Federal Court  Cour fédérale

Date: 20220421

Docket: T-1966-19

Citation: 2022 FC 565

Ottawa, Ontario, April 21, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MICHEL THIBODEAU

Applicant

and

EDMONTON REGIONAL AIRPORTS AUTHORITY

Respondent

JUDGMENT AND REASONS

[1] Mr. Thibodeau made a complaint to the Commissioner of Official Languages [the Commissioner] regarding the Edmonton Regional Airports Authority [ERAA]. After conducting an investigation, the Commissioner found that ERAA had violated several provisions of the *Official Languages Act*, RSC 1985, c 31 (4th supp) [the Act].

[2] Mr. Thibodeau is now applying to this Court for a declaration that ERAA breached the Act and for an award of damages in the amount of $7,500. While ERAA now admits to having breached the Act, it asserts that it should not be ordered to pay damages. According to ERAA, Mr. Thibodeau is a serial complainant who actively seeks out violations of the Act, and that his modus operandi amounts to a "commodification" of the rights guaranteed by the Act. ERAA also states that it has complied with the Act since the complaints were filed.

[3] I am allowing Mr. Thibodeau's application and ordering ERAA to pay him damages in the amount of $5,000. I find that awarding damages is necessary to the vindication of the rights recognized by the Act and deterrence. Nothing about Mr. Thibodeau's modus operandi changes this, and ERAA has not presented any evidence that it has become compliant with the Act since the Commissioner's report was issued.

I. Background

[4] This application follows five complaints filed by Mr. Thibodeau in January 2018 regarding breaches of the Act committed by ERAA. Mr. Thibodeau describes himself as an [TRANSLATION] "ardent defender of language rights". Over the past 20 years, he has filed many similar complaints against various federal institutions subject to the Act. Some of those complaints have given rise to applications before this Court.

[5] ERAA is an airport authority that is subject to the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5. One of the airports it operates is the Edmonton International Airport. According to section 4 of this statute, ERAA is subject to several parts of the *Official Languages*

Act, including Part IV, which deals with communications with and services to the public. Mr. Thibodeau alleges in his complaints that various communications from ERAA, including some on its website and social media, are available in English only, and that ERAA uses unilingual English slogans in various contexts.

[6] The Commissioner conducted an investigation. In October 2019, he concluded that Mr. Thibodeau's complaints were founded and that ERAA had committed various breaches of Part IV of the Act. Given that ERAA now admits that it breached the Act, a summary of the Commissioner's conclusions will suffice. The Commissioner reminded ERAA that any communications to the public must be of equal quality in both official languages. He found that the use of English was predominant in ERAA's social media communications. As for ERAA's website, he found that several documents were available in English only, that the French pages contained English content and that the URL address was in English only. He also noted that Mr. Thibodeau had submitted evidence of the use of unilingual English slogans in various contexts.

[7] Mr. Thibodeau then filed an application pursuant to section 77 of the Act, seeking declaratory relief and an award of damages. Through its counsel, ERAA subsequently wrote to Mr. Thibodeau, apologizing for the breaches of the Act raised in the complaints, but refusing to pay damages.

[8] Mr. Thibodeau's application against St. John's International Airport Authority has also been assigned to me. I am rendering judgment simultaneously in that case: *Thibodeau v St.*

John's International Airport Authority, 2022 FC 563 [*St. John's Airport*]. Certain issues are common to both files. When this is the case, I will simply refer to my reasons in the *St. John's Airport* case.

II. Analysis

A. *Breach of the Act*

[9] When dealing with an application for a remedy under section 77 of the Act, this Court must independently determine whether the Act has been breached: *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, 2004 FCA 263 at paragraphs 18 to 21, [2004] 4 FCR 276 [*Forum des maires*]. The Commissioner's report is admissible in evidence, but it is not binding on the Court.

[10] In its response to the Commissioner, ERAA argued it that was not in breach of the Act in certain respects. It seems to have adopted a narrow interpretation of the scope of sections 22 and 23 of the Act and of section 4 of the *Airport Transfer (Miscellaneous Matters) Act*, which I rejected in the *St. John's Airport case*.

[11] Before this Court, ERAA now acknowledges that Mr. Thibodeau's complaints are well founded and is not raising the arguments that I examined in *St. John's Airport*. I will therefore simply provide a brief summary of the breaches of the Act.

[12] Mr. Thibodeau's complaints focus first on ERAA's website and presence on social media platforms such as Twitter, Facebook, Instagram and YouTube. It is common ground that, at the time of the complaints and the Commissioner's investigation, ERAA's communications on these various platforms were primarily, if not exclusively, in English. Moreover, ERAA published its annual reports and development plans in English only. As I explained in *St. John's Airport*, this is a breach of section 22 of the Act.

[13] Mr. Thibodeau also highlighted a number of unilingual English slogans used by ERAA inside the airport, including on an electric cart, on clothing worn by volunteers or offered to travellers celebrating birthdays, or on various billboards. Such communications are intended for the public or the travelling public and must be in both official languages.

B. *Damages*

[14] The real issue raised in this case is whether it is appropriate and just to award damages to Mr. Thibodeau.

[15] On this point, Mr. Thibodeau submits that the jurisprudence of this Court establishes that each breach of the Act gives rise to an award of $1,500. Because he filed five separate complaints, he is of the view that he is entitled to five times that amount, or $7,500. He argues that such an award is necessary to send a clear message that it is unacceptable to breach the Act. At the hearing, he even claimed an amount of $3,000 for each breach.

[16] ERAA, on the other hand, submits that it should not be condemned to pay damages to Mr. Thibodeau. It states that such an award would not fulfill any of the functions identified by the Supreme Court of Canada in *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*], namely, compensation for the harm, vindication of the right or deterrence. It also submits that such an award would enable Mr. Thibodeau to enrich himself and "commodify" his language rights. Mr. Thibodeau in fact files multiple complaints against various institutions subject to the Act, proposing that they settle the matter for an amount of $1,500 per complaint and threatening to file an application with the Federal Court if they do not. According to ERAA, tolerating such an approach would bring the administration of justice into disrepute.

[17] For the reasons that follow, I disagree with ERAA. I am of the view instead that it is necessary to award damages to vindicate language rights and to achieve deterrence. However, I do not believe that Mr. Thibodeau is entitled to a flat rate for each complaint. In light of all the circumstances, I am awarding an amount of $5,000.

[18] To justify the award of damages, I will apply, in a manner adapted to the Act, the test set out by the Supreme Court in *Ward*, at paragraph 4:

> The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[19] The breach of the Act, which corresponds to the first step of the test, has already been established above. I will therefore proceed to the second step, which is to show which functions would be fulfilled by an award of damages.

(1) The Functions of Damages in This Case

[20] The circumstances of this case are similar to those in *St. John's Airport*, and the award of damages fulfills the same functions.

[21] This is not a case in which damages are intended to compensate individual harm. Beyond the legitimate indignation he felt when he noticed breaches of the Act, Mr. Thibodeau has not established personal harm.

[22] Damages, however, will help fulfill the other two functions established in *Ward*, namely, vindication of rights and deterrence. A declaratory judgment will not be sufficient on its own to achieve these objectives. As I will explain below, ERAA has not provided any evidence of the concrete measures that it claims to have taken to comply with the Act. A concrete sanction is necessary to remind ERAA and other federal institutions of the need to comply with the Act and to reassure the public of the importance of language rights.

(2) Countervailing Factors

[23] The next step of the test involves asking whether there are public interest considerations indicating that awarding damages would be inappropriate. ERAA raises Mr. Thibodeau's modus

operandi, the fact that a damages award would be a poor use of public funds and the steps it has taken to become compliant with the Act.

a) *Mr. Thibodeau's Modus Operandi*

[24] ERAA asserts that Mr. Thibodeau's practice of filing multiple complaints and instituting multiple proceedings against federal institutions is a bar to an award of damages. ERAA criticizes the fact that Mr. Thibodeau's income from the settlement of these complaints constitutes a perversion of the purposes of the Act. I cannot accept ERAA's arguments. ERAA's insinuations regarding Mr. Thibodeau's motives are completely unjustified. Furthermore, ERAA's arguments are incompatible with the scheme of the Act and the role assigned to private plaintiffs in its implementation.

[25] It is unnecessary to reproduce in detail all of the allegations made in ERAA's memorandum regarding Mr. Thibodeau's motivations and modus operandi. In short, ERAA is accusing him of profiting financially from the breaches of the Act about which he complains. In most cases, these complaints are based on Internet research rather than on visits to the airports in question. Mr. Thibodeau insists on settling each complaint for a flat rate of $1,500. ERAA submits that, since his retirement from the public service, Mr. Thibodeau has been devoting much of his time to the serial filing of complaints and earning a considerable income from this activity. In short, ERAA is accusing him of misusing the Act.

[26] Such accusations are unfounded and outrageous. I have no doubt that Mr. Thibodeau is motivated by his deep commitment to the defence of French and language rights. In cross-

examination, he described himself as an [TRANSLATION] “ardent defender of language rights”. He specified:

> [TRANSLATION]
>
> Language rights have been an integral part of my life since I was very young.
>
> For the past 20 years, I have been engaged in a legal battle to defend my language rights, which in principle are guaranteed by the country’s Constitution.
>
> . . .
>
> The older I get, the more I realize that federal institutions continue to violate my rights, and the more I realize that one day I will die, and still they will not respect my rights.

[27] Over the past 20 years, this commitment has led him to apply, often successfully, for several remedies under section 77 of the Act. While this undoubtedly allows him to claim the title of language rights activist, it cannot be inferred that his recent increase in activity is for an illegitimate purpose.

[28] The courts are aware of the enormous personal investment required to pursue an application under section 77 of the Act. In *Canada (Commissioner of Official Languages) v Office of the Superintendent of Financial Institutions*, 2021 FCA 159, at paragraph 52, the Federal Court of Appeal described the contribution of Mr. Dionne, the complainant in that case, as follows:

> I acknowledge the courage and perseverance that Mr. Dionne has shown throughout this process, first as a complainant to the Commissioner and later as an applicant before the Federal Court and now as an appellant before this Court. I think it is people like Mr. Dionne who advance the state of the law in the area of language rights and, for that reason, I particularly commend his

> participation in the controversy concerning the interpretation of Part V of the OLA.

[29] The same can certainly be said for Mr. Thibodeau. While he has received significant sums in damages since 2017, the monetary aspect cannot overshadow the immense personal investment he has made in the defence of language rights. There is absolutely no evidence to support ERAA's claim that Mr. Thibodeau has "commodified" language rights or that profit has become his motivation. In fact, to make such an argument shows a profound lack of sensitivity to the situation of linguistic minorities and their desire to have their rights respected.

[30] Moreover, as a matter of principle, I find it difficult to see how ERAA can fault Mr. Thibodeau for filing complaints and applying for remedies under section 77 against a range of federal institutions. ERAA is currently facing only one section 77 application. The fact that other institutions are facing similar challenges is not in itself a defence. Indeed, if each of these proceedings had been instituted by a different person, the practical result would be the same, but ERAA could not use this as an argument against Mr. Thibodeau's application.

[31] In this regard, it should be noted that the effectiveness of the section 77 remedy depends on the tenacity of private plaintiffs. Given the considerable effort required to bring a section 77 application to a successful conclusion, it is not surprising that very few people engage in this process. In this context, a federal institution subject to the Act cannot complain about the number of proceedings that an individual like Mr. Thibodeau institutes against other institutions. Awarding damages to an individual who institutes multiple proceedings under section 77 does not bring the administration of justice into disrepute. Calling this person an "activist" adds

nothing to the analysis. Ultimately, ERAA's arguments attack the very legitimacy of awarding damages under section 77, an issue that this Court has long since resolved.

[32] I therefore see nothing in Mr. Thibodeau's modus operandi that militates against awarding damages.

b) *The Proper Use of Public Funds*

[33] ERAA also submits that its financial resources would be better spent ensuring compliance with the Act than paying damages to Mr. Thibodeau. I must confess I find the logic of this argument hard to follow. Moreover, it is unsupported by evidence. Paying damages does not exempt ERAA from complying with the Act. To borrow Mr. Thibodeau's colourful image, this is not a [TRANSLATION] "discount coupon". ERAA has not presented any evidence that a modest award to Mr. Thibodeau will deprive it of the financial resources necessary to ensure the bilingual nature of its services and communications. ERAA cannot complain that this sum will benefit a specific individual, as this is an inherent feature of damages awarded for the vindication of rights and deterrence.

c) *The Correction of Breaches of the Act*

[34] In *Forum des maires*, at paragraphs 20 and 62, the Federal Court of Appeal stated that it would normally not be appropriate to award damages when the federal institution concerned has come into compliance with the Act between the filing of the complaint and the hearing of the application.

[35] Relying on this principle, ERAA submits that it should not be obliged to pay damages to Mr. Thibodeau because in the meantime it has complied with its duties under the Act. However, ERAA has provided no evidence of this. The statement of its counsel, contained in a letter to Mr. Thibodeau, is not admissible evidence and does not explain what ERAA has done to comply with the Act. In its response to the Commissioner, ERAA stated its intention to make its website bilingual within an unspecified time frame. It is difficult to conclude from this that the website is currently compliant, especially since at that stage of the proceedings, ERAA was challenging the merits of the other components of Mr. Thibodeau's complaint. Moreover, the evidentiary record contains the list of complaints filed by Mr. Thibodeau since 2017. This list shows new complaints against ERAA regarding the matters at issue in this application. While I am not called upon to rule on the merits of these complaints, their existence prevents me from giving credence to the statements of ERAA's counsel. In short, there is no concrete evidence that the objective of deterrence has lost its relevance.

C. *The Quantum of Damages*

[36] What remains to be determined is the quantum of damages that is appropriate and just, in the words of subsection 77(4) of the Act. Mr. Thibodeau is claiming $9,000, or $1,500 for each of the six complaints he has filed. He has based this calculation on certain decisions of this Court that apparently employed such a method: see e.g. *Thibodeau v Air Canada*, 2019 FC 1102 at paragraph 65.

[37] However, as I indicated in *St. John's Airport*, I do not believe that such an approach is appropriate. Rather, the Court must take into account all the circumstances in determining a just amount.

[38] To determine this amount, I am taking into account the following factors, which demonstrate the seriousness of the breach at issue:

- the importance of websites and social media to communications between a federal institution and the general public or the travelling public;

- the fact that ERAA was communicating on its social media platforms in English only at the time the complaints were filed;

- the fact that at the time the complaints were filed, only part of ERAA's website was available in French;

- the fact that the various slogans used by ERAA suggested that it did not value bilingualism at all; and

- the lack of evidence presented by ERAA regarding the steps it has allegedly taken to comply with the Act and the Commissioner's recommendations.

[39] I am also taking into account, as mitigating factors, the fact that this is the first time that ERAA has been the subject of a section 77 application and the apology it has made to Mr. Thibodeau through its counsel.

[40] ERAA cites a number of decisions in which an amount of $500 was awarded for the breach of certain *Charter* rights by police officers or prison authorities. *Brazeau v Canada (Attorney General)*, 2020 ONCA 184, can easily be distinguished, as it was a class action, and the total award was $20 million. It is true that in *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255, and *Mason v Turner*, 2014 BCSC 211, damages were awarded in the amount of $500. I believe, however, that the language rights decisions rendered by this Court provide a more relevant point of comparison. The breach of the Act examined in this case is certainly more serious than the English-only inscription on some of the fountains in Parliament, for which damages of $1,500 were awarded: *Thibodeau v Canada (Senate)*, 2019 FC 1474. The magnitude and repetitive nature of the case arguably make it comparable to *Thibodeau v Air Canada*, 2019 FC 1102, in which an award of $21,000 was made. In short, determining the amount of damages is not an exact science, and it is impossible to ensure perfect consistency with the amounts awarded in other cases.

[41] In light of all the circumstances, I believe that it is just and appropriate to order ERAA to pay damages to Mr. Thibodeau in the amount of $5,000.

III. Conclusion

[42] For these reasons, I will order ERAA to pay damages to Mr. Thibodeau in the amount of $5,000. Given this award, there is no need to grant declaratory relief.

[43] Mr. Thibodeau is also seeking costs. Under section 81 of the Act, costs usually follow the event. I see no reason to depart from this rule. I am of the view that it would be appropriate and just to award Mr. Thibodeau an amount of $3,900, which would include counsel fees and a modest fee for Mr. Thibodeau.

JUDGMENT in T-1966-19

THIS COURT ORDERS as follows:

1. The application is allowed.
2. The Edmonton Regional Airports Authority shall pay damages to the applicant in the amount of $5,000.
3. The Edmonton Regional Airports Authority shall pay costs to the applicant in the amount of $3,900, including taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michel Thibodeau (in person)	FOR THE APPLICANT (ON HIS OWN BEHALF)
Matthew Halpin Jean-Simon Schoenholz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada Ottawa, Ontario	FOR THE RESPONDENT