] A similar question to that argued in *Devinat* was also considered in *Forum des maires*. In that case the Federal Court of Appeal had to rule on whether section 41, a section setting out commitments, created a right that could be enforced by the courts through an action brought pursuant to section 18.1 of the *Federal Courts Act*. After reiterating the validity of its decision in *Devinat*, the Federal Court of Appeal noted that the question in that case concerned the existence

of an action, while in *Forum des maires* the question had to do with the existence of a duty. At the conclusion of its analysis, the Federal Court of Appeal found that "section 41 is declaratory of a commitment and . . . does not create any right or duty that could at this point be enforced by the courts, by any procedure whatsoever" (*Forum des maires*, at para. 46).

[42] I feel that for the purpose of the proceedings at bar two principles should be drawn from the Federal Court of Appeal judgments:

- section 77 of the OLA does not preclude an action for judicial review under section 18.1 of the *Federal Courts Act*; and
- an action under section 18.1 of the *Federal Courts Act* cannot be used to enforce the provisions of the OLA which do not create a duty or a right but simply consist of a commitment by the government.

[43] Under section 18.1(3) of the *Federal Courts Act*, the Federal Court has the power to "order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing", a power which is similar to a writ of *mandamus*; and the power to "declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, a decision, order, act or proceeding of a federal board, commission or other tribunal", a power similar to a writ of *certiorari*. Accordingly, on submission of an application for judicial review the Federal Court may exercise various powers having quite different effects. I feel it is necessary to draw attention to this distinction as the argument made by the respondent is based essentially on the fact that section 39 of the OLA is not a source of a right or duty. The provision actually sets out a commitment made by the government, and is therefore not enforceable and triable.

[44] Subsection 18.1(4) of the *Federal Courts Act* lists the circumstances in which the Court will exercise the powers conferred by section 18.1(3) of that Act. This will be the case if the Court is satisfied that the federal board, commission or other tribunal has failed to observe a principle of natural justice or procedural fairness, has erred in law in making a decision or has based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[45] The unenforceable and non-triable nature of section 39 has consequences for the remedies that may be granted by this Court under section 18.1 of the *Federal Courts Act*. Clearly this Court cannot make triable and enforceable a provision of the OLA as to which the function of the Office of the Commissioner is limited to conducting an investigation, making a report and making recommendations that are not enforceable in the courts. As this Court pointed out in *Thibaudeau* v. *M.N.R.*, [1994] 2 F.C. 189, at 224, the Court hearing an application for judicial review cannot exercise more powers than the federal board, commission or other tribunal could have exercised.

[46] In the case at bar, I feel that there is no justification for refusing to hear Mr. Lavoie's application for judicial review. The purpose of his application is not to transform section 39, which is declaratory of a commitment, into the vehicle of a right or duty.

[47] Essentially, Mr. Lavoie is complaining about the way in which the Office investigated his complaint (allegation of bias) or drew certain conclusions, either by ignoring the evidence before it or by not taking that evidence into account.

[48] In my opinion, in such circumstances section 18 of the *Federal Courts Act* is available to review the final report of the Office which decided that his complaint was without foundation.

[49] This result is similar to that found in the field of human rights in accordance with extensive precedent, discussed by this Court's judgment in *Ruckpaul v. Citizenship and Immigration Canada*, 2004 FC 149.

B. Does manner in which investigation of applicant's complaint conducted create reasonable apprehension of bias?

[50] The applicant argued that certain comments made by the investigator Lepage created a reasonable apprehension of bias. In particular, the applicant maintained that the investigator Lepage was trying to prove that his complaint was groundless, whereas she should have played a neutral role. The applicant based his argument on the following passage from an e-mail which she sent to the Department's acting human resources director, Kathie Everett, on September 23, 2002:

> We want to be able to prove to the complainant that Francophones do in fact have equal opportunities for employment and advancement had the Harry Hayes Centre. Please provide this information by October xx, 2002.

[51] The applicant further argued that one of the comments made by the investigator Lepage, in another e-mail to the acting director on March 5, 2003, showed that the investigator had proceeded with certain aspects of her investigation only because he had threatened to seek judicial review of the final report. I set this comment out below:

> Yes, it has been a while since we've discussed this complaint. As I've mentioned in my telephone messages, the complainant has indicated that he will request a judicial review and therefore we need some additional information to ensure that we have all the necessary proof when releasing our preliminary report.

[52] Finally, the applicant considered that the following comments by the investigator, taken from the same e-mail, supported his allegations of bias:

> I would greatly appreciate you informing me of the timeline you'll need to gather this information. Once we receive the information requested, minor adjustments will be made to the report.

[53] However, before analyzing the bias which Mr. Lavoie alleged against the investigator Lepage, I must dismiss this argument for the simple fact that when the preliminary and final reports were prepared the person responsible for the investigation was no longer Suzanne Lepage but Claire Frenette, against whom no complaint was made.

[54] Even if it could be said that these two reports were vitiated by the investigation conducted by Ms. Lepage, I feel that the applicant did not establish that Ms. Lepage had a closed mind, an allegation which has to be decided from the standpoint of a reasonable observer familiar with the facts.

[55] The allegations of bias against the investigator Lepage relate to comments which were made at the investigative stage. Consequently, the applicant will have to show that she had a closed mind in order to have the final report reviewed on this basis *(Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioner of Public Utilities)*, [1992] 1 S.C.R. 623).

[56] This standard of impartiality was defined by the Supreme Court as follows, at paragraph 57 of *Association des résidents du Vieux St-Boniface Inc.* v. *Winnipeg (City)*, [1990] 3 S.C.R. 1170:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change.

[57] The Court is satisfied from reviewing the evidence in the record that the allegations of bias made by the applicant do not meet the standard of a closed mind. First, the comment made by the investigator in the e-mail sent on September 23, 2002 does not indicate, as the applicant argued, that she was prepared to dismiss the complaint even before obtaining the information from the Department. Rather, the comment was made to inform the person responsible for collecting the information of the purposes for which it was required. The intention of proceeding with a proper investigation is in any case clearly stated by the investigator Lepage at the very beginning of this document, where she writes:

> In order to fully investigate this complaint, I have few more questions. The replies to these questions will allow us to determine if English and French-speaking candidates were treated equitably throughout the competitive process. They will also allow us to determine if French-speaking employees have equal opportunities for advancement at HRDC in Calgary.

[58] Secondly, the comments made by the investigator Lepage in the e-mail dated March 5, 2003 do not support allegations of bias. Rather, they establish an intention by the investigator to fully document her investigation, so that the report would be based on complete evidence and so be capable of standing up to judicial review. It is hard to blame the investigator for wishing to complete her investigation and ensure that all the information was actually in the record.

[59] Finally, the last comments referred to by the applicant are not such as to establish that the investigator demonstrated a closed mind. The comments simply state that the preliminary report was almost complete at that stage of the investigation and would be altered in light of information that would be obtained. It should be noted that most of the information requested in fact consisted of documentation confirming information already known, and this explained why the investigator mentioned that the changes that would be made when it had been obtained would be minor.

<u>C. Did Office err in concluding that appointment of Troy Hughes without competition was independent of non-productive competition?</u>

[60] The applicant maintained that the Office made an error requiring review of the report when it concluded that the non-productive nature of the PM-02 bilingual competition was independent of the appointment of Troy Hughes to a PM-02 English essential position without a competition. In particular, the applicant argued that the Office had evidence that the Department had created Troy Hughes' English essential position because the PM-02 bilingual competition had proved to be non-productive.

[61] The evidence which in the applicant's submission was ignored by the Office was contained in a document titled "Request for a Named Referral" sent to the Treasury Board by the Department seeking an exception to the general rule that Public Service positions should be filled by an open, fair and equitable competition. The Court is satisfied from a review of that evidence that the Office did not err in concluding that the appointment of Troy Hughes was made independently of the non-productive competition. In that document, the Department justified its request by the fact that since October 2000 many attempts at recruitment had been made and had proven to be non-productive and costly. Additionally, the Department noted in the said document that staffing needs at the Calgary Office were extreme, the unemployment rate in Calgary was very low and five other competitions to fill the same type of position had been held in the last year and a half in the environs of Edmonton, Red Deer, Lethbridge and Grande Prairie. Accordingly, the evidence did not establish any cause-and-effect relationship between the non-productive PM-02 bilingual competition and the appointment of a unilingual Anglophone

without competition. In fact, the evidence showed a great need for staff at the Office, which justified the Department's decision to hire an employee who already held a temporary position and was thus familiar with the work to be done.

[62] What is more, the bilingual position for which Mr. Lavoie applied was never abolished and was filled by a later competition (affidavit of Mr. Lavoie, applicant's record, vol. I, tab 3, paragraph 30(d) and (e)).

[63] On these facts, the Court cannot conclude that the analysis of the point by the Office was perverse or capricious.

D. Did Office err in concluding that there was equitable participation by Francophones in the Centre?

[64] The applicant contended that the Office completely disregarded the express language and purpose of the Act, when it concluded that there was equitable participation by Francophones at the Centre in Calgary despite the fact that there were no positions designated bilingual at the senior levels, although section 39 of the OLA states that the federal government is committed to ensuring that "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". The applicant further referred the Court to the policy issued by the Treasury Board Secretariat, titled "Participation of English-Speaking and French-Speaking Canadians", which provides that:

> The participation of the two linguistic groups must normally be reflected in all job categories, occupational groups and hierarchical levels, taking into account the availability of possible candidates in the relevant sector of the labour force.

[65] It appeared from the final report that information on the mother tongue of the incumbent of a position was only collated when the position to be filled was designated bilingual. Accordingly, the fact that there were no positions designated bilingual at the senior levels did not imply that all the incumbents of those positions were unilingual Anglophones. Additionally, the Office ruled, despite the fact that this information was not available, that there was equitable participation by French-speaking Canadians in the Centre, in terms of the public served by it and the size of the office. In arriving at this conclusion the Office made a statistical calculation, which was objected to by the applicant. That calculation involved saying that, as Francophones were only 1.8% of the population in Calgary, the presence of a single Francophone in a managerial position in the Department would mean that there was overrepresentation, while the absence of a Francophone meant there was overrepresentation of Anglophones. The Office's conclusion on this information was that in Calgary the Department was not a sample which lent itself to this type of proportional study.

[66] Although I agree with the applicant's proposition, that the effect of a decision based solely on statistical data is to disregard the spirit of the OLA, I feel that there is no basis for reviewing the finding by the Office that there was equitable participation by Francophones in the Department in Calgary. To begin with, the [TRANSLATION] "statistical study" made by the Office was not the basis of its decision. The study was actually made to show it was difficult to assess whether the participation of Francophones in senior positions in the Centre was equitable,

in view of its work-force and the proportion of Francophones in Calgary. Secondly, the information obtained by the Office did not indicate any disproportion that could be described as inequitable in the composition of the Centre's work-force according to an employee's mother tongue. Finally, it appeared that the Office did not know the language profile of departmental managers, which suggests it may even be possible that Francophones held this type of position. I would add that there is also no basis for accepting the applicant's argument that the Office should have extended its research to other offices of the Department in Calgary in order to determine the equitable participation of Francophones, since the report deals with the applicant's complaint and that referred specifically to the Centre office in Calgary.

[67] For these reasons, the application for judicial review should be dismissed with costs payable to the respondent (*Stevens v. Conservative Party of Canada*, 2005 FCA 383, at paragraph 60).

JUDGMENT

This application for judicial review is dismissed with costs payable to the respondent.

"François Lemieux"

Judge

Certified true translation

Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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