T-1977-94

IN THE MATTER OF an application pursuant to Section 77 of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.)

BETWEEN:

ROBERT LAVIGNE

Applicant

- and -

HUMAN RESOURCES DEVELOPMENT

(FORMERLY HEALTH AND WELFARE CANADA)

Respondent

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

THE OFFICE OF THE COMMISSIONER

OF OFFICIAL LANGUAGES

Intervenor

REASONS FOR ORDER

PINARD J.

This is an application for numerous remedies pursuant to section 77 of the *Official Languages Act* (the Act).[1] Section 77 sets out that:

(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 or V, or in respect of section 91, may apply to the Court for a remedy under this Part.

[. . .]

(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.

(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.

BACKGROUND FACTS

The applicant qualified in competition 92-NHW-QU-OC-166, held by National Health and Welfare ("NHW"), in July 1992. He was ranked 19th on the eligibility list established for bilingual positions. The applicant was appointed for a specified period to the position of information clerk at the CR-04 group and level in bilingual position ISQZC-8540C for the period from August 27, 1992 to March 31, 1993. This position was a bilingual imperative position (linguistic profile BBB). The applicant's preferred language is English. After the appropriate testing, the applicant received a B level on the reading test, a B level on the writing test and an E level on the oral test. B level on the reading test indicates that the applicant could understand most descriptive and factual texts dealing with work-related subjects, grasp the main idea of most work-related texts, pick out specific information and distinguish the main ideas from secondary ideas. B level on the writing test indicates that the applicant is able to write short descriptive or factual texts in his or her second language and has sufficient command of vocabulary and grammar to process explicit information pertaining to work-related subjects. An E level on the oral test indicates that the applicant's spoken French is at such a high level that he never has to be tested again while in the employ of the Federal Government.

In March 1993, before the term of employment ended, the 31 information clerks hired at the conclusion of competition 92-NHW-QU-OC-166 underwent a performance review for the purpose of re-hiring. All the clerks were evaluated on the basis of their performance during the term of employment ending March 31, 1993, by the unit head responsible for supervising them for the purposes of re-hiring. At the conclusion of this review process, 22 candidates were placed on an eligibility list. The 22 candidates received an overall mark of 65% or higher on the evaluation. Candidates were required to obtain a pass mark of at least 65% in order to be placed on the eligibility list. Five of the 22 candidates on the eligibility list identified themselves as Anglophones. Of the 22 candidates on the eligibility list, 19 accepted the offer of employment they were given and three did not. Some of the 19 candidates who were re-hired subsequently had their contracts renewed. However, in September 1994, none of the 19 candidates, who were re-hired in March 1993, still worked for Income Security Programs.

As is the case in all selection processes conducted in the Public Service of Canada, the employees concerned were rated on a basis of three factors: knowledge, abilities and personal suitability. The marks of the 31 information clerks ranged from a high of 85% to a low of 34.2%. The applicant received an overall mark of 52.8%. As a result, he could not be placed on the eligibility list and has not been re-hired by the respondent since his term of employment ended on March 31, 1993. Applicant's mark on the knowledge factor was 79 out of 140, or 56.42%. Applicant's mark on the abilities factor was 115 out of 220, or 52.2%. Applicant's mark on the

personal suitability factor was 70 out of 140, or 50%. On February 8, 1994, the respondent asked the Public Service Commission of Canada to provide him with a list of candidates from its inventory for use in another competition, that is competition 94-NHW-QU-OC-004. The purpose of that competition was to establish a new eligibility list to meet the additional needs of the Montréal client service centre. The previous eligibility list, established following competition 92-NHW-QU-OC-166 in August 1992, was still valid but no longer contained any names; in other words, everyone who had been on the list was either working with Income Security Programs or not available. On February 11 and 16, 1994, the Public Service Commission of Canada sent the respondent HRD referral notices containing the names of candidates who might wish to enter the competition. The applicant's name did not appear on the lists of referrals from the Public Service Commission. The fact that the applicant's name did not appear on the said lists was not the result of any action by the respondent HRD, choosing referred candidates being the responsibility of the Public Service Commission.

During his employ at NHW, the applicant made four complaints to the Commissioner of Official Languages ("COL"). The report prepared by the COL sets them out as follows:

6 his supervisor requires that correspondence addressed to the regional office in Quebec City be written in French (OCOL file 1950-92-H2);

6 memorandums sent to the Montreal District Office from the Quebec Regional Office are unilingual French (OCOL file 0174-93-H2);

6 most of the job-related training courses are offered in French only at the Montreal District Office (OCOL file 0175-93-H2);

6 various unilingual English messages sent by electronic mail from the Montreal District Office to the Quebec Regional Office are returned with the notation "*en français s.v.p.* " [in French, please] (OCOL file 0357-93-H2).

In a letter dated July 4, 1993, the complainant added further elements to his initial allegations, namely:

6 the linguistic climate that prevailed at the Montreal office reflected the fact that the institution had not created an environment conducive to the use of English;

6 his employer had done nothing to promote the use of English and refused him the right to work in English;

6 the fact that he had been denied training and work instruments in English had an unfavourable impact on the acquisition of knowledge and on his performance, and, consequently, on the evaluation of these done by his supervisor; the employer used this evaluation in deciding not to rehire him for another specified period (term).

The COL identified the issue as having to do with "language of work and with equal opportunities for employment and advancement in federal institutions" pursuant to the provisions of Part V of the Act. The Montréal work region is designated as bilingual, and accordingly, employees have the right to use the language of their choice in carrying out their work functions. The Québec Regional Office is not designated as bilingual. The Québec office has jurisdiction over the Montréal office. The Report set out that "the Quebec office must accommodate the employees of the Montreal office as regards their right to work in the official language of their

choice. Thus, in the internal handling of the files of NHW clients, the employees of the Montreal office may communicate with the Quebec office in the language of their choice."

The conclusions of the COL, rendered in his Report which came out in June 1994, were as follows:

< & nbsp; the management of the Montreal office did not identify in advance the linguistic preference of the complainant (nor of the other term clerks) when he took up his duties;

< & nbsp; the management of the Montreal office did not ensure that the complainant and other English-speaking staff received the documentation produced at the regional and local levels in their official language;

< & nbsp; the complainant's opportunities to demonstrate his abilities and potential were affected due to the fact that he was obliged, during approximately half his term of employment, to work in French; and

< & nbsp; the complainant was put at a disadvantage in terms of his opportunity to acquire and master work-related knowledge because he did not receive his initial training in his official language and did not have work instruments available in his language. The complainant was thereby placed at a disadvantage in the selection process compared to his French-speaking peers. This situation could have had a negative impact on his opportunities for employment in the Department.

As the COL concluded that the applicant's language of work complaints were founded, he made the following recommendations to the respondent HRD:

1. review, without delay, the complainant's performance evaluation (the one prepared within the context of the selection process of persons recalled for another term), taking into account the fact that the complainant was placed at a disadvantage in demonstrating his knowledge and abilities; and, if possible, review its decision not to renew his term.

[. . .]

2. organize, by June 30, 1994, information sessions for the managers of the Montreal office to make them more aware of their linguistic obligations;

3. ensure that the managers of the Montreal office take, by June 30, 1994, all the measures required to provide English-speaking employees with work instruments in their official language and to create a climate conducive to the use of both official languages in the work environment;

4. ensure immediately that staff training in bilingual regions in Quebec is offered in the official language of the employees; and

5. put in place, by June 30, 1994, the corrective measures contemplated in July 1993 by the Regional Director, Human Resources, with regard to central services at the Quebec office.

The original performance review was prepared by a Mrs. Dubé (the unit head responsible for supervising the applicant) who found that the applicant did not meet the minimum requirements (at a 65% testing level) to be placed on a recall list for another term. A Mrs. Lavoie conducted the re-evaluation of the applicant's qualifications pursuant to the recommendation of the COL. As per Mrs. Lavoie's affidavit, she found that the applicant, even when considering that he was placed at a disadvantage as per the COL Report, still did not meet the minimum requirements to be placed on a re-hire list.

On August 23, 1994, the applicant filed this Originating Notice of Motion pursuant to section 77 of the Act.

ISSUE

As the respondent HRD has admitted to infringements under Part V of the Act, the only remaining issue is the appropriate remedy to be granted by this Court.

ANALYSIS

Given the admission by the respondent HRD that the language of work rights of the applicant, as guaranteed under Part V of the Act, have been infringed, the applicant is seeking, pursuant to paragraphs 77(1) and (4) of the Act, the following remedies:

1. an Order compelling HRD to provide the applicant and COL with the results of the review of the applicant's file including the reasons for the decision that was made concerning the failure, in 1993, to renew the applicant's employment, as recommended by the COL in his report;

2. damages in the following amounts:

- $50,000.00 in exemplary damages arising from the discriminatory conduct of HRD
- $39,393.648 for loss of salary
- $4,924.152 for lost benefits (holidays/sick leave)
- $25,000.00 for physical and mental anguish and the loss of the "enjoyment of life", including all medical expenses

Total: $119,317.80

3. an Order requiring HRD to re-instate the applicant in the Federal Public Service;

4. an Order declaring that the employment record of the applicant while at HRD be subject to verification and rectification where needed;

5. an unqualified letter of reference;

6. an Order that HRD provide a letter of apology to the applicant, to be posted throughout all HRD facilities; and

7. an Order for costs.

For its part, the respondent HRD submits that the Court should declare that, in consideration of all the circumstances, the applicant has already been granted an appropriate and just remedy for the said infringements.

Thus, as the foregoing discussion indicates, the respondent HRD has already acknowledged that it infringed the Act. In addition, the respondent HRD has agreed to implement the recommendations of the COL Report. I am satisfied, on the facts in this case, that the re-evaluation which was recommended by the COL Report and which was undertaken by HRD was reasonably and adequately performed by Mrs. Lavoie. Although the applicant would have preferred not to be compared to his Francophone colleagues, Mrs. Lavoie's evidence is that, in accordance with the recommendations in the COL Report, she reviewed the applicant's performance evaluation, "taking into account the fact that the complainant was placed at a disadvantage in demonstrating his knowledge and abilities". Considering paragraphs 37 to 50 of Mrs. Lavoie's affidavit, I am satisfied that Mrs. Lavoie conducted her review pursuant to the guidelines set out in the COL Report and that she assessed the applicant in a fair manner. I note, however, that while Mrs. Lavoie's re-evaluation constitutes a very significant and objective measure of justice in the circumstances, this Court is not limited to any of the recommendations in the COL Report. Subsection 77(4) of the Act very clearly gives this Court a broad discretion to grant any appropriate remedy. In order to determine what remedy would be appropriate in the circumstances of this case, I propose to consider each of the specific remedies requested by the applicant.

I note that, with respect to the first remedy requested by the applicant, the latter indicated during the hearing before me that the respondent has complied with his request to have the results of the review of his file communicated to him.

As to those remedies that remain in issue, I find that there is no serious evidence to support three of the Orders sought by the applicant against the respondent HRD. In my view, the evidence does not support either the applicant's request for an Order requiring HRD to re-instate him to the Federal Public Service, nor the applicant's request for an Order declaring that his employment record while at HRD be subject to verification and rectification where needed. Furthermore, the evidence does not support the applicant's request for an unqualified letter of reference. I base my first finding on the fact that the applicant has not, to my mind, established any causal link between the non-compliance by the respondent HRD with Part V of the Act and the fact that he was not re-hired when his term contract ended on March 31, 1993. On the second finding, I remark simply that the applicant has not satisfied me that his employment record needs to be rectified. Finally, the respondent HRD has already sent the applicant a letter confirming his employment at Health and Welfare Canada from August 27, 1992 to March 31, 1993. For these reasons, and taking into account the results of the applicant's performance re-evaluation given by Mrs. Lavoie, all three of the above-mentioned Orders sought by the applicant would be inappropriate remedies in this case.

As to the question of damages, I would like to deal first with the respondent's submission that no damages ought to be awarded because this proceeding was brought by Notice of Motion. The respondent contends that, in view of the traditional reluctance of Courts to grant damages as a remedy when the proceedings have been instituted by way of Notice of Motion, it follows that

section 77 of the Act gives no right to claim damages. Counsel for the respondents referred to *Lussier v. Collin*, a decision of the Federal Court of Appeal, in support of the proposition that "Even if it is presumed that section 24 of the Charter gives a right to claim damages, it certainly does not permit the rules of procedure prescribing how such claims must be made to be ignored."[2] In that decision, Hugessen J.A., for his part, indicated that he agreed with his brother judges, and expressed the view that with respect to an application for an order to pay damages "The rules of procedure do not allow such an order to be made on a mere motion; to maintain the contrary would seriously prejudice the right of the defendant to raise all his defences." In my view, that case can be distinguished from the present one in that the Charter gives no indication as to the manner in which a claim for a remedy under section 24 ought to be heard and determined. The *Official Languages Act*, by contrast, includes section 80 which states:

> An application made under section 77 shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*.

Thus, the legislator has specified that the application under section 77 of the Act brought by the applicant shall be heard and determined in a summary manner in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Court Act*. No such rules have been adopted. . . . The applicant has respected Part X of the Act by proceeding by way of application rather than by way of action. In the absence of any special rules adopted under section 46 of the *Federal Court Act*, the procedure established under Part X of the Act ought to be respected and given full effect in the expedient fashion provided for by the legislator. Accordingly, Rule 400 of the *Federal Court Rules*, which was invoked by counsel for the respondents, is not infringed and in any event cannot be used to defeat the legislator's intent. As stated in Rule 2(2), the *Federal Court Rules* "are intended to render effective the substantive law and to ensure that it is carried out; and they are to be so interpreted and applied as to facilitate rather than to delay or to end prematurely the normal advancement of cases". In addition, Rule 302 dictates that "no proceeding in the Court shall be defeated by any merely formal objection". Furthermore, considering the proceedings herein, the documentary evidence, and the arguments made on behalf of all the parties with respect to the applicant's claim for damages, and taking into account that the respondents have not shown nor even complained of any prejudice resulting from the procedure used by the applicant, I conclude that the right of the respondents to raise all their possible defences with respect to the applicant's claim for damages has not been prejudiced at all.

I also agree with the intervenor's submission that the interpretation suggested by the respondents, which would disallow damages, is restrictive and incompatible with the interpretation of the nature and purposes of the Act that was given by the Federal Court of Appeal in *Canada (Attorney General) v. Viola*:[3]

> The 1988 *Official Languages Act* is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms*, it follows the rules of interpretation of that Charter as they have been

defined by the Supreme Court of Canada.[6] To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), 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".[7] 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 a 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 *Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education et al.*:[8]

> . . . legal rights as well as language rights belong to the category of fundamental rights,
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> . . .
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> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle.
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> . . .
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> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights.

[6] *R. v. Big M Drug Mart Ltd. et al.*, [1985] 1 S.C.R. 295; *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Therens et al.*, [1985] 1 S.C.R. 613; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

[7] *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89-90. See also: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd. et al.*, [1985] 2 S.C.R. 536, at p. 547; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 236; *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 224; *Winnipeg School Division No. 1 v. Craton et al.*, [1985] 2 S.C.R. 150, at p. 156; *Insurance Corporation of British Columbia v. Heerspink et al.*, [1982] 2 S.C.R. 145, at pp. 157-158.

[8] [1986] 1 S.C.R. 549, at p. 578.

Subsection 77(4) of the Act is a restatement of subsection 24(1) of the Charter which allows anyone whose rights or freedoms under the Charter have been infringed or denied to apply to a Court of competent jurisdiction to "obtain such remedy as the Court considers appropriate and just in the circumstances". Just as subsection 24(1) of the Charter gives the Court a broad discretion to grant a remedy for a Charter violation, subsection 77(4) of the Act gives the Court an equally broad discretion to grant a remedy for a violation of the language rights protected under it. At the time of the adoption of the 1988 *Official Languages Act*, the Supreme

Court of Canada, in *Mills v. The Queen*,[4] had already established that damages were a possible remedy under subsection 24(1) of the Charter. Later, in *R. v. Gamble*,[5] the Supreme Court of Canada confirmed that remedies under subsection 24(1) of the Charter should be given a broad and purposive interpretation, and that "distinctions which have become uncertain, technical, artificial and, most importantly, non-purposive should be rejected". In that context, given the importance of damages in the judicial system, I share the intervenor's view that restricting the type of remedy so as to exclude damages would be incompatible with the plain meaning of subsection 77(4) of the Act. Had the legislator intended to limit the Court's powers under that specific provision to grant a remedy so as to exclude damages, it would have stated so explicitly.

In interpreting subsection 77(4), one must also keep in mind the purpose of the Act, as set out in subsection 2(*a*), which is to accomplish the following objective relating to the language of work in federal institutions:

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

Thus, a purposive analysis also leads to a broad and liberal interpretation of subsection 77(4) which would allow the Court the discretion to order damages as a remedy under Part X of the Act (see *Clarke v. Clarke*, [1990] 2 S.C.R.795, at pp. 806-807, per Wilson J.).

Furthermore, the choice of the appropriate remedy under subsection 77(4) must fall entirely within the discretionary power of the Court. In *Mills, supra*, at page 965, the Supreme Court of Canada commented upon the extent of this discretion in the context of section 24 of the Charter:

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. . . .

In my view, the interpretation proposed by the respondents would interfere with the proper exercise of judicial discretion.

Finally, the 1988 *Official Languages Act* is a statute designed to create practical and effective legal rights and obligations. To accomplish this objective, and to ensure that the Act is indeed an effective instrument for the protection of the language rights of Canadians, damages must be included among the realm of remedies available to the Court under subsection 77(4). The ability of the Court to award damages is, in my view, essential to the enforcement of guaranteed quasi-constitutional rights.

Consequently, I must now deal with the applicant's claim for damages. Having determined above that the applicant has not established any causal link between the non-compliance by HRD with Part V of the Act and the fact that he was not re-hired when his term contract ended on March 31, 1993, the applicant is not entitled to any compensation for loss of salary and benefits.

With respect to the applicant's claim for damages for physical and mental anguish and loss of "enjoyment of life", including all medical expenses, the causal link between HRD's infringement of the language rights of the applicant and the medical evidence, which is limited to Dr. Dalton's letter dated January 25, 1996 and medical expenses (medication) in the amount of $139.51, is not satisfactorily established. However, HRD's infringement led the applicant to file numerous complaints with the COL. These legitimate attempts by the applicant to protect his language rights caused him significant inconvenience and loss of enjoyment of life, which must be compensated for by an award of damages in the amount of three thousand dollars ($3,000.00), with interest from the date of the Order in this matter.

With respect to the claim for exemplary damages, the applicant has not established that HRD's conduct was of a harsh, vindictive, reprehensible or malicious nature. The Supreme Court of Canada stated the following in regard to exemplary or punitive damages, in *Vorvis v. I.C.B.C.*:[6]

> Moreover, punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

In the case at bar, concerning complaints 1950-92-H2 and 0357-93-H2 (HRD's requirement to have the applicant's written reports relating to Francophone clients sent in French to the clerk-analysts of the Québec office), the respondents recognize that the applicant should have had the right to write all the reports he sent to the clerk-analysts of the Québec office in English. However, it would appear that at the time the applicant was required to write the said reports in French, HRD honestly believed that, pursuant to parts of IV and V of the Act and the Treasury Board Policies, those reports had to be written in French. After discussions between the HRD and the COL, the applicant was finally authorized to write his reports in English.

Concerning complaint 0174-93-H2 (use of the French language by the respondent in two letters sent to the applicant on August 28, 1992 and on September 8, 1992), the respondents recognize that pursuant to paragraph 36(1)(*a*)(i) of the Act, the HRD had the duty to make central and personal services available to the applicant in his preferred official language. However, at the time the two letters concerned by the complaint were sent to him, the applicant had not yet chosen the official language in which he preferred to receive that kind of written communication.

Concerning complaint 0175-93-H2 (job-related training courses), the respondents recognize that the applicant should have had the opportunity to receive all his work-related training and all the work instruments in his preferred official language. However, it seems most of the work instruments were in fact provided to the applicant in his preferred official language.

In these circumstances, HRD having also agreed to follow the recommendations contained in the COL's Report, I cannot find that HRD's conduct was extreme in its nature, nor that by any reasonable standard it is deserving of full condemnation and punishment. Therefore, the applicant is not entitled to any amount of money in exemplary damages arising from the discriminatory conduct of the respondent's employees.

Finally, considering that the COL concluded that the applicant's language of work complaints were founded, and considering that the respondents have admitted to infringements under Part V of the *Official Languages Act*, I agree with the applicant that HRD owes him a formal apology. In my view, such an apology will advance the purposes of the Act. It will tell every employee of a federal institution that, with respect to language of work and provision of services, HRD is firmly committed, in accordance with the Act, to upholding and according equal status to both official languages, as well as to ensuring that every employee has equal rights and privileges, irrespective of their preferred official language. Accordingly, it will be ordered that a formal apology be given in writing to the applicant and that it be posted throughout all HRD facilities.

Upon hearing the parties' submissions on costs, the applicant will be granted costs on a party to party basis.

OTTAWA, Ontario

October 30, 1996

JUDGE

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[1] S.C. 1988, c. 38, assented to July 28, 1988.

[2] [1985] 1 F.C. 124 at 125, Pratte J.A.

[3] [1991] 1 F.C. 373 at 386-387, Décary J.A.

[4] [1986] 1 S.C.R. 863.

[5] [1988] 2 S.C.R. 595 at 640.

[6] [1989] 1 S.C.R. 1085 at 1107-1108, McIntyre J.