

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE MINISTER OF HUMAN RESOURCES
(GOVERNMENT OF THE NORTHWEST TERRITORIES)

Employer/GNWT

-and-

THE UNION OF NORTHERN WORKERS

Union/UNW

RE: EXCLUSIONS UNDER SECTION 41(1.7)(d)
PUBLIC SERVICE ACT

AWARD

BEFORE:

Tom Jolliffe, Q.C.

FOR THE EMPLOYER:

Sandra Jungles
Cheryl McKay

FOR THE UNION:

Linda Cassidy
Anne Marie Thistle

HEARING DATE:

April 11, 2017

HEARING LOCATION:

Yellowknife, Northwest Territories

DATE AWARD ISSUED:

May 23, 2017

This matter arises out of the filing by the Union of Northern Workers in February 2014 of grievance #14-P01635 alleging that certain positions have been inappropriately excluded from the bargaining unit. As with other filed grievances, and awards issued, it requires interpretation of the *Public Service Act* R.S.N.W.T. 1988, c.P-16 pertaining to the restriction of GNWT employee eligibility for inclusion. As has been noted previously in the context of other awards between these Parties dealing with the exclusion issue there is no doubt about the *Act* providing stand-alone legislation for regulation of collective bargaining for GNWT employees. The specific statutory language concerning which the Parties are now seeking an arbitrator's determination relative to a particular identified position being ineligible, or not, is Section 41(1.7)(d). They are agreed that this award will cover the handling of the one position without prejudice to later dealing with other positions covered by the same grievance, or the possible issue of timeliness. The governing provision reads as follows:

(1.7) An employee, other than an employee of the Northwest Territories Power Corporation or a teacher, is not eligible for membership in a bargaining unit where, in the opinion of the Minister, the employee is employed;

(1.7) Un fonctionnaire, à l'exclusion du personnel de la Société d'énergie des Territoires du Nord-Ouest et des enseignants, ne peut adhérer à une unité de négociation si ce fonctionnaire, de l'avis du ministre, est employé :

(d) as a legal officer or in a position that provides translation services to a legal officer on a regular basis

d) à titre de conseiller juridique ou pour fournir régulièrement des services de traduction à un conseiller juridique

As with other awards, for comparison purposes, and ease of reference, the entirety of Section 41(1.7), is appended to this award.

Evidence:

The position under arbitral consideration at this point is that of Legislative Coordinator (position #82-1532) in Legislation Division of the Department of Justice. It has been occupied by Marie Venne since 2006 and has always been considered by the Employer to be an excluded position. The job description document entered in evidence at Tab 7 of the joint evidence brief is appended to this award. Reviewing this document shows that there is mention of the need for the position to have bilingual language skills, referenced at various times within the document, and being summarized in the Purpose Of The Position section as: "this position is responsible for a variety of functions that can best be performed by a person who works in both English and French, including the translation of Government and Non-Government notices from English to French for publication in the *Northwest Territories Gazette*, and the preparation of bilingual tables and indexes in the *Northwest Territories Gazette*." Suffice to say, broadly stated, the job description indicates the scope of the incumbent's duties to include providing support services in respect to appointments, regulations and legislative research, including to the Director and four legislative counsel with knowledge of legal terminology in both English and French.

The Legislative Division position flow chart entered in evidence shows four Legislative Counsel; in addition to a French Legislative Counsel. It shows a Manager, Legal Translation under whom the Legal Translator position works, and also the Bilingual Legislative Technician position. The Legislative Coordinator's position is not titled as a translator's position in being listed below the Divisional Secretary and the

Administrator/Editor positions. The position does not fall within any legal officer category whose incumbents admittedly are the staff lawyers.

There were two witnesses called to testify by the Employer, none by the Union.

The first witness, Mike Reddy, is the Director of the Legislation Division at the Department of Justice, reporting to the Assistant Deputy Minister of Justice and Attorney General of the Northwest Territories. Mr. Reddy is the administrative head of the Division and is regarded as a senior lawyer within the Government. He oversees the Division's work which involves providing legislative drafting services required by the Government and the Legislative Assembly. In so doing, he supervises the administrative staff providing support and other services such as the legally required publication in the *Northwest Territories Gazette* of annual volumes of the statutes, regulations, statutory instruments, appointments and revocations, and government and private notices. He gives advice with respect to legislation and statutory interpretation to client government departments and commissions, as do the legal officers under his supervision. Mr. Reddy's own job has no requirement for the incumbent to be bilingual and he acknowledged not being bilingual. He relies on those who are bilingual for the services they provide under his management of the Division.

By way of clarifying his own responsibilities, Mr. Reddy's job description was entered in evidence (document #82-0054), which in his overseeing the scope of duties and organizational structure of the Legislation Division, even personally drafting the most sensitive and confidential legislation, includes *inter alia* the following description:

The Director is responsible for the Legal Translation Section of Legislation Division which, in addition to its primary responsibility for the preparation of French versions of the Bills, regulations and statutory instruments, also provides legal translation services to the Courts in respect of judgments and to the Deputy Minister, and the Assistant, Deputy Ministers in respect of internal Justice documents which require translation into French, or external French documents which require translation into English.

Mr. Reddy's job description also sets out the Division's organizational structure as "providing a full range of legislative drafting services, in English and French ...". It includes describing the legislative counsel in Drafting Section (A) as follows:

Legislative Counsel (staff of 4): Legislative counsel provide legislative drafting services to Cabinet, the Legislative Assembly and the departments and public agencies. In addition to preparing Bills, regulations and statutory instruments, legislative counsel give legal opinions with respect to the legislation being prepared and statutory interpretation.

In addition, the Division's organizational structure contains the following positions in the same Drafting Section (A):

Editor-Administrator, Legislative Coordinator, Director's Secretary: (staff of 3): These individuals perform administrative and support tasks within the Division, though each position has discrete responsibilities for preparation of legislation, appointments or statutory publications.

The legal translator position described as being in Legal Translation Section (B) is set out as follows:

Legal Translator: (staff of 1): the Legal Translator provides French translations of the Bills, regulations and other statutory instruments prepared within Legislation Division. At the request of the Judiciary or the Department of Justice, he or she translates into English or French, as the case may be, judicial decisions, policy papers, letters, or other instruments.

As indicated earlier, in addition, Legal Translation as currently structured, also has a manager working under Mr. Reddy, and a bilingual legislative technician. None

of these are the same position as Legislative Coordinator who is nevertheless contemplated to have bilingual capability by reference to her job description document entered in evidence.

Mr. Reddy, in his testimony, described what he has observed to be the major components of the Legislative Coordinator's position performed by Ms. Venne, primarily talking about those elements set out in her job description associated with providing support services. By his description, it probably entails between 50% - 75% of her time spent recording appointments and appointment revocations for publication in Part I of the *Northwest Territories Gazette*, done in English and French, also organizing publication of certain other statutorily required notices such as name changes. By his recollection in 2016 there were some 494 appointment notices and 272 revocations issued in certificate form which Ms. Venne ensured had been properly signed by the responsible Minister, compiled monthly and published in Part I in both languages. She was described by Mr. Reddy as having no role with respect to Part II which sets out the full text of the changes to regulations, sundry orders and statutory instruments, being those documents dealing with the laws of the Northwest Territories involving lawyer draftsmanship. They have been compiled by legal counsel with language comparability confirmed by the French language counsel in conjunction with the legal translator.

Mr. Reddy testified that whether it be the Legislation Division's Part I or Part II responsibilities, the need exists to ensure accuracy in both French and English. Given Ms. Venne's experience and facility in both languages, he testified, she "gets it done

with minimum oversight” by him concerning the Part I legal information to be published in the *Gazette*, despite the overall responsibility for accuracy resting with him.

Mr. Reddy also testified that generally the Legislation Division staff work collaboratively in dealing with highly confidential information concerning statute and regulations’ development under discussion. He ventured to say that all information coming into the Legislation Division office is confidential until entering the public realm in normal course of its publication in the *Gazette* whether it be with respect to the Part I recordings or Part II publications. He said there are other bilingual staff members in addition to the translator, and it is not uncommon for them to “bounce ideas off each other” in their dealing with language issues. He also testified that in his view Ms. Venne in fulfilling her Legislative Coordinator duties coming within her job description does ensure that the French text reflects the English text relative to the Part I publications, admittedly being a different role than the legislative context under Part II where there are various translation comparability requirements to consider by the French language counsel with the involvement of the person occupying the legal translator position. He does not doubt that the work of the Legislation Division remains confidential until entering the public domain.

The only other witness called to testify in this matter, Marie Venne, has been in the Legislative Coordinator position since 2006, having always been excluded from the bargaining unit by the Employer to this point. She described herself as suitably bilingual to work in both English and French in performing whatever duties she has

been instructed to complete. She acknowledged that at least 50% of her instructed duties on a day-by-day basis relate to dealing with Part I appointments and revocations of appointments coming from the office of the responsible Minister. By her description, the Legislation Division receives notices of appointments or revocations written in English, and required to be published in the *Gazette* in both languages which is left to her, including ensuring that the French version is accurate. She does this on her own. She also ensures the accuracy of the Index of recorded information in both languages. She testified that over the years she has prepared and updated a binder/guide book containing appropriate descriptions translated by her into French which she has long since inputted into the current database of applicable French language descriptions. It requires some revision on her part from time to time to remain current. Ms. Venne described herself as having no duties with respect to new statutory instruments created under Part II except for ensuring that they are accurately indexed in the *Gazette*, having created a table for identifying the title in both languages, date of registration and number, and properly inserting the statutory instruments that have been drafted. Any translation aspects related to creating new statutory instruments, whether regulations or Bills, do not fall to her.

Argument:

The Employer cites the fundamental principle of statutory interpretation relied on by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, with Justice Iacobucci having quoted Driedger, *Construction of Statutes* (2nd

ed. 1983) at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Ms. Jungles submitted that in dealing with the Section 41(1.7)(d) ineligibility requirement it is necessary to observe that the term "legal officer" is not expressly defined for purposes of the Legislation Division, leaving one to recognize its ordinary plain meaning, in context, it being a reference to any of its lawyers (legislative counsel as described in the position flow chart entered in evidence). It obviously includes Mr Reddy who as director is considered a senior government lawyer. Whether the language goes on to require the exclusion of the Legislative Coordinator position requires one to review the scope of duties contemplated by the job description, and whether they encompass providing translation services to a legal officer, i.e., one or other of the Translation Division lawyers, on a regular basis. In recognizing the ordinary meaning of the express exclusion covering the providing such services "on a regular basis", counsel submitted, it is a matter of spontaneously understanding that it would have to involve such work happening over and over again, meaning what is usual, normal and customary for the position. The various dictionary meanings referenced by counsel indicate an element of orderly frequency, for example, I observe that *The Concise Oxford Dictionary* contains the definition for "regular" as "acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly." The regular work contemplated as requiring the position to be ineligible for

bargaining unit inclusion is that of "translation services." It invites an inquiry into the work she performs which brings one to the heart of the issue in this matter. What is the incumbent expected to be doing on a regular basis by reference to the job description?

Ms. Jungles reviewed the testimony of the bilingual position incumbent, Ms. Venne, being that she receives all statutory appointments and revocations following their Ministerial approval, in addition to any other Part I notices, in English. She uses her self-created database of translations, sometimes requiring her to make additions for newly created terms, i.e., to insert the French text of the notices into the *Northwest Territories Gazette*. By her testimony, she spends at least 50% of her day, every day, dealing with the notices which are published every month, ensuring their proper translation into French at the same time. She does this work for Mr. Reddy, whose evidence indicates the significance of Ms. Venne regularly applying her bilingual skills as described in testimony.

Further, the Employer relies on the scope clause contained in the job description with its reference to the Legislation Coordinator position providing support services regarding appointments, regulations and legislative research to the director, four legislative counsel, the Manager of Legal Translation and the one Legal Translator position. The scope clause specifically references the incumbent preparing and translating into French the indexes and tables, and the Government and non-government notices. The scope clause also requires the incumbent to maintain the registers and database for appointments and revocations which Ms. Venne explained

in testimony she does in English and French. Her description was said to fall in line with the responsibilities clause contained in the job description indicating that she translates government and non-government notices into French for publication in the *Gazette* which we know from her testimony, counsel submitted, is a regular part of her job.

Further, the Employer relies on the knowledge and skills portion of the job description requiring demonstrated verbal and written communications skills in French and English. This includes "proven ability to work at a strong technical level to research statutory appointments and to translate *Northwest Territories Gazette* notices from English into French", also "the proven ability to apply grammatical and technical rules in both languages", and "demonstrated knowledge of legal terminology in English and French", all performed within a team setting. This work, ultimately, is performed under the direction and guidance of the Director, a senior lawyer, who is responsible for directing the preparation and publication of whatever information emanates from Legislation Division.

Ms. Jungles also cited "community of interest" criteria as something to consider, having me note that in labour relations matters it has been considered a factor in determining the scope of the bargaining unit, or its position exclusions. The criteria includes the nature of the work being performed, and the functional coherence and interdependence of the employees involved, by her description working collaboratively. Counsel pointed out that Ms. Venne performed her duties on a highly confidential basis, together with her coworkers who are excluded, she dealing with official

government records containing statutory instruments required to be published, but not yet in the public domain. It should be viewed as all coming together to indicate the position should be excluded.

Ms. Cassidy on behalf of the Union submitted that obviously the legislative coordinator's position does not fall within the scope and bounds of being a legal officer working at the Legislation Division. It is a matter of assessing whether the duties encompassing Ms. Venne's position amounted to providing translation services to a legal officer on a regular basis. The evidence indicates that her work in applying her bilingual language skills largely entails the important task of verifying that the text of the Part I notices required for publication in the *Gazette* are accurate in both French and English, meaning that the texts are reflective of each other. The Union holds to the view that it should not be considered the same kind of work undertaken by the Division's manager of legal translation or the single legal translator, by reference to the divisional flow chart. Their work is in the nature of providing translation services to the legal counsel relative to whatever requirements they might have pertaining to the work done by the lawyers.

The Union does not view it to be a matter at this point of considering the issue of community of interest which may well have been considered in drafting the statutory language. Rather, the Parties should consider it to be a matter of determining whether the duties fall within the bargaining unite exclusion on the basis of a plain reading of the statutory language, in context, there being no dispute about the Driedger interpretation principle adopted in *Rizzo*.

Plainly put, the Union takes the evidence as demonstrating that the legislative coordinator position does not provide translation services to legal officers (lawyers) on any regular basis with Ms. Venne's translation efforts being confined to ensuring the language consistency of the notices' text for publication in the *Gazette*. She no doubt applies her bilingual ability in ensuring their French/English accuracy, but it is not in the nature of advising a lawyer on how the French language version of a draft bill should be formulated.

Conclusion:

It is appropriate for me to state at outset that whether there was a community of interest approach taken in the Government of the Northwest Territories enacting Section 41(1.7)(d), possibly to acknowledge there being shared confidentiality between those initially formulating legal language in English and those ensuring its French language accuracy, in my view it cannot be the determinative factor in deciding this grievance. Here, it is fundamentally a matter of interpreting the resulting express statutory language by reference to what both counsel have described from their competing perspectives to be a clear enacted exclusion requiring a factual review of the scope of duties and responsibilities as to whether the Legislation Coordinator position comes within the restrictive language of Section 41(1.7) (d) of the *Act*. The testimony from Ms. Venne is obviously helpful in that she has been performing in the position since 2006 and has a complete understanding of what the job entails as worked by her day-by-day, but the job description itself is the key component for my consideration. At

the same time one must recognize, as directed by the Supreme Court of Canada, that it is always a matter of considering statutory language in context with reliance on the Driedger statement of principle.

In taking this view, I observe that the statutory exclusion is not stated broadly enough to cover all bilingual employees at Legislation Division, or those working elsewhere in whatever government departments they are employed, who might well be expected to be providing advice and counsel by reference to their French language expertise on issues arising in any general sense of needing some clarification and understanding in both languages. At the same time, the exclusion provision does not expressly refer to one needing to hold the position title of "translator". It does contemplate translation services being provided on a regular basis to a legal officer, in this case meaning to one or other of the lawyers at Legislation Division which includes the Director as a senior government lawyer heading the Division. We know that the Division already employs a manager of Legal Translation and a Legal Translator who presumably are primarily involved on the legislative drafting side of the ledger, whether with Bills, regulations or other statutory instruments needing to be enacted in both French and English, working to ensure statutory accuracy and providing their advice to lawyers on that basis. For comparison purposes, there is an obvious exclusion under Section 41(1.7)(d). At this point the Legislative Coordinator's position largely involves dealing with the Part I notices which are required to be published in both French and English.

In my dealing with this exclusion language, firstly it is necessary to consider the job description in terms of the position requirements. In the section entitled **Purpose Of The Position** I note the incumbent is described as “responsible for a variety of functions that can best be performed by a person who works in both English and French, including the translation of the government and non-government notices from English into French for publication in the *Northwest Territories Gazette*, and the preparation of bilingual tables and indexes in the *Northwest Territories Gazette*”. This described purpose needs to be further considered in the context of the language contained in the **Scope** clause which follows and states that the position provides “support services” in respect of appointments, regulations and legislative research to the Director, four Legislative Counsel, Manager of Translation and the one Translator, positions. It would seem from Ms Venne and Mr. Reddy’s testimony that the support services in her day-to-day work normally include translating Part I notices being legal/statutory mandated documents. The **Responsibilities** section contains reference to her dealing with appointments and appointment revocations which includes preparing the instrument, coordinating of the approval process, registering the instrument, entering it in the appointments database which we know from her testimony she is required to maintain and update in both languages. Further, in dealing with the *Gazette* responsibilities, the incumbent is required to translate government and non-government notices into French for publication, also create tables and indexes in both languages. The **Knowledge, Skills and Ability**, section indicates that she should have a “proven ability to work at a strong technical level, to research

statutory appointments and to translate *Northwest Territories Gazette* notices from English into French” specifically being required not only to have a demonstrated knowledge of drafting and legal translation standards and conventions, but also a demonstrated knowledge of legal terminology and English and French.

Secondly, Ms. Venne’s testimony demonstrates that her performance in the position currently requires her to use her translation abilities in performing her Part I *Gazette* publication duties on a daily basis. Probably at least 50% of her work at this point on an ongoing basis includes dealing with the Part I notices which are required to be issued in both French and English. The evidence indicates that they come into the Division written in English and require translation into French which she does, in addition to providing the indexing in both languages, and concerning which she has developed, maintains and updates a catalogue of bilingual descriptions. There is no indication that anyone assists her in this work.

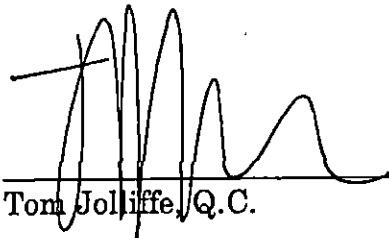
Thirdly, in my view, the evidence discloses that the translation work carried out in connection with the Part I publication duties should be considered as providing her services to a legal officer. Realistically, Ms. Venne in furtherance of her job expectations under the position description document, as explained by Mr. Reddy in his testimony, ultimately is providing her translation results to him as the senior lawyer heading of the Legislation Division whose principal responsibilities include ensuring absolute accuracy in dealing with all official publications contained in the *Gazette*, including any Part I notifications she has translated. Mr. Reddy daily relies on the same kind of translation expertise from Ms. Venne as is set out in the job

description, a requirement for the Legislation Coordinator position.

In all, I have concluded that the Legislative Coordinator position as set out in the Job Description document entered in evidence, currently held by Ms. Venne, is one which provides translation services to a legal officer on a regular basis, namely primarily to the Director of Legislation Division as an ongoing, orderly and expected activity, he being a senior lawyer who fulfills the role of legal officer in satisfying his own job requirement. It is to ensure French and English accuracy in all publications contained in the *Northwest Territories Gazette*. That being the case, the position is declared to be ineligible for membership in the bargaining unit by operation of Section 41(1.7)(d) of the *Public Service Act*.

I remain seized in the event that there is any need for further directions or clarification and in order to deal with any other issues arising under the same grievance #14-PO1635.

Dated at Calgary, Alberta, this ²~~22~~ day of May, 2017.



Tom Jolliffe, Q.C.

Excluded
employees:
general

(1.7) An employee, other than an employee of the Northwest Territories Power Corporation or a teacher, is not eligible for membership in a bargaining unit where, in the opinion of the Minister, the employee is employed

- (a) as a deputy head, a head of a secretariat of the Executive Council, an assistant deputy minister, a director, a regional director, an assistant director, an area director, a regional superintendent or an auditor;
- (b) in a position in a division or section of the Financial Management Board Secretariat with duties and responsibilities that include developing and administering policies, procedures and guidelines respecting human resource management, program evaluation, financial planning and resource allocation;
- (c) in a position that provides support or advice directly to the Executive Council, a committee of the Executive Council or a member of the Executive Council;
- (d) as a legal officer or in a position that provides translation services to a legal officer on a regular basis;
- (e) in a position with duties and responsibilities that include providing advice and assistance, on a regular basis, respecting the terms and conditions of employment, including collective bargaining;
- (f) in a position with duties and responsibilities that include carrying out the following on a regular basis:
 - (i) staffing,
 - (ii) interpreting employment contracts,
 - (iii) resolving workplace disputes,
 - (iv) responding to grievances, or
 - (v) providing advice in respect of the matters referred to in subparagraphs (i) to (iv);
- (g) in a position with management responsibility that includes directly assigning work to, assessing the performance of and imposing discipline on other employees;
- (h) a dentist or a medical practitioner; or
- (i) in a position that provides administrative or secretarial support directly
 - (i) to a person referred to in paragraphs (a), (c) or (d), or
 - (ii) to a person referred to in paragraphs (b), (e), (f) or (g) in respect of the duties and responsibilities referred to in those paragraphs.

(1.7) Un fonctionnaire, à l'exclusion du personnel de la Société d'énergie des Territoires du Nord-Ouest et des enseignants, ne peut adhérer à une unité de négociation si ce fonctionnaire, de l'avis du ministre, est employé :

- a) à titre d'administrateur général, de chef de secrétariat du Conseil exécutif, de sous-ministre adjoint, de directeur, de directeur régional, de directeur adjoint, de directeur de secteur, de superviseur régional ou de vérificateur;
- b) dans une division ou une section du Secrétariat du Conseil de gestion financière avec des attributions qui comprennent le développement et la gestion de politiques, de procédures et de lignes directrices se rapportant à la gestion des ressources humaines, à l'évaluation de programme, à la planification financière et à l'allocation de ressources;
- c) pour un poste qui vise à fournir un soutien ou des conseils directs au Conseil exécutif, à un comité du Conseil exécutif ou à un membre du Conseil exécutif;
- d) à titre de conseiller juridique ou pour fournir régulièrement des services de traduction à un conseiller juridique;
- e) pour un poste dont les attributions visent à donner régulièrement des conseils et de l'aide sur les conditions d'emploi, notamment dans le cadre des négociations collectives;
- f) pour un poste dont les attributions portent régulièrement, selon le cas, sur :
 - (i) la dotation en personnel,
 - (ii) l'interprétation des contrats d'emploi,
 - (iii) la résolution des différends sur les lieux de travail,
 - (iv) le traitement des griefs,
 - (v) les conseils donnés relativement aux affaires visées aux sous-alinéas (i) à (iv);
- g) pour un poste de responsabilité de gestion qui se rapporte directement à l'attribution du travail aux autres fonctionnaires, à l'évaluation de leur rendement et au respect de la discipline sur les lieux du travail;
- h) comme dentiste ou médecin;
- i) pour un poste qui vise à fournir un soutien administratif et de secrétariat directs :
 - (i) soit aux personnes visées par les alinéas a), c) ou d),
 - (ii) soit aux personnes visées par les alinéas b), e), f) ou g) quant aux attributions qui y sont visées.

Fonctionnaires
exclus