11-22-1994

Re Canada Post Corp and CUPW

Innis Christie

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IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

RE: National Grievance (The Grievor)
Imperative Staffing of Bilingual Wicket Positions
C.U.P.W. Grievance No. N00-91-00001
C.P.C. Arbitration No.

BEFORE: Innis Christie, Arbitrator

AT: Ottawa, Ontario

HEARING DATES: February 1, 1993 (Re: Preliminary Award), February 7 and 8, June 20 and 21 and July 7, 1994 (Re: This Interim Award).

FOR THE UNION: Paul Kane, Counsel
Jean-Marc Eddie, Counsel
John Fehr, National Chief Shop Steward
Donald Lafleur, Representative, CUPW National

FOR THE EMPLOYER: Roland Forget, Counsel
Rene Cadieux, Counsel
Jacques Mangeon, Labour Relations Officer
Robert Gauthier, Manager Official Languages

FOR THE INTERVENOR, THE COMMISSIONER OF OFFICIAL LANGUAGES:
Richard Tardif, Counsel
David Phillips, Senior Officer

DATE OF INTERIM AWARD: November 22, 1994

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National Union grievance dated December 30, 1991, alleging breach of the Collective Agreement between the parties bearing the expiry date 31-07-89, but kept in effect by force of legislation, and in particular of Articles 11, 12 and 13, in that the Employer designated certain wicket positions as "bilingual imperative" without regard to the staffing requirements of the Collective Agreement. In the grievance the Union requested a declaration that this action by the Employer was in breach of the Collective Agreement and in bad faith, an order that the Employer restore the situation as it was, hold constructive consultations with the Union on all questions of positions to be designated bilingual and pay damages, with interest, to the Union and all of its members adversely affected by the Employer's action.

At the outset of the hearings in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all post-hearing time limits are waived. Counsel did not agree to waive pre-hearing time limits.

INTERIM AWARD

As I said at the outset of my Preliminary Award in this matter, dated September 2, 1993, the essence of this matter is that the Employer alleges that it has been required by official recommendations by the Commissioner of Official Languages, acting under the Official Languages Act, to designate and staff certain wicket positions as "bilingual imperative".

In my **Preliminary Award** I ruled on three issues:

1) The intervention of the Office of the Commissioner of Official Languages.

2) Is this a continuing Grievance, such that remuneration is available beyond the 25 day limitation period, set out in Article 9.09(b)(i) and (ii), to those who have been denied promotion or transfer on the basis of the Employer's policy of imperative staffing?

3) National Grievance No. N00-91-00001 is before me and, according to the Union, so are 28 other grievances dealing with similar issues filed on behalf of individuals, locals and regions. Am I seized of those grievances?

1) The intervention of the Office of the Commissioner of Official Languages. For the reason subsequently set out in my Preliminary Award, I ruled in the course of the hearing on February 1, 1993, that I would allow the intervention of the Office of the Commissioner of Official Languages to a limited extent, and that has occurred.

2) **A Continuing Grievance?** Is this a continuing grievance, so that a remedy is available to those who have been denied promotion or transfer, or otherwise suffered injury, on the basis of the Employer's policy of imperative staffing, regardless of when the grievance was filed, subject to their recovery being limited by the 25 day limitation period in Article 9.09(b)(i) and (ii)?

In my Preliminary Award I ruled that in so far as C.U.P.W. Grievance No. N00-91-00001 is a policy grievance there is no time limit and therefore no issue of whether it is "a continuing

grievance". I further ruled that it is a policy grievance which requests remedies that, under this Collective Agreement, are not part of the policy grievance process, so that in respect of it I would only award a remedy appropriate to such a grievance.

In the context of the principal grievance before me, which is CUPW No. N00-91-00001, it was not strictly necessary for me to decide whether breaches by the Employer of Articles 11, 12 and 13 would give rise to continuing grievances; breaches of the Collective Agreement that could be grieved at any time but remediable only for the time limited by which ever paragraph of Article 9.09 applied. However, because the matter was fully argued and considering what I had to say in relation to the next preliminary matter, I addressed the issue. I stated that the time limits in the Collective Agreement do not mean that the Employer could adopt the policy here in issue, wait 25 days and then administer the Collective Agreement in accordance with that policy free of any possibility of challenge through the grievance procedure. What they do mean is that the Employer can rely on the fact that if there is no grievance within 25 days after it has made a particular promotion or work assignment based on the policy that action, and the consequences that flow automatically from it, cannot be grieved. However, the next such action based on the policy may be grieved.

3) **What grievances are before me?** National Grievance No. N00-91-00001 is before me and, according to the Union, so are 28 other grievances filed on behalf of individuals, locals and regions dealing with the same issue. Without having studied the detail of each of the 28 grievances which the Union seeks to join, I was prepared to conclude that all of them "raise similar issues", in a sufficiently broad and fundamental sense, with National Grievance

No. N00-91-00001, that the Union was entitled to refer them to me, and to have them dealt with simultaneously.

On the assumption, based on what counsel told me, that none of the grievances that the Union seeks to join to the principal one have been previously referred to other arbitrators, I ruled that I was prepared to deal with them simultaneously.

At the conclusion of the hearings in this matter, counsel advised me that they had agreed that I should proceed with the policy grievance and remain seized of the individual grievances, to allow the parties an opportunity to attempt to dispose of the individual grievances in light of my disposition of the policy grievance.

The Dispute: On March 16, 1992, the Employer provided the Union with a list of positions where it has superimposed upon the seniority entitlements in Articles 11, 12 and 13 the requirement that employees being promoted to, or transferring into, the designated wicket positions be bilingual at the time of promotion or transfer. The parties refer to this as "imperative staffing". The Employer's position is that it is required by law to apply the Collective Agreement in this way.

The Union's position is that the Employer is bound by law to operate within the terms of the Collective Agreement. Wicket positions, which are preferred positions, are to be assigned on the basis of seniority under the Collective Agreement. The recommendations by the Commissioner of Official Languages do not, in the Union's submission, have the force of law, although, of course, the Official Languages Act itself does. The Union submits that the Employer can comply with the Collective Agreement without breaching the Official Languages Act.

The Union points to the fact that there are also provisions in the Collective Agreement which impose obligations on the Employer to provide training, including language training, where employees take on new duties or where the requirements of positions are increased.

Counsel agreed that, while this grievance arose under the Collective Agreement dated June 28, 1988, imposed by His honour Judge Cossette as arbitrator, the directly relevant provisions are unchanged. As in my Preliminary Award, therefore, I will refer throughout to Articles by the numbers they bear in the "new" Collective Agreement signed by the parties on July 1, 1992, where there has been no relevant change in the text.

The full statement of the grievance in this matter (translated) is:

> The employer is designating positions in the wicket sections as being bilingual from now on without justifying, for each position, the need of this change. Furthermore, in doing so, the employer ignores the requirements of articles 11, 12 and 13 and others of the collective agreement regarding the obtaining and/or the preservation of the said positions. Moreover, the employer realizes that it is deliberately contravening the terms and conditions of the collective agreement and claims that it is not bound by them. The employer has been acting in bad faith and these actions constitute violations to the collective agreement.

The "Corrective Action Requested" is:

> In conformity with the collective agreement renewed through Bill C-40, the Union requests a statement to the effect that the above situation goes against the provisions of the collective agreement and that the employer is acting in bad faith. Moreover, the Union requests an order requiring the employer to restore the situation as it existed before and to hold constructive consultations with the Union regarding the issue of jobs to be designated as bilingual.
>
> The Union requests that damages be paid to members as well as to the Union for all injustices or adverse effects caused by the denial of their contractual or legal rights following the employer's decision. The Union reserves the right to request any additional remedy, including punitive damages.

This grievance is dated December 30, 1991 and was, according to counsel, faxed to the Employer on January 7, 1992.

It appears to be undisputed that from November 22, 1990, on, the Employer has been designating positions as bilingual imperative and staffing at least some of them on the basis that the requirements of the Articles 11, 12 and 13 of the Collective Agreement, with respect to such matters as "Seniority", "Preferred Assignments" and "Vacant Positions" and "Bilingual Positions", are over-ridden by the requirements of the Official Languages Act. This stance is quite properly the subject of a policy grievance, which may be presented at any time, as provided in Article 9.09(d).

In the course of the hearing the order requested was limited and refined to a request by the Union for a five part order to the effect that:

1. In staffing bilingual positions on an imperative basis the Employer is breaching the Collective Agreement;

2. The Corporation has an obligation to provide language training to employees;

3. The Corporation must comply with Article 13.18 of the Collective Agreement in filling bilingual positions.

4. There is no conflict between the Collective and the Act;

5. The recommendation made by the Commissioner of Official Languages on May 22, 1990, is not binding on the Employer.

The fourth of these was modified orally by counsel for the Union at the hearing. Mr. Kane conceded that, not withstanding the words of the Collective Agreement, the Employer can by-pass a senior unilingual employee to ensure that a bilingual person replaces an employee in training for a position that has been designated "bilingual imperative", because, he said, the Official Languages Act appears to require that. If necessary, he said, this could involve hiring a term employee; but of course the senior bilingual employee entitled to the temporary position would take preference to a more junior bilingual person.

The Union claims the Employer has in fact; (i) removed previously assigned wicket clerks to allow for bilingual staffing, (ii) decided that unilingual employees are not even qualified to apply for bilingual positions, (iii) refused language training that would

have been given in the past and (iv) paid bilingual bonuses which, by these policies, are effectively denied to senior unilingual employees. As I understand it, only allegations (ii) and (iii) are directly involved in this policy grievance. With respect to (i) Counsel for the Employer made it clear that it is not the position of the Employer that someone in a bilingual position could ever be taken out of that position to be replaced by someone already bilingual. In those situations Article 13.18(a) would always apply. My conclusion is that any allegations by the Union to the effect that the Employer has in fact done this must be treated as matters of individual grievance.

The Facts: The facts relevant to this policy grievance fall under three heads; (1) "Development of the Official Languages Act and the Regulations", (2) "Dealings between the Employer and the Commissioner of Official Languages, including the making of the recommendations" and (3) "The Employer's dealings with the Union in its efforts to achieve institutional bilingualism". Without restating the voluminous documentary evidence before me or detailing all of the testimony, I will set out here what has seemed to me to be relevant to the issues before me.

(1) **Development of the Official Languages Act and the Regulations**

The first Official Languages Act was passed by Parliament in 1969. In Section 9(1) it provided that every Crown Corporation, including, of course the Employer, had the duty to ensure that, in the National Capital Region, at its head office and at each of its principal offices in a federal bilingual district, "members of the public can obtain available services from and can communicate with it in both official languages". Section 9(2) imposed an additional

duty to do the same, "to the extent that it is feasible to do so", in other locations where there was "a significant demand".

The federal bilingual districts were never established and, to quote the words of Mr. Tardif, counsel for the Intervenor, the Commissioner of Official Languages, the courts gave the Act a restrictive interpretation and "established its declaratory rather than executory nature as well as its lack of primacy over federal enactments."

In this context, in 1982, Canada adopted the Canadian Charter of Rights and Freedoms, Section 20 of which gave a Charter right to services in both official languages in terms very similar to Section 9 of the Official Languages Act of 1969:

> 20 (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
>
> (a) there is significant demand for communications with and services from that office in such language: or
>
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both French and English.

This right is subject to Section 1 of the Charter. Section 24 of the Charter provides a direct remedy by application to a court of competent jurisdiction.

The current Official Languages Act was enacted by Parliament in 1988. It is clear from the Act itself, not to mention the Parliamentary debates which accompanied its passage, that the intent was both to effectuate Section 20 of the Charter and to give this new Act more than declaratory effect. These ends were accomplished by creating the office of the Commissioner of Official Languages with the duties, functions and powers set out in Sections 55-75 and by giving complainants, and the Commissioner with consent of a complainant, the right to seek a remedy in the Federal Court in accordance with Sections 76-81. The primacy of the substantive parts of the Official Languages Act, including Part IV, "Communications and Services to the Public", over all other Federal legislation except the Canadian Human Rights Act is spelled out in Section 82.

Section 22 of the Official Languages Act, 1988, provides, in terms reflective of Section 9 of the 1969 Act and, more importantly, the Charter:

> 22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities
>
> (a) within the National Capital Region; or
>
> (b) in Canada or elsewhere, where there is a significant demand for communications with and services from that office or facility in that language.

I accept the characterization of the Official Languages Act as quasi-constitutional stressed by counsel for both the Employer and

the Commissioner of Official Languages. The words of Decary J.A. in the Federal Court of Appeal in Canada (Attorney General) v. Viola [1991] 1 F.C. 373, at p. 386-7, are particularly appropriate here:

> The 1988 Official Languages Act is not an ordinary statute. ... it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it" ...

The Commissioner of Official Languages performs important functions under the Official Languages Act. Having reviewed the material before me, including, in particular, the written brief of counsel for the Employer, I accept the following characterization of the Commissioner's office and role put forward by counsel for the Commissioner:

> The Office of the commissioner of Official Languages is not a judicial or quasi-judicial body empowered to make binding decisions. ... it tries to resolve disputes between complainants and institutions in a conciliatory fashion. The Office of the Commissioner of Official Languages reports the results of its investigation to the complainant and the institution [Section 64(1)], and eventually to the Governor in Council [Section 65(1)] and to Parliament [Section 65(3)]. However if the Commissioner's recommendations are not followed by the institution, the Commissioner may apply, with the consent of the complainant to the Federal Court for a remedy. [Section 78(1)]. ...
>
> The Commissioner's primary tool for ensuring respect for the

> Official Languages Act by government institutions is to make recommendations to the President of the Treasury Board and the deputy head and/or other administrative head of any federal institution concerned. **He has no power to directly force any federal institution to take any action nor does he have the power to grant a remedy.** [emphasis added]

In my opinion Section 63(1) of the Official Languages Act could not be more explicit in granting the power to the Commissioner of Official Languages to make recommendations only. The judgement of the Supreme Court of Canada in Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385, at pp.398-9, dealing with the meaning of "recommendations" in another context, only illuminates what is already crystal clear in Section 63(3) of the Act. Notwithstanding the importance of what the Commissioner of Official Languages does and, indeed, the quasi-constitutional status of the statute of which his office is the primary enforcement mechanism, Parliament has chosen to empower him only to make "recommendations". Section 63 provides:

> 63(1) If, after carrying out an investigation under this Act, the Commissioner is of the opinion that
>
> (a) the act or omission that was the subject of the investigation should be referred to any federal institution concerned for consideration and action if necessary,
>
> (b) any Act or regulations thereunder, or any directive of the Governor in Council or the Treasury board, should be reconsidered or any practice that leads or is likely to lead to a contravention of this Act should be altered or discontinued, or

> (c) any other action should be taken,
>
> the Commissioner shall report that opinion and the reason therefore to the President of the Treasury Board and the deputy head or other administrative head of any federal institution concerned. ...
>
> (3) The Commissioner may
>
> (a) in a report under subsection (1) **make such recommendations as he thinks fit**; and;
>
> (b) **request** the deputy head or other administrative head of the federal institution concerned **to notify the Commissioner within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations.** [emphasis added]

In summary, counsel for the Commissioner of Official Languages states his written brief, "if the legislator had intended for the Commissioner to have the authority to make an order, more precise wording to that effect would have been used".

Pursuant to Section 32 of the Official Languages Act, on December 16, 1991 the Official Languages (Communications with and Services to the Public) Regulations were adopted, to define the circumstances where there is a "significant demand" for the purposes of Part IV of the Act, including, of course, Section 22. The Regulations need not be elaborated upon here, beyond saying that they apply to the Employer and that they set out formulae for determining specifically which facilities are subject to Section 22 on the bases of elaborate formulae using census statistics. The Regulations now make it clear at which of its offices the Employer

has the obligation to provide service in both languages, but, as counsel for the Commissioner of Official Languages observes in his written brief of argument, they do not specify, any more than does the Act itself, how the services should be provided. This, counsel, says, is "institutional bilingualism".

(2) Dealings between the Employer and the Commissioner of Official Languages, including the making of the recommendations.

The main thrust of dealings between the Commissioner of Official Languages and the Employer up to May of 1990, when the Commissioner made the Recommendations which are central to this award, can be succinctly described by reference to the Commissioner's Annual Reports. I start, as does the Employer's counsel in his written brief, with the Annual Report -1987 because it summarizes what has gone before, at pp. 83-4;

> Since 1982 every one of our Annual reports has made reference to the collective agreement between Canada Post and CUPW. In 1982 we noted that management considered itself bound by the agreement and could not therefore require candidates for bilingual positions to meet the language requirements upon appointment. In 1983 we said that until the Corporation found the will to tackle this long-standing problem, even the best laid plans for improving minority language service would stay on the drawing board. In 1984 we referred favourably to the Corporation's new and ambitious action plan but lamented the fact that several projects were hampered by the collective agreement. In 1985 we were pleased to note that an agreement had been reached with CUPW regarding staffing of bilingual wicket-clerk positions, even though seniority rights continued to complicate the issue. (In fact the 1985 agreement did very

> little to change the situation: seniority rights still took preference, but bilingual employees moving into bilingual positions were required to become bilingual and were entitled to take up to six months of language training.) Last year we suggested that only with a stronger emphasis on language considerations during union negotiations could Canada Post gain better control over work scheduling and redeployment of bilingual staff. Even to the most optimistic eye it is evident that, in five years, progress on this front has been minimal.

In the Annual Report - 1988 the Commissioner starts by stating that the number of complaints about counter service is down, and that the lack of bilingual capacity among supervisors is "still the prime obstacle". He then, at p. 124, comments on the Collective Agreement dated June 28, 1988, imposed by His honour Judge Cossette as arbitrator;

> The new contract, arrived at following binding arbitration in 1988, provided some relief for customers in certain centres which had seen bilingual capacity in post offices come and go. Employees with seniority who transfer to more desirable positions are now obliged to stay in the new position for one year. This should ensure a minimum of continuity in bilingual service even if up to half that period may still be spent in language training , as the contract allows. A unilingual employee occupying a position at the time of its being designated bilingual is now required to become bilingual within a reasonable time, failing which the employee may be moved to a non bilingual position. The hoped-for clause which would have enabled Canada Post to replace that individual with a counter clerk who met the language requirements did not survive arbitration, so the ability of staff to serve

> customers in their official language of choice is still a problem for which the Corporation continues to seek solutions.

Obviously, the Commissioner of Official Languages had hoped that Judge Cossette would provide for "imperative staffing" of bilingual positions; meaning that employees would be required to be already bilingual to be able to move into such positions. The Annual Report - 1989, the first year of the current Official Languages Act, notes no real change in the situation.

It appears from these Reports, and was acknowledged in cross-examination by the only witness called by counsel for the Employer, Mr.Robert Gauthier, Manager of Official Languages for the Employer, that through the 1980's the Employer continually put the CUPW Collective Agreement forward as justification for not providing more fully bilingual services to the public.

On May 22, 1990, the Commissioner of Official Languages made "recommendations" pursuant to Section 63(3) of the Act, which is set out above. He did so in a three page letter to Donald Lander, President and CEO of the Employer. The whole letter is an important part of the context here, but the most directly relevant parts are;

> I am writing to you concerning obstacles cited by the Canada Post Corporation ("CPC") in meeting its legal obligations to provide bilingual services to the Canadian public. ...
>
> ... We have been led to understand that seniority provisions in the collective agreement with CUPW do not permit the Corporation to require, as a staffing criterion, that successful candidates of bids for certain key bilingual

counter positions possess the established linguistic skills in order to respect fully the rights of the public to communicate and receive services in the language of their choice... .

As an example...at Sudbury postal station "A" ...[w]e learned that ... [a]ccording to the Corporation, the employees in question cannot be reassigned because they were appointed to their positions prior to the 1988 arbitration decision governing the existing collective agreement...which addressed the issue of staffing bilingual positions... . In the absence of a satisfactory reply...on the issue, Canada Post does not seem to be capable of offering alternative administrative arrangements to provide the bilingual services required.

... No provision of a contract can have the effect of requiring a federal institution to violate its statutory and constitutional obligations. ....

I am of course aware that the June 29, 1988, arbitration decision did not go so far as to grant Canada Post the authority to staff bilingual positions...on an imperative basis and that the decision, without reference to the Official Languages Act, would have the appearance of being binding on both parties. However, we are dealing here with provisions intending to implement obligations under the Charter of Rights. Moreover, Part XI of the 1988 Official Languages Act prescribes that the Act's provisions relating to, among others, communications and services to the public prevail...

On the basis of these considerations, I recommend that the Canada Post Corporation,

1. recognize its duty to staff key bilingual positions on an imperative basis, where circumstances require, with persons meeting the established linguistic requirements and that these principles take precedence over any collective agreement with the Corporation.

2. develop and apply objective criteria to determine in each case whether bilingual counter positions be staffed on an imperative or a non-imperative basis, and;

3. ensure, within a reasonable timeframe, that all existing linguistically unqualified incumbents of bilingual counter positions possess the required linguistic skills.

....I ask that you advise me...no later than June 27, 1990, of your Corporation's intention to adopt the foregoing recommendations and plans for their implementation.

These are the three recommendations upon which the parties have focused their attention in these proceedings. They have asked me to rule directly on their binding effect on the Employer. It is not disputed by the Union that they are "Recommendations" for the purposes of section 63(3) of the Official Languages Act.

On September 12, 1990, the Commissioner of Official Languages again wrote Mr. Lander, in part as follows:

Your Corporation's response of June 25, 1990, from your Vice-President, Human Resources and Administration, indicated that Canada Post would not take steps, as recommended to ensure that key bilingual counter positions be filled with

> persons who automatically meet the established linguistic requirements....
>
> In light of these responses received from Canada Post, I consider that adequate and appropriate action has not been taken by your Corporation to implement the attached recommendations. I invite Canada Post to re-examine the positions taken in their regard and advise me, by October 1st, 1990, of any additional comments you may wish to make. If the Corporation does not take concrete action in the implementation of the recommendations, I will consider using other means provided for in the Official Languages Act in order to ensure the appropriate action is taken.

(3) **The Employer's dealings with the Union in its efforts to achieve institutional bilingualism.**

Following receipt of the September 12, 1990, letter from the Commissioner of Official Languages the Employer decided to implement imperative staffing and advised the Union officially in a letter dated November 22, 1990, from Harold Dunstan, then Vice-President, Human Resources and Administration, to J.C. Parrot, then President of the Union;

> ...I am advising you of our intention to accept the Commissioner's recommendation and to begin implementing imperative staffing of positions where the Commission has recommended such action as necessary to meet service-related obligations.

Counsel for the Union called two witnesses. The first was Darrell Tingley, President of the Union since 1992 and Vice-President from

July 1987. Previously, from 1974-87, Mr. Tingley was National Director for the Atlantic Region. In all of these positions he was involved in the Employer's efforts to achieve institutional bilingualism. The second was Raymond Poley, the President of the Union's Moncton Local, a wicket clerk who has been directly affected by the Employer's bilingualism policy.

Mr. Tingley testified that the Union has supported bilingualism, provided that it is achieved through training. While this may be generally true, the evidence suggests some reluctance. The 1986 Collective Agreement between the parties provided;

> **13.18 Bilingual Positions**
>
> (a) The employee who is the incumbent of a position when such position is designated as bilingual shall not be required to become bilingual or to receive training for that purpose. However, he can maintain his position if, in an effort to become bilingual, he fails to meet the required standards.
>
> (b) Where a bilingual position becomes vacant or when a vacant position is designated bilingual it shall be filled in accordance with this agreement and in such a case the provisions of clause 13.11 shall apply provided sufficient and adequate training in the other official language has been given to the employee.

Paragraph (b) has remained unchanged. However, because of the Official Languages Act and the interventions of the Commissioner of Official Languages paragraph (a) was an issue between the parties

July 1987. Previously, from 1974-87, Mr. Tingley was National Director for the Atlantic Region. In all of these positions he was involved in the Employer's efforts to achieve institutional bilingualism. The second was Raymond Poley, the President of the Union's Moncton Local, a wicket clerk who has been directly affected by the Employer's bilingualism policy.

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> (a) The employee who is the incumbent of a position when such position is designated as bilingual shall not be required to become bilingual or to receive training for that purpose. However, he can maintain his position if, in an effort to become bilingual, he fails to meet the required standards.
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Paragraph (b) has remained unchanged. However, because of the Official Languages Act and the interventions of the Commissioner of Official Languages paragraph (a) was an issue between the parties

in negotiations which ended with the statutorily imposed Collective Agreement of 1988, under which this grievance arises. This is clear from the following passages in the Report of his Honour Judge Cossette, the statutory arbitrator who determined the contents of that Collective Agreement, at pp. 55-7;

> The employer wants this clause [13.18, quoted above] to be amended to require that the incumbent of a position designated as bilingual be or become bilingual within a reasonable period.
>
> The union is seeking the status quo because the proposed change would penalize unilingual employees, and because the current practice has not, in its opinion, created problems for the employer.
>
> It is not quite accurate to say that the present article 13.18 has not caused any problems, as the Commissioner of Official Languages has received complaints about Canada Post and has had to intervene.
>
> The first paragraph of article 13.18 is paradoxical, to say the least, in that it does not clearly require that the incumbent of a bilingual position be or become bilingual; one may therefore ask why the position is described as bilingual.
>
> In my view it is not unreasonable to require that the incumbent of a bilingual position be or become bilingual; on the contrary, it is only natural, reasonable, and consistent with common sense.
>
> The change demanded will therefore be granted, but it will be effective from the date of this decision in order to

protect the rights of employees already in positions, which is only fair.

Article 13.18 of the collective agreement is related to Appendix "H", which provides for a bonus to be paid to the incumbents of bilingual positions. ...

Now that new incumbents will be required to meet bilingual requirements, they should not be exposed to the risk of losing the bonus or of receiving a lesser one.

... There is no need to amend Appendix "H", ...

In the result, the 1988 Collective Agreement reads as follows:

13.18 <u>Bilingual Positions</u>

(a) Effective on the date of the decision of the mediator-arbitrator, the employee who is the incumbent of a position when such position is designated as bilingual must be or become bilingual. Incumbents who are not bilingual shall be given a reasonable period of time to become bilingual. Incumbents failing to become bilingual shall be offered a non-bilingual position in accordance with the order of priority in clauses 13.07 and 13.08.

The current version of Article 13.18 is unchanged, except that the opening phase has been dropped and cosmetic changes required by the structure of the new Collective Agreement have been made.

It was Mr. Tingley, as 1st National Vice-President, who responded on December 6, 1990, to Mr. Dunstan's letter of November 22 to J.C.

Parrot. He asked for "a break-down as to where the language requirements have not been met." This brought a rely from Gilles Courville, on behalf of the Employer, dated December 13, to the effect that the law demanded imperative staffing and that the Employer would follow the recommendations of the Commissioner "where the office of the Commissioner of Official Languages has identified situations where imperative staffing is required to meet the requirements of the law."

On January 16, 1991, Elliot Clarke, the Employer's Director, Labour Relations Operations, advised Divisional Labour Relations Managers;

> The Corporation has accepted the Commissioner's recommendation. Consequently, bilingual positions which become vacant are to be staffed with employees who are bilingual (imperative staffing).

This transformation of all bilingual positions to bilingual imperative did not last very long. Under date of April 4, 1991, the Employer promulgated to its Directors, Human Resources and Administration, its policy of requiring at least three bilingual imperative positions in any facility where the Official Languages Act requires bilingual services;

> IMPERATIVE STAFFING OF BILINGUAL COUNTER POSITIONS
>
> ...
>
> The Corporation is committed to providing counter services in the preferred official language of customers, throughout business hours, in all "significant demand postal localities", as indicated in the Corporate Official Languages Program, element 3.1.1 ... [a list of all affected postal stations was attached]

In order to meet our obligations under element 3.1.1, it has been determined that a minimum of one (1) bilingual employee must be present at the counter at all times. This translates into a minimum of three (3) bilingual positions staffed by bilingual employees to cover all shifts, breaks, and leaves.

... the following criteria should be considered when staffing front counter bilingual positions:

1. where an outlet has 3 or more bilingual positions, of which a minimum of 3 are already occupied by linguistically qualified individuals, any other vacancies will be staffed in accordance with article 13.18 of the CUPW collective agreement.

2. where an outlet has 3 or less bilingual positions and less than 3 bilingual employees, future vacancies in bilingual positions must be staffed by individuals who are linguistically qualified upon appointment (Imperative Staffing of "Key Bilingual Positions" Rule).

It was not until March 16, **1992**, after the filing of this grievance, and in response to a letter from Philippe Arbour, the Union's National Director of Grievances, to Donald Lander, President of the Employer, that the Employer officially provided the Union with this policy and the list of postal stations affected.

Mr. Tingley testified that the Union was prepared to make the concession outlined by counsel for the Union, referred to above; that, not withstanding the words of the Collective Agreement, the Employer can by-pass a senior unilingual employee to ensure that a

bilingual person replaces an employee in training for a position that has been designated "bilingual imperative". If necessary, this could involve hiring a term employee; but of course the Union's position is that the senior bilingual employee entitled to the temporary position would take preference to a more junior bilingual person.

I have not found it useful to set out here any of the testimony of Raymond Poley, the President of the Union's Moncton Local. While he provided an additional perspective, for purposes of this policy grievance it does not seem to me to be productive to deal with an individual case such as his. His testimony does suggest that there is uncertainty and unevenness on the part of line management in applying the Employer's bilingualism policy, which is relevant here, but specific problems of that sort can only be addressed in the context of individual grievances.

Counsel for the Employer called only one witness; Robert Gauthier, Manager of Official Languages for the Employer. In 1983 Mr. Gauthier joined the Employer's Directorate of Official Languages as "Service to the Public Analyst" and was promoted to his present position in 1988. I have set out here the relevant points in his testimony, which I have accepted as factual. Mr. Gauthier was cross-examined at length and, while much of what he said in cross-examination added to my understanding of the facts, his credibility was not put in doubt.

I note that Counsel for the Employer designated Mr. Gauthier as his "advisor", rather than Mr. Jacques Mangeon, the Labour Relations Officer who attended throughout the hearing. Counsel for the Union questioned whether, on this basis, Mr. Gauthier should be allowed to be present during the testimony of the Union's witnesses. I ruled that he could be. Naturally, in assessing Mr. Gauthier's

credibility in case of any conflict with the testimony of the Union witnesses I have had to take into account the fact that he had heard their testimony. In fact, in this case, that consideration proved to be insignificant.

Mr. Gauthier testified that the Employer has developed an elaborate policy on official languages, which involves the staffing of most bilingual positions on an imperative basis, although there are some classified as bilingual non-imperative. As of the 31st of December, 1991, there were 3476 counter positions, of which 802 were designated bilingual. 754, or 94%, of those were staffed by employees with bilingual capacity. While it may not be relevant, I note that Mr. Gauthier testified that as of January 6, 1994, there were 2624 counter positions, of which 688 were designated bilingual. 654, or 95.1%, of those were staffed by employees with bilingual capacity.

Up to 1991 the Employer's approach had been to appoint people to bilingual positions strictly in accordance with the Collective Agreement. According to Mr. Gauthier's testimony, a person thus appointed was then given a language diagnostic test by the Public Service Commission to determine proficiency. It took between two weeks and two months for the results to come back. If the results were positive, indicating that the person had potential, he or she would be sent on language training. If not, that person would never go on language training.

The training usually consisted of a two week immersion, after which he or she would return to work, to put into practice what had been learned. According to Mr. Gauthier, this is by far the most effective approach to adult language training. This alternation of

training and work would be continued for any where from two to nine immersions, for up to six months, tailored to individual needs.

Mr. Gauthier testified that the effect was that the Employer would not be providing bilingual service during the period of waiting for the results of the initial proficiency test to come back, or during the two week intervals when the trainee was in his or her position consolidating what he or she had learned in his or her most recent immersion, except, perhaps, toward the end of the process. This would be so, of course, even if the Employer had backfilled with a bilingual person while the incumbent was on training. Where the opportunity existed this is what the Employer did, but often bilingual people were simply not available to backfill, resulting in some cases in complaints to the Commissioner of Official Languages.

Mr. Gauthier testified that it was not unusual for a trainee to discontinue, or for a person who had completed his or her training to bid out of the bilingual position. In any such case the Employer had to start all over again. Mr. Gauthier's evidence was that the training cost for the CUPW bargaining unit was roughly $450,000., excluding salaries, in fiscal 1990-91, and somewhat more in the preceding years. Quite apart from whether imperative staffing was required by law after the Commissioner of Official Languages made his recommendations of May 22, 1990, it is apparent that imperative staffing would be more efficient and save the Employer money. Mr. Gauthier acknowledged that the Employer was aware of this. Certainly he personally was aware of it, although according to his testimony these concerns were not what motivated the adoption of imperative staffing.

With the implementation of bilingual imperative staffing, according to Mr. Gauthier, the Employer designated 227 locations where there

had to be at least three bilingual wicket employees, if there were in fact at least three such people already employed there. There were more than three bilingual positions at many of those locations but only three of them would be designated "bilingual imperative", meaning that when any of those three became vacant the senior candidate had to be already bilingual to move such a position. The Employer would go through the seniority list to find a bilingual candidate, but if necessary would, and does, hire from the street. This is not always done, which has resulted in complaints to the Commissioner of Official Languages. In such cases the Employer has pleaded lack of resources.

After the implementation of imperative staffing the same language diagnostic test administered by the Public Service Commission to determine what training a person requires has been used to determine whether the senior candidate for an imperatively staffed position is bilingual.

Mr. Gauthier explained the Employer's development of the policy of requiring that there be three bilingual imperative positions to ensure continuous service in the minority language where required. He noted but did not really explain how this requirement could be met where the Employer had only employed two counter clerks and, according to the policy, would not increase the number to three.

With respect to the bilingual non-imperative positions Article 13.18 has continued to be applied as before. The Employer attempts to backfill the position with a bilingual employee while the unilingual incumbent is on language training. On the face of it, Article 13.15 of the current Collective Agreement and Article 13.10 in its predecessor require that this be done on basis of seniority, but Mr. Gauthier acknowledged that the Employer has ignored

seniority and even gone to the street on occasion to backfill with people with bilingual capacity.

Mr. Gauthier acknowledged that even with the bilingual imperative policy in place there have been cases where the Employer had not been able to fill such vacancies with bilingual people and has had to send unilingual employees on language training. He agreed that in these situations, where more than one employee requires training, the Employer minimizes disruption by sending them on language training one at a time.

Mr. Gauthier also explained that after the Employer's policy, as set out in the statement of April 4, 1991, which I have quoted above, was implemented, in another context the Commissioner of Official Languages took issue with the Employer's requirement that all bilingual positions be staffed in an imperative basis, insisting that some of them could be bilingual non-imperative. The result was that "All Managers" received a letter from Mr. Gauthier dated September 8, 1993, attached to which was a new Chapter 1701.02 of the Corporate Manual System, setting out "the functional policy concerning staffing of positions within the Corporation requiring the knowledge and use of both English and French".

As I understand it, this is the latest articulation of the Employer's policy, which Mr. Gauthier testified does not, in his opinion, contradict the April 4, 1991, policy with respect to the wicket clerks who are the subject of this grievance;

1. **OBJECTIVE**

This policy defines the criteria governing imperative and non-imperative staffing of positions within the

corporation requiring the knowledge and use of both English and French (bilingual positions).

2. **POLICY STATEMENT**

To enable the Corporation to meet its obligations to serve its customers and employees and to communicate with them in the official language of their choice, managers will determine the staffing methods to be used to staff bilingual positions.

3. When mastery of both official languages is determined to be an important requirement in carrying out duties of key or other positions defined in the "Application" section, staffing must be on an imperative basis.

In other circumstances where it is not necessary or a priority to fill a position on an imperative basis, the Corporation agrees to staff back-up or developmental positions on a non-imperative basis. These cases should be the exception rather than the rule.

When a bilingual service can be temporarily provided in another manner, the position may be filled by a candidate who does not meet the language requirements of the position at the time of staffing and who is eligible for language training, or who is exempted from meeting the language requirements of the position due to special circumstances. ...

4. **DEFINITIONS** ...

Key Bilingual Position

Any position that is essential to the immediate provision of service to the public or employees in both official languages, due to the nature and scope of the position's duties or the nature of the term of the appointment or transfer for which administrative measures would not be appropriate or effective.

Administrative Measures

Temporary measures or provisions taken by the manager when no bilingual employees are available or when incumbents do not meet the language requirements of their position, so services can still be provided in both languages.

5. APPLICATION

5.1 Use of Imperative Staffing

Bilingual positions will be staffed on an imperative basis when the following criteria apply.

5.1.1 Key Bilingual Positions

a. Positions that are the only or first point of contact in such areas as: ...

. counter operations ...

5.1.2 Appointment or assignment to a bilingual position for a determinate period (term position). ...

5.1.4 Other bilingual positions for which administrative measures are not effective. ...

6. **AREAS OF RESPONSIBILITY** ...

6.1 **Managers**

a.determine the staffing method (imperative or non-imperative) for bilingual positions that must be filled, in keeping with this functional policy; ...

6.2 **Human Resources** ...

a.assist managers in applying the policy;

b.monitor application of the policy.

6.3 **Equality rights and Official Languages Branch**

a.interpret the policy and, where applicable, provide assistance and advice on implementation. ...

Mr. Gauthier testified that from 1991 to the date of the hearing there had been approximately 30 cases of imperative staffing.

Faced with Employer documents indicating that after the adoption of the policy of imperative staffing that policy was not being uniformly pursued across the county, Mr. Gauthier acknowledged that at least in the Atlantic division measures other than imperative staffing had been used to ensure bilingual services.

The document particularly in point was the minutes of a meeting "BETWEEN CANADA POST OFFICIALS (ATLANTIC DIVISION) AND MEMBERS OF THE OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES, HALIFAX, JULY 11, 1991". It states in part:

> CPC officials stated that imperative staffing has not yet ben used within the Division in regards to bilingual counter clerk positions but indicated that it would be used if necessary. Other options include second language training for counter clerks and hiring bilingual "casuals" to replace them as required.
>
> In response to questions about OCOL's position, Mr. Breton [of the Office of the Commissioner of Official Languages] explained that the Commissioner has a responsibility to ensure that language rights are respected but that it is up to each institution to decide how to manage its operations in accordance with it linguistic obligations. The April directive on imperative staffing for counter positions was noted. ...
>
> CPC officials indicated that alternative measures had been taken in a number of cases to improve bilingual capacity. The following cases were discussed:

Six specific locations were discussed. At four of them extra casuals were being hired to ensure bilingual capacity. This "double banking" is not normally the Employer's policy. It was also clear from this document, and from Mr. Gauthier's testimony, that imperative staffing was used in the Atlantic Region as well as elsewhere.

Mr. Gauthier agreed in cross-examination, however, that generally, senior employees occupying unilingual positions who have applied for wicket positions have been denied those positions because they are not bilingual, and they have been told that they will no longer be given language training at the Employer's expense. He agreed that the Commissioner of Official Languages has never told the Employer that it would not be acceptable to have bilingual employees placed temporarily in positions now classified as bilingual, or bilingual imperative, until those entitled to them by seniority under the Collective Agreement had satisfactorily completed language training. In his opinion such a system would be acceptable to the Commissioner as long as it ensured that bilingual services were offered throughout business hours at the locations identified by application of the Regulations.

In redirect, Mr. Gauthier made it clear that he did not understand the Employer to have any obligation to double bank and did not believe that, without it, the Employer could always meet its obligations under the Official Languages Act and still comply with the Collective Agreement. To meet its obligations under the Official Languages Act, he said, the Employer had to staff some key positions on an imperative basis.

The Issues: Mr. Kane, counsel for the Union, stated in his closing submissions that, for purposes of this national policy grievance, the Union accepts that the Employer can designate a position as bilingual in compliance with the law, and does not have to justify doing so. The issues, in his submission, are:

1. **Training.** The Union's submission is that only if the employee entitled by seniority to bilingual position has failed to meet the required standard after six months of training can the Employer go to the next person on the seniority list or,eventually, to "the street".

2. **The Designation "Bilingual Imperative".** The Union's submission is that there is no provision in the Collective Agreement for any such designation, and it changes nothing in terms of the seniority rights of employees to such positions on a permanent basis or the Employer's obligations to train them.

3. **Who Will Replace An Employee On Training?** As I have mentioned above, the Union conceded that the Employer can use a bilingual person to replace an employee in training for a position that has been designated "bilingual imperative", because, Mr. Kane said, the Official Languages Act appears to require that.

4. **Conflict Between the Collective Agreement and the Law.** What is the legal effect of the "recommendations" of the Official Languages Commissioner? Faced with a vacant bilingual position which has to be filled, can the Employer to comply with the Collective Agreement without breaching the Official Languages Act and the Regulations? On the evidence, is imperative staffing of vacant bilingual positions required to comply with the law?

For the Employer, Mr. Forget focused on this last issue. He acknowledged that the Union's concession with respect to issue #3 "helped", but he stressed that the Employer's position, and that of the Commissioner of Official Languages, was that there was a conflict between the requirements of the Official Languages Act and the Collective Agreement, specifically Article 13.18(b), which had, by law, to be resolved in favour of the Official Languages Act.

The Commissioner's "recommendations", he submitted, had the force of law. Further, in his submission, on the question of whether there was and is such a conflict, I should defer to the opinion of the Commissioner of Official Languages, who is expert in these matters and charged explicitly with dealing with them.

However, as I have already noted, Mr. Tardif, counsel for the Intervenor, the Commissioner of Official Languages, took the position that the Commissioner's recommendations had no binding legal effect. He urged instead that they should be accorded the respect appropriate to them as the opinion of an expert mandated by Parliament.

I will address these issues, but in reverse order, and, in the course of doing so, I will attempt to deal with all issues relevant to this policy grievance raised by all three counsel.

Decision:

Conflict Between the Collective Agreement and the Law. My job as arbitrator is to interpret, apply and, through registration of my award as an order of the Federal Court, enforce the Collective Agreement between the parties. My authority as arbitrator is limited to that conferred on me by the Collective Agreement and the Canada Labour Code. Neither gives me the jurisdiction to enforce the Official Languages Act. Nevertheless, it is clear that as an arbitrator I am bound by, and must apply, laws of general application, to the extent that they render illegal or otherwise unenforceable whatever contract or collective agreement I am empowered to enforce. See Brown and Beatty, Canadian Labour Arbitration (3rd ed., looseleaf) para. 2:2100; McLeod et al. v. Egan et al (1974), 46 D.L.R. (3d) 150, at p. 152; and Re Canada Packers (Hoffman Meats) and U.F.C.W.U., Local 139 (1985), 21

L.A.C.(3d) 289 (Swan, chair), at p.292-3. Therefore, in so far as compliance with any order by me would put the Employer in breach of the Official Languages Act I cannot make such an order.

To determine whether that would be the case I must, of course, interpret the Official Languages Act. That interpretation will be subject to judicial review, without curial deference if my interpretation is not correct, as made clear by the Supreme Court of Canada in McLeod et al. v. Egan et al (supra), but it is, nevertheless, a function I must perform.

What is the legal effect of the "recommendations" of the Official Languages Commissioner? The first question, and, if I may say so, the easiest for me, is whether the recommendations by the Commissioner of Official Languages are binding on the Employer, either because they themselves have the force of law or because to disregard them constitutes breach of the Official Languages Act.

In my opinion the recommendations by the Commissioner of Official Languages are not binding on the Employer on either basis.

Counsel for the Employer argued vigorously for the proposition, set out in his written brief of argument, that;

> The Commissioner's recommendation is a decision which affects rights, is normative in character, is constitutional in nature and must be complied with and takes precedence over the collective agreement. Therefore the collective agreement must be applied in such a way that it must take into consideration the application of the Commissioner's recommendation.

As I have already stated above, I accept the characterization of the Commissioner's office and role put forward by counsel for the Commissioner himself, as "not a judicial or quasi-judicial body empowered to make binding decisions." As counsel for the Commissioner further stated, "He has no power to directly force any federal institution to take any action nor does he have the power to grant a remedy."

This is another way of saying that the Commissioner's recommendation does not have the force of law, does not affect rights, and is not "normative" in character. I agree. The Official Languages Act has been held to be quasi-constitutional in its effect, but that does not make the Commissioner's recommendation quasi-constitutional. He has power to make recommendations only, and the judgement of the Supreme Court of Canada in Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385, at pp.398-9, dealing with the meaning of "recommendations" in another context, leaves me with no doubt that "recommendations" in the context section 63(1) the Official Languages Act are simply that.

Notwithstanding the importance of what the Commissioner of Official Languages does and, indeed, the quasi-constitutional status of the Act of which his office is the primary enforcement mechanism, Parliament has chosen to empower him only to make "recommendations". Counsel for the Commissioner has stated that "if the legislator had intended for the Commissioner to have the authority to make an order, more precise wording to that effect would have been used". I suggest, rather, that at least some wording to that effect would have been used.

If the recommendations are not made binding by the Official Languages Act, a breach of them cannot be considered to amount to a breach of the Act.

Counsel for the Employer further submitted;

> The recommendation was subject to judicial review under section 18.1 of the Federal Court Act; such a challenge can only succeed if the recommendation is patently unreasonable and "clearly irrational". The Union did not contest the recommendation and is estopped from contesting this recommendation at the present time."

Counsel for the Commissioner himself, as I have just said, characterized the Commissioner of Official Languages as "not a judicial or quasi-judicial body empowered to make binding decisions." It would follow from that that he is not properly subject to judicial review under section 18.1 of the Federal court Act. However, in St-Onge v. The Commissioner of Official Languages, [1992] 3 F.C. 287, the majority appears to have reached the opposite conclusion, without specifically addressing the reasoning of Marceau J., who dissented explicitly on this point. In that case the Court allowed Mr. St-Onge's appeal in an application under section 18.1 of the Federal Court Act for a declaration to the effect that the Commissioner had misinterpreted the Official Languages Act. Nevertheless, I am not persuaded by this submission by counsel for the Employer. It is not at all evident that the Union was required, by the doctrine of estoppel or an any other basis, to question the binding effect of the Commissioner's recommendation by proceeding under the Federal Court Act, rather than by this grievance, even if it is correct to say that it could have done so; a proposition that would have appeared very doubtful at the time the grievance was filed. Moreover, I am

not satisfied that the Union would have had standing to apply to the Federal Court under section 18.1 of the Federal Court Act.

Section 75 of the Official Languages Act does not provide for judicial review. It is a special statutory enforcement mechanism, which may well call for the Federal Court to exercise the same restraint in determining the validity of a recommendation by the Commissioner of Official Languages that it would exercise on judicial review of a judicial or quasi-judicial body, but that does not change the nature or legal effect of the recommendation. Indeed, the Union would not appear to be able to commence proceeding under section 75 and it is not even clear that the Union has standing in such proceedings, although I would think the Court might see fit to grant it standing if it, or its members, were to be affected by an order of the Court under section 75(4).

Effect of the Official Languages Act Itself. Breach of the Act itself is a quite different matter from a breach of the recommendations of the Commissioner of Official Languages. As I have already said, the Employer must comply with the Act and an arbitrator under the Collective Agreement cannot require the Employer to breach it. As the Supreme Court of Canada has recently reiterated in Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 and Dickason v. the University of Alberta, [1992] 2 S.C.R. 1103, the parties cannot contract out of their obligations under a statute of this sort.

The problem is that the Act does not set out clearly what constitutes a breach. It speaks only in very broad and general terms, appropriate to legislation which is at once aspirational and armed with two special enforcement processes; the powers of the Commissioner of Official Languages, which have already been

described, and the broad power of the Federal Court in section 77(4) "to grant such remedy as it considers appropriate and just in the circumstances."

The Official Languages Act is structured to achieve its purposes through "institutional bilingualism", to use another quote from Mr. Tardif, counsel for the Commissioner of Official Languages. This involves the imposition of an obligation to achieve bilingualism on an institution like Canada Post, with the institution being charged with responsibility for coming up with the means of reaching that result rather than with being subjected to specific statutory directions.

The difficulty is that in respect of employment matters Canada Post is not master in its own house. It is obliged by the Canada Labour Code to bargain collectively with the Union, and to respect the terms of its collective agreement, as interpreted by a properly chosen arbitrator. The Collective Agreement is structured to accord individual rights to employees, so it fits awkwardly into institutional bilingualism.

Nevertheless, the Employer and the Union together, no more than the Employer alone, can disregard the requirements of the Official Languages Act. But, when they disagree with one another on the specifics of whatever result is required by the Official Languages Act and, or, on how that result is to be obtained, how does the deadlock between them get broken? Unfortunately, as between the parties to the Collective Agreement neither of the two special enforcement processes under the Official Languages Act is directly available. Neither can complain directly to the Commissioner of Official Languages about the services the Employer provides to the public, and only a complainant, or the Commissioner with the consent of a complainant, can go to the Federal court under Part X

of the Official Languages Act. As between themselves, the parties to the Collective Agreement can have resort **only** to the mechanisms of the Agreement as mandated by the Canada Labour Code.

Their best option might well be to negotiate provisions into the Collective Agreement which satisfy the Commissioner of Official Languages and are therefore unlikely to be disrupted by either of the special enforcement processes under the Official Languages Act. This could have been done when the Collective Agreement was being negotiated or as a agreed amendment. Failing that, as, according to the excerpt from Judge Cossette's Report, the parties here obviously have, the Employer is required to do what it has to do to comply with the Official Languages Act, and, if the Union disagrees, its recourse is to grieve, as it has in this policy grievance and in the 28 individual grievances with which I am seized.

Unfortunately, all I can then do is rule on whether the particular Employer action grieved against offends a valid provision of the Collective Agreement. A provision of the Collective Agreement will be invalid only if it precludes the Employer from complying with the Official Languages Act. If it is possible to do so, I must give any such provision an interpretation that does not preclude the Employer from complying with the Official Languages Act, but if a particular provision does preclude the Employer from complying I must rule it invalid. If the Collective Agreement provision in question does not in my opinion preclude compliance with the Official Languages Act I have no power other than to say so, and award whatever appropriate remedy is sought by the Union.

The question for me is whether the Collective Agreement precludes the Employer from complying with the Official Languages Act, not whether compliance with the Collective Agreement makes compliance

with the Act more expensive or less convenient. **However, considering the nature and purpose of the Official Languages Act, which is evident from its Preamble and Section 2, I, no less than a court interpreting the Act, must heed the words of Decary J.A. in the Federal Court of Appeal in Canada (Attorney General) v. Viola [1991] 1 F.C. 373, at p. 386, which I have already quoted above, and so interpret the Act "as to advance the broad policy considerations underlying it" ... .**

In doing so I must also bear in mind His Lordship's important caution;

> To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but are nonetheless the result of delicate social and political compromise, it requires the courts to exercise caution and to "pause before they decide to act as instruments of change", as Beetz J. observed in Society des Acadiens v. Parents for Association of Fairness in Education [1986] 1 S.C.R. 549 at p. 578.

If the Courts should exercise caution, all the more should an arbitrator under a collective agreement. In this connection Decary J.A. also noted Section 91 of the Official Languages Act, which provides:

> 91. Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is required.

His Lordship then went on to say, at p.388;

> Essentially these provisions are but a revised statement of the duty already imposed by s. 40 of the 1969 Official Languages Act to maintain the principle of selection based on merit. By stating that language requirement must be imposed "objectively". s. 91 expressly confirms what has always been implicit, namely that language requirements cannot be imposed frivolously or arbitrarily. The purpose of this section is to provide comfort and reassurance rather than to create new law, ...

In the case of a particular grievance the question for an arbitrator under the Collective Agreement will be: Cannot the Employer, in the circumstances of a particular grievance, realistically, effectively meet the requirements of the Official Languages Act and the Regulations and still comply with the Collective Agreement. Broadly, those requirements are that, where there is a significant demand, services must be provided throughout the business day in both official languages.

An arbitrator may, and I certainly would, take into account the opinion of the Commissioner of Official Languages on the question of what constitutes compliance with the Official Languages Act. If the issue becomes whether in particular instances the Employer is failing to fulfil its obligations under the Official Languages Act itself because of the requirements of the Collective Agreement I would accord the highest respect to the official opinion of the Commissioner; both as to whether there was a breach and as to what steps had to be taken to rectify or cease the breach and prevent its recurrence.

If imperative staffing was, in the opinion of the Commissioner of Official Languages, the only effective or practical solution I might well find that to be, or to have been, the case,

but the decision as to whether a provision of the Collective Agreement is invalid, or whether it can be interpreted to avoid invalidity, must be the arbitrator's. If my decision is that a disputed provision of the Collective Agreement is not invalid the Employer must live with that, the recommendations of the Commissioner of Official Languages not withstanding.

As I have explained, and as the Commissioner has himself recognized through his counsel, his recommendations are not binding in law and cannot release either the arbitrator or the Employer from their obligations to give effect to the words of the Collective Agreement. They could, however, provide helpful, neutral, expert guidance on the clash between the Collective Agreement and the Official Languages Act.

The problem with the "recommendations" of May 22, 1992, even in the context of specific grievances, is that they lack the specificity an arbitrator would find helpful. They simply direct the Employer to come up with a policy, and the mere fact that the Employer's policy is satisfactory, in the sense that although it breaches the Collective Agreement it complies with the Official Languages Act, is of little help. As arbitrator I would welcome assistance in determining whether there is an acceptable policy that would not breach the Collective Agreement, plausibly interpreted. It would be very helpful to know what would be the policy acceptable to the Commissioner of Official Languages that would least intrude on rights under the Collective Agreement.

Be that as it may, I am dealing here not with particular employee grievances but with a policy grievance. Specifically, the questions I must answer are: **faced with a vacant bilingual position which has to be filled, can the Employer comply with the Collective Agreement without breaching the Official Languages Act and the**

Regulations? On the evidence, is imperative staffing of vacant bilingual positions required to comply with the law?

As I have already explained, the language of the current Collective Agreement is not different in any relevant respect for the one under which this policy grievance arose. The specific provisions of the Collective Agreement in issue are:

> **13.18 Bilingual Positions in Group 1-PO Internal**
>
> (a) The employee who is the incumbent of a position when such position is designated as bilingual must be or become bilingual. Incumbents who are not bilingual shall be given a reasonable period of time to become bilingual. Incumbents failing to become bilingual shall be offered a non-bilingual position in accordance with the order of priority on clauses 13.12 and 13.13.
>
> (b) Where a bilingual position becomes vacant or when a vacant position is designated bilingual it shall be filled in accordance with this Agreement and in such a case the provisions of clause 13.11 shall apply provided sufficient and adequate training in the other official language has been given to the employee.

Article 13.11 provides:

> **13.11 Acquiring Knowledge in Group 1-PO Internal...**
>
> In the application of clauses 13.12, 13.13.

> 13.14 ... it is understood that the employee must, in order to retain his/her position, acquire the specific knowledge requirements of the job within a reasonable period of time not to exceed six (6) months.

Clauses 13.12, 13.13 and 13.14 are the standard provisions governing the filling of positions by seniority. Clause 13.15, is also relevant here, to the backfilling of positions temporarily vacated while those filling them on a permanent basis are on training:

> **13.15 Temporary Exception**
>
> Where a vacant position is being filled and the senior employee is not available, it may be filled temporarily from among available employees in accordance with the provisions of clause 13.12.

My conclusion is that the Employer is not, realistically, effectively required by the Official Languages Act to refuse generally to apply these provision of the Collective Agreement in areas of significant demand for bilingual services. In reaching this conclusion, because of the nature and purpose of Act I have concerned myself with more than the logic of the law and theoretical possibilities. That is why I refer to what is "realistically, effectively required". Mr. Gauthier's testimony about the Employer's practices was very helpful in this respect.

Faced with a vacant bilingual position which has to be filled the Employer **may** be able to comply with the Collective Agreement without breaching the Official Languages Act and the Regulations.

The evidence is that, realistically, imperative staffing of vacant bilingual positions is **not** generally required to effectively comply with the law, although there may be situations where it is required. My response to Issue #3, below, is highly relevant to this conclusion.

For the reasons that I have explained, it is difficult to generalize about the impact of the Official Languages Act on these provisions of the Collective Agreement. It is also difficult to say just what the effect of the Employer's "policy" of imperative staffing is, particularly in its latest manifestation quoted above. The Employer could, and can, do nothing other than attempt, with the guidance of the Commissioner of Official Languages, to comply with the Official Languages Act without breaching the Collective Agreement, as interpreted and applied in light of that Act. Where there are specific grievances which the parties cannot settle, all an arbitrator can do is say whether the Employer's attempt has been successful in the particular circumstances.

The arbitrator's limited powers need not, however, be the end of the matter. A complainant, or the Commissioner of Official Languages with the consent of a complainant, may take any such matter to the Federal Court, which can bring to bear the much wider power specifically granted by Section 77(4) "to grant such remedy as it considers appropriate and just in the circumstances." An order under Section 77(4) would not only carry the authority of the Court, it would be definitive about the impact of the Official Languages Act on the Collective Agreement in a way that an arbitrator could not be. Clearly, the Court's order would override any order an arbitrator might have made, including this one.

3. **Who Will Replace An Employee On Training?** It is very significant that the Union has conceded that the Employer can use a bilingual person to replace an employee in training for a position that has been designated "bilingual imperative". This means that, in that context, Article 13.15 and its predecessor, Article 13.10, are not an obstacle to achieving the purposes of the Official Languages Act. The result is that in many more situations than would otherwise be the case the Employer can, realistically, effectively provide immediate bilingual service to the required level without denying senior employees their rights under Article 13.18.

To be clear about this, not withstanding the words of the Collective Agreement, the Employer can by-pass a senior unilingual employee to ensure that a bilingual person replaces an employee in training for a position in which it is imperative to have a bilingual employee. If necessary, this can involve hiring a term employee; but the senior bilingual employee entitled to the temporary position would take preference over a more junior bilingual person.

Where this course of action is not realistic the Employer may still have to resort to imperative staffing. What the realities are will have to be settled in individual cases. There will be issues of available human resources and cost. I recognize that in particular situations it may come down to a judgement about whether the cost of providing training and a temporary bilingual replacement is realistic. Difficult as it may be for an arbitrator to second-guess the Employer on that question, I do not think the Employer can be permitted, on its own say-so, to use the Official Languages Act to save costs to which it is effectively committed under Article 13.18.

I must add that, realistically, I think arbitrators in particular cases must add to the Union's concession. In particular, on the evidence before me, I think a similar approach is dictated by the Official Languages Act where; (i) a unilingual employee entitled to a position by virtue of seniority is awaiting the results of the language diagnostic test, or (ii) a unilingual employee is in the course of training and, during periods back on the job, is not yet able to provide service in the other language up to the standard required by the Act.

2. **The Designation "Bilingual Imperative".** The Union's submission was that there is no provision in the Collective Agreement for any such designation, and it changes nothing in terms of the seniority rights of employees to such positions on a permanent basis or the Employer's obligations to train them.

The Union is correct, literally, in both respects. In reality, however, the second part of this submission is a restatement of Issue #4, with which I have already dealt as best I can. The Employer can use the designation "bilingual imperative" if it wishes. It's obligations under the Collective Agreement, interpreted and applied in light of the Official Languages Act, are as I have stated them.

1. **Training.** The Union's submission was that only if the employee entitled by seniority to bilingual position has failed to meet the required standard after six months of training can the Employer go to the next person on the seniority list or, eventually, to "the street". Subject to what I have said in relation to Issues #4 and #3, and the following caveat about testing, I accept this submission as correct.

In my opinion the Employer can rely on the language diagnostic test, which, according to Mr. Gauthier's testimony, a person thus appointed was, and is, given a by the Public Service Commission to determine language proficiency. That test is, realistically, a legitimate part of the administration of Article 13.18, interpreted in light of the Official Languages Act. If the result of the test administered by the Public Service Commission is negative, to the effect that the candidate will not be able to become bilingual with the standard training, the test itself should be treated as compliance by the Employer with its training obligation under Article 13.18.

Conclusion and Order: On the basis of the foregoing I have reached the following conclusions with respect to the orders requested by the Union as grievor in this policy grievance;

1. Faced with a vacant bilingual position which has to be filled the Employer **may very well** be able to comply with the Collective Agreement without breaching the Official Languages Act and the Regulations. The evidence is that, realistically, imperative staffing of vacant bilingual positions is **not** generally required to effectively comply with the law, although there may be situations where it is. The recommendation made by the Commissioner of Official Languages on May 22, 1990 is not binding on the Employer but the advice of the Commissioner of Official Languages should provide useful guidance to both the Employer and the arbitrator in particular circumstances.

2. Subject to the limitations set out above, the Corporation has an obligation to provide language training to employees as required by Article 13.18 of the Collective Agreement.

3. Where the Employer is able, realistically, to comply with Article 13.18 without effectively breaching the Official Languages Act and the Regulations, it must do so in filling bilingual positions.

Innis Christie
Arbitrator