Cour fédérale  Federal Court

Date: 20210212

Docket: T-1966-19

Citation: 2021 FC 146

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 12, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MICHEL THIBODEAU

Applicant

and

EDMONTON REGIONAL AIRPORTS AUTHORITY

Respondent

ORDER AND REASONS

I. Background

[1] This is a motion brought by the respondent, the Edmonton Regional Airports Authority [ERAA], under section 97 of the *Federal Courts Rules*, SOR/98-106 [Rules]. The ERAA seeks an order which aims in particular to force the applicant, Michel Thibodeau, to answer several

questions asked during cross-examination on an affidavit, as well as to produce a number of documents requested in the summons to appear.

[2] This motion arises in the context of an application filed on December 6, 2019, by Mr. Thibodeau under section 77 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [OLA]. His application is based on five complaints submitted to the Commissioner of Official Languages [Commissioner] on January 22, 2018, for violation of his language rights. These include the predominance of English in the ERAA's social media accounts, the unequal English and French content on the Edmonton Airport website (including the URL address), the publication of documents of public interest in English only on the airport website, and unilingual English signage inside and outside the airport.

[3] In his application, Mr. Thibodeau seeks a declaration that the ERAA has not met its obligations under the OLA. Due to the violation of his language rights, Mr. Thibodeau claims a remedy under subsection 77(4) of the OLA in the amount of $7,500 in damages as well as a formal letter of apology from the ERAA.

[4] On January 17, 2020, Mr. Thibodeau served a sworn affidavit in support of his application. This affidavit deals primarily with complaints made by Mr. Thibodeau to the Commissioner. Attached are the complaints as well as the Commissioner's investigation report confirming that they are founded and that the ERAA has failed to meet its obligations under the OLA. In his affidavit, Mr. Thibodeau also testified to the impact these violations had on him and the importance of ensuring that his language rights are respected.

[5] On February 26, 2020, the ERAA sent Mr. Thibodeau a letter in which it admitted its liability with regard to the allegations raised in the notice of application and apologized to Mr. Thibodeau. It then explained how it considered it would be inappropriate in the circumstances to pay the requested amount, for the following reasons:

> [TRANSLATION]
> However, the Respondent believes that paying you damages would be inappropriate in the circumstances. The Respondent has taken note of the recommendations of the Commissioner of Official Languages ("Commissioner") in his final investigation report of October 2019 regarding your complaints. The Respondent has already taken steps to implement these recommendations and will continue to follow the recommendations of the Commissioner.
>
> Although the Respondent considers that any violation of the *Official Languages Act* ("OLA") is one too many, it does not believe that an individual should be able to earn a significant income by deliberately seeking out violations of the OLA in order to collect some sort of commission. In view of your numerous complaints against federal institutions and your numerous court cases, the Respondent considers that you are not only an activist, but also a professional litigator in language rights. Although your dedication to the cause of language rights is commendable, the amounts you claim are not always used to advance this cause.
>
> The Respondent is a not-for-profit corporation, and its financial resources are not unlimited. The Respondent estimates that the sum of $7,500 which you claim would be better invested to implement the Commissioner's recommendations. Thus, a greater number of Canadians would benefit from it, and resources would be directed to where they are really needed.
>
> Please note that the Respondent is not minimizing the importance of your language rights or those of other Canadians. On the contrary, the Respondent recognizes the identity-related and constitutional aspects of their nature. This is why the Respondent will work with the Office of the Commissioner of Official Languages to improve its services to and communications with the travelling public.

[6] On the same day, the ERAA also served on Mr. Thibodeau a direction to attend for cross-examination on an affidavit. The ERAA asked Mr. Thibodeau to bring with him several documents relating to, among other things, monetary sums received or to be received as settlement for violations of his language rights since 2011, as well as the complaints filed with the Commissioner on his own behalf, or on behalf of his wife or his son.

[7] Owing to the delays caused by the pandemic, the cross-examination which was to take place on March 4, 2020, was rescheduled for November 20, 2020.

[8] Mr. Thibodeau filed an additional affidavit on November 6, 2020, to which he attached the letter of apology from the ERAA.

[9] On November 20, 2020, Mr. Thibodeau appeared for cross-examination without the requested documents. He also refused, during cross-examination, to answer several questions asked by the ERAA in relation to other complaints he had filed against other federal institutions and the context surrounding those complaints. In general, the questions and documents subject to an objection fall into three categories. The first category relates to the history of complaints filed by Mr. Thibodeau, while the second relates more to financial remedies obtained following the settlement of those complaints. The third category concerns the appearances of Mr. Thibodeau before parliamentary committees and the transcript of a call with a lawyer in another case.

[10] The ERAA submits that the questions asked and the documents requested were relevant and proper in the context of a cross-examination on affidavit, that they relate to the main issue in

the underlying proceeding, namely the award of damages under subsection 77(4) of the OLA, and that they are relevant to the content of the letter of apology found in Mr. Thibodeau's additional affidavit.

II. Analysis

[11] Cross-examinations on affidavit are governed by sections 83 to 100 of the Rules. Section 97 of the Rules provides that if a person refuses to answer a proper question during an oral examination or to produce a requested document, the Court may, among other things, order that person to attend or re-attend a further oral examination at his or her own expense, and to answer a question that was improperly objected to and any proper question arising from the answer.

[12] The scope of cross-examination on affidavit has been the subject of numerous court decisions (*CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 29 [*CBS*]; *Thibodeau c Administration de l'aéroport international d'Halifax*, 2019 CF 1149 (CanLII) at para 13; *Ottawa Athletic Club inc. (Ottawa Athletic Club) v Athletic Club Group inc.*, 2014 FC 672 at paras 130–33 [*Ottawa Athletic Club*]; *Sierra Club of Canada v Canada (Minister of Commerce)*, [1998] FCJ No 1673 (QL) at paras 9, 13 [*Sierra*]; *Merck Frosst Canada Inc. v Canada (Minister of Health)*, [1997] FCJ No 1847 (QL) at paras 4, 7–8 [*Merck Frosst 1997*]; *Merck Frosst Canada Inc. v Canada (Minister of National Health and Welfare*), [1996] FCJ No 1038 (QL) at para 9).

[13] Recently, in *CBS*, the Federal Court of Appeal endorsed the principles laid down by this Court in *Ottawa Athletic Club* at paragraphs 130 to 133 on the extent of the affiant's obligations

in providing documents or answering questions during cross-examination. It is generally recognized that the scope of a cross-examination on affidavit is more limited than an examination for discovery, that "[a]n affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit" and "should submit to cross-examination not only on matters set forth in his affidavit, but also to those collateral questions which arise from his answer" (*CBS* at para 29, citing *Ottawa Athletic Club* at para 132).

[14] It is also recognized that the person must also "answer all questions upon which he can be fairly expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which his affidavit touches" (*Swing Paints Ltd v Minwax Co*, [1984] 2 FC 521 at para 19). The person may also be cross-examined on documents relevant to the determination of the issue even if those documents are not mentioned in the affidavit filed (*Sierra* at para 9).

[15] Subsection 77(4) of the OLA reads as follows:

(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. [Emphasis added]	(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances. [Soulignement ajouté.]

[16] In *Canadian Food Inspection Agency v Forum des maires de la Peninsule Acadienne*, 2004 FCA 263 [*Forum*], the Federal Court of Appeal noted that the wording of this provision

was identical to that found in subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter] and that the Court thus has considerable latitude as to the choice of remedy "it considers appropriate and just in the circumstances" to grant under subsection 77(4) of the OLA (*Forum* at para 56).

[17] The four-step analytical framework for determining whether an award of damages constitutes an "appropriate and just" remedy within the meaning of subsection 24(1) of the Charter is stated in the judgment *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*]:

> 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.

[18] This analytical framework was endorsed by this Court in *Thibodeau v Air Canada*, 2011 FC 876 at paragraph 86.

[19] The ERAA maintains in particular that the questions asked and the documents requested are relevant to the third step of the *Ward* judgment analysis, which allows a federal institution to demonstrate that certain considerations countervail the award of damages, such that damages would be neither appropriate nor just. It emphasizes that the Supreme Court of Canada has recognized that the list of countervailing considerations was not exhaustive and would be

established as the case law evolves. It notes, however, that at least two considerations were relevant: the existence of other remedies and concerns about good governance.

[20] The ERAA alleges that Mr. Thibodeau attempted in the past, without *success*, to obtain very high amounts as a form of remedy for the infringement on his language rights (*Thibodeau v Air Canada*, 2004 FC 800 at para 3). According to the ERAA, Mr. Thibodeau has since changed his modus operandi and, rather than asking for large amounts, files hundreds of complaints and asks $1,500 for each of them, [TRANSLATION] "thus inflicting death by a thousand cuts . . . on federal institutions". In this regard, it argues that Mr. Thibodeau admitted during his cross-examination that he had about fifty complaints in reserve against the ERAA, and that he would ask for $1,500 per complaint, for a total of $75,000.

[21] The ERAA also argues that the questions are also relevant to the second step of the analysis in *Ward*, or the compensation component. Mr. Thibodeau must demonstrate "why damages are an appropriate and just remedy" in that they perform at least one of the following functions: (1) compensation; (2) vindication of the right; and (3) deterrence of future breaches. However, during his cross-examination, Mr. Thibodeau argued that the "compensation" component was part of the basis for his claim for damages. In addition, he alleges in his affidavit:

> [TRANSLATION]
> 12. I feel my rights have been violated when I am confronted with such a unilingual English and/or predominantly English display. It causes me frustration, stress and loss of enjoyment of life.

[22] The ERAA maintains that it is entitled to cross-examine Mr. Thibodeau on any related issue which demonstrates that he has not suffered any damage, but that he is in fact an activist who deliberately seeks out violations of the OLA, files hundreds of complaints to the Commissioner and who subsequently alleges having suffered “loss of enjoyment of life” to profit from it. The ERAA believes it is entitled to test the credibility of Mr. Thibodeau on the issue of damages.

[23] In response, Mr. Thibodeau is of the opinion that the questions are beyond the scope of a cross-examination and are not relevant to the dispute. He maintains that the ERAA argument is a distraction argument. Rather than confronting its own compliance with the OLA, the ERAA attacks the person who denounces the breaches. Mr. Thibodeau underlines that the ERAA did not submit any authority explaining in what way the motivations which it tries to impute to him are relevant to the awarding of damages. According to him, accepting the ERAA’s argument would amount to reducing the dissuasive effect of the OLA by shifting the blame onto the behaviour of an applicant.

[24] Mr. Thibodeau also maintains that the production of the documents and information requested is not proportional to the remedy sought, namely the award of $7,500 in damages. In addition, it would go against the spirit of section 3 of the Rules, which provides that the Rules must be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

[25] Finally, Mr. Thibodeau maintains that certain answers and certain documents requested are in part covered by settlement privilege and the confidentiality of settlements.

[26] After examining the information requested and considering the written and oral representations of the parties, the Court considers that it is appropriate to order Mr. Thibodeau to answer some of the questions requested by the ERAA.

[27] Even though the remedy provided for in section 77 of the OLA is, in terms of procedure, governed by the rules applicable to applications for judicial review and is intended to be a summary and expeditious procedure, it is not an application for judicial review. It is instead more akin to an action (*Forum* at para 15). The judge hears the matter *de novo* and is not limited to the evidence provided during the Commissioner's investigation (*Forum* at para 20).

[28] Moreover, in *Thibodeau v Air Canada*, 2014 SCC 67 at paragraph 97, the Supreme Court of Canada recognized that the OLA does not mandate the award of damages in all cases.

[29] In the present case, the only question in dispute concerns the granting of a remedy that is "appropriate and just in the circumstances" since the ERAA unreservedly acknowledges in its letter of apology its failure to meet its linguistic obligations, as well as the importance that must be given to language rights.

[30] The Court agrees with the ERAA that the number of complaints filed by Mr. Thibodeau to the Commissioner as well as the monetary sums received or to be received constitute

information relevant to determining a remedy that is "appropriate and just in the circumstances" according to subsection 77(4) of the OLA. They are relevant to steps 2, 3 and 4 of the *Ward* judgment's analytical framework.

[31] Through its questions, the ERAA wants to establish that Mr. Thibodeau is deliberately seeking out violations of the OLA in order to then obtain compensation. It challenges the credibility of his testimony about the harm he alleges to have suffered. It is not, as Mr. Thibodeau suggests, a fishing expedition. In his cross-examination, Mr. Thibodeau stated the following:

> [TRANSLATION]
> Q. So just to clarify, because I saw all these complaints, you weren't visiting the airport website because you wanted to travel to the airport when you noticed these violations, right?
>
> A. That is true. The context in which I did the research was to check and see if the Edmonton airport respected my language rights.
>
> Q. Okay. Was that the one and only reason for your visit to the website?
>
> A. In this case here, yes.
>
> Q. Then you expected to find violations of your language rights?
>
> A. I presumed there would be. Just so you know, because if I think I understand your questioning, it was why did I do my research there; it started because I realized that at the Halifax International Airport, in a previous case, there had been a lot of violations of my language rights. I said to myself that if there are so many violations at the Halifax Airport, then maybe it's the same at the Edmonton Airport, and that's what I went and checked.

[32] Mr. Thibodeau acknowledges in his cross-examination that he deliberately searched for violations of the OLA on the ERAA website and on social media and that he filed similar

complaints against the Halifax Airport, which is not a party to this dispute. He also claims that whenever he sees a violation and has the opportunity to do so, he files a complaint. If there are several violations, he may file several complaints against the same federal institution. He also admits to having filed some fifty complaints against the ERAA and that he intends to ask for the sum of $1,500 for each violation that the Commissioner finds well founded. He also indicates that he settled certain complaints out of court when the legal process became too cumbersome.

[33] Furthermore, Mr. Thibodeau states in his affidavit that he feels his rights have been violated when he is confronted with a display that violates his language rights. He claims that it causes him “frustration, stress and loss of enjoyment of life”, and he acknowledges having filed several complaints with the Commissioner to assert and enforce his language rights.

[34] The Court therefore considers that there is a factual basis for the ERAA’s allegations and that it stems from his affidavit and the answers he gave during cross-examination.

[35] As the Federal Court of Appeal noted in *CBS*, an affiant who swears to certain matters should not be protected from fair cross-examination on the very information he volunteers in his affidavit. He may also be submitted to cross-examination on those collateral questions that arise from his answers (*CBS* at para 29).

[36] In addition, having voluntarily included the letter of apology in his supplementary affidavit, Mr. Thibodeau must submit to the questions arising from it. That said, the ERAA acknowledges in its letter of apology that any violation of the OLA is one too many but states

that it [TRANSLATION] “does not believe that an individual should be able to earn a significant income by deliberately seeking out violations of the OLA in order to collect some sort of commission”.

[37] Mr. Thibodeau argues that in *Thibodeau c Administration de l’aéroport international d’Halifax,* 2019 CF 1149 (CanLII), this Court refused to order that he answer a question relating to the number of complaints made against the port authority in question because that question fell within the scope of examination for discovery. However, the context for this decision was different. The examination on affidavit dealt with the conditions for admitting an additional affidavit under section 312 of the Rules and not with the underlying claim for a remedy.

[38] In view of the foregoing, the Court considers that it is proper for the ERAA to test the credibility of Mr. Thibodeau on the damage he claims to have suffered (*Merck Frosst 1997* at para 8; *Merck Frosst Canada Inc v Canada (Minister of National Health and Welfare)*, [1994] FCJ No 662 at para 26). It will be open to the trial judge to assess what weight to give to the information arising from his answers in determining what remedy is “appropriate and just”.

[39] That being said, the Court agrees with Mr. Thibodeau that the exercise of providing the requested answers must be proportional to the application and the issues in dispute.

[40] However, it appears that Mr. Thibodeau has already produced, in the context of T-1023-19 (*Thibodeau v St. John’s International Airport Authority*), a list of 253 complaints that he filed with the Commissioner between 2017 and 2019. During cross-examination, the ERAA presented

a chart to Mr. Thibodeau and asked him to confirm that it was an identical list. Mr. Thibodeau cannot therefore claim that the [TRANSLATION] "process for listing all complaints made against all federal institutions" constitutes an inordinate obligation in determining the appropriate remedy.

[41] Mr. Thibodeau will therefore have to answer questions 171 to 176 in cross-examination. The table will thus provide the answers to questions 163, 164, 165, 169, 170, 177 and 179 and to item 1(b) of the table filed by the ERAA in support of this motion.

[42] Considering further that the ERAA is now only seeking the annual total of the sums received or receivable in settlements or damages for the last five (5) years, the Court no longer considers the request to be disproportionate.

[43] The Court finds that Mr. Thibodeau's argument that the disclosure sought would infringe settlement privilege is unfounded. The Court does not see how the disclosure of the annual amount will reveal anything about the individual settlement agreements. Because there are several complaints and the percentage of settled complaints is not mentioned, there is no way of knowing which complaint resulted in which settlement.

[44] Mr. Thibodeau will therefore have to answer questions 184 and 185 and provide the annual total of the sums received or receivable as settlements or damages for the violation of his language rights for the last five years.

[45] Regarding questions 124, 186 to 187, 206 to 208, the ERAA did not persuade the Court of the requested information's relevance for the purposes of the question to be determined by the trial judge. Mr. Thibodeau's use of precedents to draft court proceedings, his opinion on the tax treatment of compensation received, the number of letters of apology he has received from federal institutions as well as the number of times he has appeared before parliamentary committees are, in the Court's view, questions which go beyond the bounds of relevance, both in determining the award of a remedy and in questioning Mr. Thibodeau's credibility.

[46] The final questions relate to the transcript of a conversation which the ERAA claims took place between Mr. Thibodeau and counsel for the Port Authority of St. John's, Newfoundland, in connection with file T-1023-19. This document was presented to Mr. Thibodeau during his cross-examination. According to the ERAA, this transcript shows how Mr. Thibodeau goes about intimidating and obtaining compensation from federal institutions at $1,500 per complaint filed with the Commissioner.

[47] Mr. Thibodeau maintains for his part that he objected to the admissibility of this document in T-1023-19 since it is a call recorded without his knowledge.

[48] The ERAA maintains that this is not privileged information as Mr. Thibodeau states in this conversation that he was not making any offer to settle. The ERAA also argues that the document is found in Court File T-1023-19.

[49] Since the document is the subject of an objection in another file, the Court does not intend to rule on its admissibility or the relevance of questions 255 to 257.

III. Conclusion

[50] In closing, the Court wishes to stress that the fact of allowing the ERAA to obtain answers to some of its questions does not mean that in the future the respondents will be able to ask in all cases that the applicants make a complete inventory of their claims for their language rights. This decision is certainly not intended to discourage applicants from asserting their rights. In all cases, relevance and proportionality must be assessed on the basis of the particular circumstances of the case. In the present case, the Court is not persuaded, given the affidavits submitted by Mr. Thibodeau and the answers he gave during his cross-examination, that the questions asked by the ERAA are clearly irrelevant to the only question in dispute, namely the award of damages to Mr. Thibodeau. The trial judge has the right to have access to all information which is relevant and pertinent to enable him or her to arrive at a just decision (*Sierra* at para 11). It will be up to the trial judge to determine, having regard to all the circumstances, the weight to be given to this information and what remedy is to be granted, if any.

[51] The ERAA indicated to this Court at the hearing that it considered that the answers to the questions could be given in writing. The Court is of the same opinion. Mr. Thibodeau must therefore respond in writing, within (30 days of this order, to the questions identified as proper in these reasons. An application under section 77 of the OLA is intended to be a summary

proceeding even though it is in some respects akin to an action. It is important that the parties act expeditiously so as to move the application to the hearing stage as quickly as possible.

[52] Regarding the costs of this motion, the ERAA claims a fixed amount of $1,000.

[53] Mr. Thibodeau proposes that costs in this motion be ordered in his favour, in any event of the cause, given the importance of the issues raised in the proceedings.

[54] As success is divided in this motion, the Court will make no award as to costs.

ORDER in T-1966-19

THIS COURT ORDERS as follows:

1. The ERAA's motion is granted in part.
2. Mr. Thibodeau must respond in writing, within 30 days of this order, to the questions identified as proper in the reasons for this order.
3. There is no order as to costs.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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