Federal Court  Cour fédérale

Date: 20240417

Docket: T-110-23

Citation: 2024 FC 467

Ottawa, Ontario, April 17, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

MICHEL THIBODEAU

Applicant

and

AUTORITÉ AÉROPORTUAIRE DE RÉGINA

Respondent

ORDER AND REASONS

[1] The Respondent, the Regina Airport Authority ("RAA"), brings a motion for a stay of this proceeding pending the determination of cases currently before the Federal Court of Appeal that it says involve similar legal and factual issues. The two cases are appeals from: *Thibodeau v. St. John's International Airport Authority*, 2022 FC 563 [*St. John's Airport*], and *Thibodeau v. Edmonton Regional Airports Authority*, 2022 FC 565 [*Edmonton Airport*].

[2] The RAA submits that it would be wasteful to proceed with the current matter without the guidance of the Court of Appeal's decisions.

[3] The Applicant, Michel Thibodeau, opposes the stay request, arguing that his claim involves questions of fundamental rights and any delay will permit the RAA to continue to fail to meet its obligations under the *Canadian Charter of Rights and Freedoms* [the *Charter*], and the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [the *OLA*].

[4] The parties generally agree on the legal principles that guide the analysis of whether the Court should exercise its discretion to stay this proceeding pending the determination of the other cases. The dispute concerns the relevant considerations and their relative weight.

[5] For the reasons that follow, the motion to stay the proceeding will be granted.

I. Background

[6] On January 12, 2023, the Applicant filed a Notice of Application in this Court pursuant to s. 77(1) of the *OLA* against the RAA. The application is related to several complaints previously filed with the Office of the Commissioner of Official Languages ("OCOL") alleging that the RAA had failed to comply with the *OLA* and the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48 [the *Regulations*]. Various provisions of the *OLA* and *Regulations* provisions apply to the RAA pursuant to the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5 [the *ATA*]. The Applicant's complaints related to

RAA's failure to ensure that its website, social media accounts (Facebook, Twitter and Instagram), and certain telephone services were available in both official languages.

[7] The Applicant's claim under s. 77(1) seeks a declaration that the RAA has not respected its obligations under the *OLA*, as confirmed by the Investigation Report issued by the OCOL on November 30, 2022. The Applicant also seeks damages for the violation of the *OLA*, a letter of apology and any other remedies the Court deems appropriate, as well as his costs. The Applicant asserts that the RAA has failed to implement previous findings made by the OCOL in regard to earlier complaints, and that the problem persists.

[8] It is not necessary, at this stage, to review the history of the complaints and findings in any detail. It is sufficient to note a few key points: first, the OCOL reports have found that RAA did fail to comply with its obligations under the *OLA*. Second, the reports reveal that while the RAA has endeavoured to remedy some of the instances of non-compliance respecting communication with the travelling public, there is a fundamental disagreement between it and the OCOL regarding the scope of the official language obligations of airport authorities in their communication with the general public.

[9] For the purposes of this motion, it is also not necessary to set out the details regarding the official language obligations of airport authorities and airports, as specified in the *OLA*, *Regulations* and *ATA*. A detailed description of those provisions is set out in *St. John's Airport* at paragraphs 5 -13. It is sufficient to note here that airports have an obligation to provide services to members of the travelling public in both official languages if the airport is located in the

National Capital Region, or a provincial or territorial capital city, or if there is significant demand for those services. Under the *OLA*, the "head office" of a federal institution has to provide bilingual services no matter where it is located. A central question in this case – as in the cases under appeal – is how these provisions apply following the transfer of responsibilities from Transport Canada to regional airport authorities.

[10] The RAA has described the Applicant's complaints as falling into two categories: (1) complaints that some aspects of the RAA's official languages services directed towards the "travelling public" were deficient (Category 1 complaints); and (2) complaints that other aspects of RAA's communications to the public (that it alleges were not directed specifically towards the travelling public) did not comply with the *OLA* (Category 2 complaints). The RAA accepts that the Category 1 complaints fall within the purview of its language rights obligations, but disputes that the Category 2 complaints relate to obligations created by the law.

[11] The OCOL investigation report into the complaints addressed the Applicant's complaints as well as similar complaints that had been filed by others. It found certain Category 1 complaints to be well-founded, noted that the RAA had taken steps to remedy the deficiencies, and acknowledged that the COVID-19 pandemic had posed certain practical difficulties for the air transport industry. However, the OCOL Report also found that the Category 2 complaints were well-founded, and that RAA had not implemented the necessary measures to address these issues.

[12] The Report notes that the RAA disputed the OCOL interpretation of the scope of its obligations under the *OLA*, in particular whether it was subject to the "head office" rules that require all communications with the public to be in both official languages. This was relevant to certain aspects of the complaints, for example concerning the voicemail message of the RAA's CEO, its social media and website posts regarding its general operations, and some of its publications. The OCOL Report sets out its interpretation of the scope of the RAA's obligations under the law, which it says is consistent with the decision of this Court in *St. John's Airport*.

[13] The Report indicates that the RAA does not accept the OCOL interpretation of the scope of its obligations. It ends by finding the complaints to be well-founded, making recommendations that the RAA take the necessary steps to address the issues identified in the investigations, and that it adopt a communications strategy that would result in compliance with the *OLA*.

[14] Based on the Report, the Applicant launched his application under s. 77(1) of the *OLA*. In response, the RAA has brought a motion to stay this proceeding, pending the determination of the appeals in cases that it claims involve similar questions of fact and law: *St. John's International Airport Authority v Michel Thibodeau* (Federal Court of Appeal File No.: A-114-22) and *Administration des Aéroports Régionaux d'Edmonton c Michel Thibodeau et al* (Federal Court of Appeal File No.: A-112-22). At the time of the hearing of this motion, the Federal Court of Appeal had granted intervener status to the Commissioner of Official Languages as well as the Canadian Airports Council. In addition, Justice Leblanc had issued an Order that the two appeals

be heard sequentially on the same day and by the same panel of the Federal Court of Appeal. Since that time, the appeals were heard on April 11 and 12, 2024, and judgment was reserved.

II. Issues

[15] The only issue at this stage is whether the RAA motion for a stay of this proceeding should be granted.

III. The test to be applied

[16] The RAA motion is brought pursuant to paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7. There is no dispute between the parties that this Court has the inherent jurisdiction to stay this proceeding; there is also no disagreement about the legal principles that govern the granting of a stay in these circumstances. The parties each rely on one of the leading authorities in this area: *Power To Change Ministries v Canada (Employment, Workforce and Labour)*, 2019 CanLII 13579 (FC) [*Power to Change*]; and *Jensen v Samsung Electronics Co, Ltd*, 2019 FC 373 [*Jensen*].

[17] The law is clear that the over-arching consideration in assessing whether the Court should stay its own proceeding is whether it is in in the interests of justice to do so. There are no hard and fast rules that apply to a decision involving such an open-ended discretion, but certain guiding principles must be applied, including the objective of securing the "just, most expeditious and least expensive determination of every proceeding", in accordance with Rule 3 of the *Federal Courts Rules*, SOR/98-106.

[18] Rather than repeating the analysis done in previous cases, I would simply adopt the following summary of the relevant principles set out by Justice Richard Southcott in *Jensen* (see, to a similar effect, the summary in *Power to Change* at paragraphs 17 – 20):

> [9] This "interest of justice" test was first described by Justice Stratas in *Mylan Pharmaceuticals ULC v AstraZeneca Canada, Inc*, 2011 FCA 312 [*Mylan*] and was approved by the Federal Court of Appeal [FCA] in *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 [*Coote*] and *Clayton v Canada (Attorney General)*, 2018 FCA 1 [*Clayton*]. In *Mylan*, the FCA distinguished between situations where the FCA was enjoining another body from exercising its jurisdiction and others where the court was deciding not to exercise its own jurisdiction until later. The FCA held that, when it is deciding whether to delay its own hearings pending another appeal, the "interest of justice" test governs. In *Mylan*, as in the current case, the FCA was asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues.
>
> [10] The "interest of justice" test is a wide-ranging test that can embrace many elements, and I have to consider "all the circumstances" in exercising my judicial discretion to grant or to deny a stay pursuant to it (*Coote* at paragraph 12; *Mylan* at paragraphs 5, 14; *The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14 [*HarperCollins*] at paragraph 127). In *Mylan*, the FCA pointed to the "broad discretionary considerations" involved by the test, one of those being the public interest consideration in proceedings moving "fairly and with due dispatch". The FCA further noted that the courts will not "lightly delay a matter" and that it "all depends on the factual circumstances presented to the Court" (*Mylan* at paragraph 5). Moreover, in considering the interest of justice, the courts should be guided by certain principles including securing "the just, most expeditious and least expensive determination of every proceeding on its merits" as expressly provided by FC Rule 3, and the fact that "[a]s long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – [the] Court should exercise its discretion against the wasteful use of judicial resources" (*Coote* at paragraphs 12-13; see also *Korea Data Systems (USA), Inc v Amazing Technologies Inc*, 2012 ONCA 756 at paragraph 19).

> [11] More recently, in *Clayton*, the FCA reminded that, in determining whether to stay its own proceedings, the "responsibility of the Court to ensure that proceedings move in an expeditious, timely, and fair manner is a critical consideration" (*Clayton* at paragraph 28).
>
> [12] The "interest of justice" test thus acknowledges that extensive discretionary considerations regarding the administration of justice are at play in the exercise of the Court's power to impose a stay or suspension of its own proceedings. I agree with the Defendants that Mylan and its progeny have clearly established that the usual requirements of the tripartite test for the issuance of interlocutory injunctions or stays, as they were established by the SCC in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 [*RJR-MacDonald*], do not apply here. A moving party requesting the Court to temporarily suspend its own process is not required to prove that irreparable harm will occur if the order sought is not granted, or that the balance of convenience tilts in its favour.
>
> [13] However, the FCA has nonetheless held in *Clayton* that, in assessing the interest of justice, "courts may take into account some of the same considerations as in *RJR-MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests" (*Clayton* at paragraph 26). Indeed, prejudice or harm to the moving party is not irrelevant in assessing the interest of justice. On the contrary, far from being divorced from the interest of justice, the notions of harm and prejudice are a central element of the considerations to be taken into account by the Court when deciding whether to suspend its proceedings or not. Indeed, when the applicable test is the interest of justice, a moving party still has the burden "to prove that carrying out the action would cause [him or her] prejudice or injustice and not simply inconvenience" (*Barkley v Canada*, 2018 FC 228 at paragraph 5). In fact, in *Clayton*, the failure to demonstrate prejudice was a factor retained and singled out by the FCA to justify the denial of a stay (*Clayton* at paragraphs 26, 28).

[19] From this, Justice Southcott distilled the following summary:

> [14] In my view, the case law thus establishes that the "interest of justice" test that I need to apply is anchored in three overarching principles: 1) a flexible approach aimed at protecting the interest of a just, fair and efficient resolution of a proceeding; 2) the existence

> of some form of prejudice, harm or injustice, as opposed to simple inconvenience, to be suffered by the moving party in the absence of a stay; and 3) the determinative place of the particular factual circumstances presented to the Court.

IV. Analysis

[20] The RAA argues that it is in the interests of justice to grant the stay because there is considerable overlap between this case and the appeals. It argues that delaying this proceeding for the limited time it will take to determine the appeals will avoid a duplication of efforts or needless expenditure of resources by the parties and the Court; and allowing this matter to proceed while the appeals are pending would present an unacceptable risk of contradictory judgments.

[21] The Applicant argues that his application should proceed, noting that the existence of the appeals has not prevented other, similar matters from proceeding. He refers, *inter alia*, to:

- *Thibodeau v Greater Toronto Airports Authority*, Court File Nos.: T-2013-19 and T-534-21, heard February 21, 2023; decision issued February 20, 2024: 2024 FC 274;
- *Thibodeau c Sa Majeste le Roi*, Court File No.: T-1423-21, heard June 1, 2023, judgment reserved;
- *Thibodeau v Saskatoon Airport Authority*, Court File No.: T-339-23, resolved by agreement of the parties on November 24, 2023; and
- *Thibodeau v Winnipeg Airport Authority*, Court File No.: T-340-23, resolved by agreement between the parties on June 20, 2023.

[22] The Applicant submits that the stay should be refused in light of the fundamental nature of the rights involved in this claim. He points to the fact that the RAA has been found to have breached its obligations under the *OLA* and *Regulations* on several occasions, that it continues to refuse to implement the full scope of the OCOL recommendations, and that other similar matters have not been stayed.

[23] Applying the guidance set out in the case-law summarized above to the particular facts of this case, I find the following considerations to be the most relevant: the nature of the Applicant's claim and the fundamental nature of the rights involved; the degree of similarity between the issues raised in this case and the appeals; and the relative progress of this proceeding, as compared with the state of readiness and timing of the appeals.

[24] First, the Applicant's emphasis on the fundamental nature of the rights involved in this case, and their importance to him as well as to the wider community, is a very significant contextual factor. The rights of official language minorities to communicate with public institutions in the language of their choice, including both sending and receiving information, is enshrined in the *Charter* and *OLA*. There are specific provisions in the *OLA* that recognize the importance of communication in both official languages for the travelling public, and Parliament ensured through specific provisions in the *ATA* that the core of these obligations would continue after the administration of some airports was transferred to local airport authorities.

[25] The RAA does not take issue with this; it says it takes its obligations to communicate with the travelling public in both official languages seriously. The Applicant disputes this,

arguing that the RAA has repeatedly failed to meet its obligations towards the travelling public, and that it has not complied with its broader obligations towards the official language minority community. I accept that any delay in adjudicating these rights is a serious matter that weighs against granting the stay.

[26] Second, it is significant that the OCOL Report found that the RAA had not complied with its obligations under the *OLA* and *Regulations*, in respect of both Category 1 and Category 2 complaints. While this Report's findings are not binding on me, they do represent the considered view of the Commission expressly tasked with investigating complaints under the *OLA*, and with an unquestioned expertise in this area. Having said that, it is also worth noting that the OCOL Report acknowledges the overall cooperation and positive steps taken by the RAA in response to the investigation, and it appears that many of the Category 1 matters have been addressed.

[27] Third, a particularly important consideration is the degree of overlap between the current proceeding and the factual and legal issues raised in the two appeals. Having examined the materials, and considered the submissions of the parties, I find that there is a significant parallel between the issues raised in this case and the matters under consideration in the two appeals. In particular, at this stage of the matter it appears that this case, as well as the appeals, raise questions concerning:

- The scope of the obligations of airport authorities under the *OLA* and *Regulations*, in light of the *ATA*. Specifically, whether airport authorities have "head office" obligations to ensure all of their communications with the public are in both official languages. It appears that none of the parties to any of the cases doubt that the

obligations respecting communication directed to the travelling public apply to both airports and airport authorities; and

- Whether damages are an appropriate remedy in regard to a failure to comply with obligations towards the travelling public, given that the Applicant was not, at the relevant time, a traveller using the airports, nor was he seeking to use the airports for the purpose of travel.

[28] I note here that both the appeals and this case will undoubtedly raise other issues, but for the purposes of this analysis, it is not necessary to present an exhaustive list.

[29] Fourth, the state of readiness of this proceeding as compared with the appeals is a relevant consideration. In previous cases, the fact that a stay motion was brought at a relatively advanced stage of the proceeding or shortly before the scheduled trial dates weighed against the grant of a stay: see, for example *Richards v Canada*, 2021 FC 231 at paragraph 28.

[30] The proceeding in this case was launched by the Applicant on January 12, 2023. Following some procedural steps, the Applicant filed his Application Record on April 12, 2023. The Respondent filed its stay motion on May 2, 2023, and the motion was heard on June 21, 2023.

[31] The RAA argues it is in the interests of justice to grant the stay so as to avoid a duplication of resources and needless expense for both the Court and the parties. While the

Applicant has filed his Motion Record, including his affidavits, the Respondent has only filed one affidavit. The RAA contends that this proceeding is at a relatively early stage. In addition, it submits that staying the proceeding would avoid the risk of inconsistent decisions. RAA submits that it will suffer an inherent prejudice simply by virtue of its exposure to the risk of inconsistent results: *Teva Canada Innovation v Pharmascience Inc*, 2021 FC 367 at paragraph 32.

[32] RAA submits that it is important to note that the appeals are at an advanced stage, and the parties and interveners have filed substantial amounts of evidence and comprehensive submissions. The RAA adds that the fact that OCOL and the Canadian Airports Council have intervened in the *St. John'*s *Airport* appeal and the Canadian Ports Authorities have intervened in the *Edmonton Airport* appeal will ensure that the Court of Appeal has the benefit of a wider range of perspectives than would be available to the judge hearing this matter on the merits.

[33] In response, the Applicant points to the lack of any affidavit evidence from RAA to establish the nature or scope of any prejudice it says it will suffer. He claims this is fatal to its argument on this point, citing *Jensen* at paragraph 15. The Applicant says that the risk of inconsistent decisions is entirely speculative, citing *Richards* at paragraphs 25-30. He argues that the current state of affairs is that the RAA continues to violate the fundamental language rights of Francophones, and therefore it is not in the interests of justice to grant the stay.

[34] Moreover, the Applicant points to evidence about the overall decline of the status of the French language in Canada, and asks the Court to consider that wider context as well as the several OCOL reports finding the RAA failed to respect its language rights obligations. He says

that he seeks to remedy this state of affairs through this application, which should be allowed to proceed without further delay.

[35] On this point, I find that both parties have made important points. Given the degree of overlap, and advanced stage of the appeals, proceeding to a hearing in this case without the guidance of the Court of Appeal on the central questions does raise a risk of a needless expenditure of resources by the Court and the parties. It would undoubtedly be more efficient for the parties to complete their records and the Court to hear and decide the matter based on the rulings in the appeals. On this, I note that the Applicant may wish to amend his submissions and/or evidence to take into account the guidance set out by the Court of Appeal, and the Respondent may well want to do the same.

[36] I do not accept that the absence of an affidavit specifying the particular costs or efforts the RAA would incur in taking further steps in this proceeding is a fatal flaw. In this case, there can be no question that the scope and nature of the evidence the parties will wish to bring forward and the nature of the arguments they will submit will be affected in a significant manner by the Court of Appeal decisions. If the RAA is not subject to the "head office" obligations, the case will be narrowed; if damages are not an appropriate remedy in the circumstances of this case, or only limited damages are available, the parties' submissions will be more focused. In contrast, if the RAA is subject to the "head office" duties, and damages are available on the basis claimed by the Applicant, the evidence and submissions will be more expansive. This is a matter of common sense, and the RAA argument on this point does not rest on the type of expert evidence that was at issue in *Richards*.

[37] There is some force in the RAA argument that it will face uncertainty and risk if this matter proceeds to a hearing and a decision is rendered without the guidance of the Court of Appeal decisions. This is not, in my view, technically a risk of inconsistent judgments in the sense discussed in most of the jurisprudence (for example, see *Power to Change* at paragraphs 29-34, and *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 18). Unlike those cases, the RAA does not face the prospect of inconsistent results directly against its interests due to parallel proceedings, because it is not a party to the appeals nor is there any evidence of any other similar proceeding against it that is currently underway. In that sense, the RAA only faces one risk – of a judgment against it in the current proceeding.

[38] However, I do accept that if this matter proceeds, and the judge hearing it on its merits decides that the RAA is subject to the "head office" rule and/or that damages are an appropriate remedy, there is a risk that the RAA would have to appeal that decision if the Court of Appeal decides otherwise in the *St. John's Airport* and *Edmonton Airport* appeals. To that extent, I accept the RAA's argument that it faces a risk of inconsistent judgments that might impose an additional burden on it.

[39] Stepping back, it is important to return to first principles. I am required to assess whether it is in the interests of justice to stay the current proceeding, considering the overarching principle that the Court is to seek to "secure the just, most expeditious and least expensive outcome", as well as that applications are to be heard and determined without delay and in a summary way.

[40] Taking all of the considerations set out above into account, I find that it is in the interests of justice to grant the stay.

[41] I am persuaded that a stay is appropriate given the significant overlap between the issues raised here and in the appeals, as well as the advanced stage of the appeal proceedings as compared with the state of this matter. It is also relevant that there is evidence that the RAA has taken steps to remedy several of the violations found by the OCOL Report (as the OCOL itself acknowledges). This mitigates, to some degree, the scope and nature of the alleged ongoing rights violations.

[42] I also note that if this matter proceeds, and the Court of Appeal issues its decisions before the judgment and reasons are issued in this case, the parties would likely want to re-open this matter to submit further evidence and/or submissions. This would involve both duplication of effort and needless expenditure of the time and resources of the parties and the Court, which would be avoided by waiting for the relatively short period until the Court of Appeal hears and decides the appeals.

[43] For all of the reasons set out above, RAA's motion for a stay of this proceeding will be granted.

[44] The RAA did not seek its costs of the motion, and none will be awarded. Each party shall bear its own costs.

ORDER in T-110-23

THIS COURT ORDERS that:

1. The Respondent's motion for a stay of this proceeding is granted.

2. This proceeding is hereby stayed until 60 days have elapsed following the issuance of the decisions of the Federal Court of Appeal in *St. John's International Airport Authority v Michel Thibodeau* (Federal Court of Appeal File No.: A-114-22) and *Administration des Aeroports Régionaux d'Edmonton c Michel Thibodeau et al* (Federal Court of Appeal File No.: A-112-22).

3. No costs are awarded.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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