Federal Court  Cour fédérale

Date: 20240816

Docket: T-2134-23

Citation: 2024 FC 1280

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 16, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

MICHAEL MOREAU

Applicant

and

HIS MAJESTY THE KING
(PAROLE BOARD OF CANADA)

Respondent

ORDER AND REASONS

I. Nature of the matter

[1] As part of his duties as a supervisor with the Parole Board of Canada [PBC], the applicant, Michel Moreau, requested that a student hired by the PBC under the Federal Student Work Experience Program undergo second-language training. On August 8, 2023, he was informed of the PBC's refusal of this request. It appears that, under a financial directive

governing the use of funds provided for this purpose, language training is only offered for indeterminate and longer-term employees, not for students employed under a student employment program. On the same day, Mr. Moreau filed a complaint with the Commissioner of Official Languages [Commissioner] concerning his employer's refusal, under section 58 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [Act]. On August 9, 2023, the Commissioner informed Mr. Moreau of his refusal to hear the complaint; I presume under subsection 58(5) of the Act, as the decision itself is not in the record at this stage of the proceedings.

[2] On October 10, 2023, Mr. Moreau, who is not represented by counsel, filed a notice of application under section 77 of the Act with the Court. On November 15, 2023, the Attorney General of Canada [AGC], on behalf of the PBC, filed a motion to strike, arguing, among other things, that Mr. Moreau's application was in fact a disguised application for judicial review, that Mr. Moreau does not have the standing to file such an application, that the application was late and that the nature of the notice of application was vague and imprecise. The AGC therefore asked the Court to strike Mr. Moreau's notice of application or, alternatively, to order Mr. Moreau to file an amended notice of application precisely setting out the supporting reasons.

[3] On January 30, 2024, Ngo J of this Court granted the motion in part and ordered Mr. Moreau, by way of a motion to that effect, to amend his notice of application and clarify the nature of the instituted proceeding. Specifically, she asked Mr. Moreau to clarify whether the remedy he is seeking is an application for judicial review or a remedy under section 77 of the Act, and she also ordered him to clarify his allegations so the AGC could respond to them.

However, the Court also stated that its order did not affect the PBC's right to take any other measure it deemed necessary in the circumstances.

[4] Before me, Mr. Moreau has filed a motion for leave to amend his originating document, using the application for a remedy available under section 77 of the Act. In addition, Mr. Moreau argues that his own language rights were violated by the PBC when it refused to allow language training for his student—an employee hired under a student employment program—and that this was a violation of the Act. He claims that this concerns a debate on the new Part VII of the Act, specifically subparagraph 41(6)(c)(i). In short, Mr. Moreau alleges that the new section 41 of the Act—in force since June 20, 2023—creates an obligation on the part of the employer to provide language training to all its employees, and that the PBC fettered its discretion by blindly complying with its financial directive and failing to consider the values enshrined in subsection 16(1) of the *Canadian Charter of Rights and Freedoms* [Charter].

[5] For its part, the PBC argues that Mr. Moreau's application for a remedy is clearly bound to fail because the facts he alleges, even if they are assumed to be true, cannot support the application as reworded. The PBC submits that the facts alleged in the amended notice of application are not likely to constitute a breach of the Act and that, moreover, some of the remedies sought in the amended notice of application remain specific to applications for judicial review or have no reasonable possibility of being granted in this claim, which concerns a breach of Part VII of the Act. The PBC is therefore asking the Court to dismiss Mr. Moreau's motion for leave to file the amended notice of application, which would result in the dismissal of the application in its entirety.

[6] For the reasons that follow, I am of the view that this motion should be granted as Mr. Moreau has shown that his amended notice of application has a reasonable prospect of success.

II. Preliminary observations

[7] The provisions applicable to this case can be found in the annex to this decision. The Court granted Mr. Moreau leave to file a motion to amend his originating document. The PBC opposes that motion. As a result, I can decide to simply dismiss Mr. Moreau's motion, leaving intact his originating document as already filed. However, the PBC is asking not only that I reject the amendments proposed by Mr. Moreau, but also that I strike the application in its entirety, which amounts to a motion to strike. In the interest of simplicity, I shall address the matter in this way.

III. Analysis

A. *General principles*

[8] Motions to amend pleadings are governed by rule 75 of the *Federal Courts Rules*, SOR/98-106. The amendment of a pleading is subject to the test of reasonable prospect of success. According to the Federal Court of Appeal, "the absence of a reasonable prospect of success is a well-established reason for a court to dismiss a motion for leave to amend" (*Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176 [*Teva*] at para 29). Several decisions have dealt with the meaning of "reasonable prospect of success" in the context of motions to strike claims, a meaning that the Federal Court of Appeal in *Bauer Hockey Corp. v Sport Maska*

Inc. (Reebok-CCM Hockey), 2014 FCA 158 at paragraph 16, suggested equally applies to the issue whether a court should grant a proposed pleadings amendment (*Teva* at para 29).

[9] In deciding whether an amendment has a reasonable prospect of success, "its chances of success must be examined in the context of the law and the litigation process, and a realistic view must be taken": *Teva* at para 30; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*] at para 25. The test for determining whether the pleadings disclose a reasonable cause of action is whether it is "plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 [*Babstock*] at para 14; *Jensen v Samsung Electronics Co. Ltd.*, 2023 FCA 89 [*Jansen FCA*] at para 15. In short, "if a claim has no reasonable prospect of success it should not be allowed to proceed to trial" (*Babstock* at para 14).

[10] In applying this test, the Court focuses on pleadings, not evidence (*Imperial Tobacco* at para 23; *Jensen FCA* at para 52). The pleadings must be read generously, holistically and practically in an approach that must "err on the side of permitting a novel but arguable claim to proceed to trial" (*Imperial Tobacco* at para 21; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 34; *Mancuso v Canada (National Health and Welfare*), 2015 FCA 227 at para 18).

[11] Moreover, an application under section 77 of the Act raises two questions: (i) was the complaint justified at the time it was filed because of a breach of the Act; and (ii) if so, what is the appropriate and just remedy in the circumstances at the time of trial (*Forum des maires de la*

Péninsule acadienne v Canada (Food Inspection Agency) (F. C.A.), 2004 FCA 263, [2004] 4 FCR 276 [*Forum des maires*] at para 53).

[12] Finally, the obligation set out in Part VII lends itself to a two-step analysis. Federal institutions must first be sensitive to the particular circumstances of the country's various official language minority communities and determine the impact that the decisions and initiatives that they are called upon to make may have on those communities. Second, federal institutions must, when implementing their decisions and initiatives, act, to the extent possible, to enhance the vitality of these communities; or where these decisions and initiatives are susceptible of having a negative impact, act, to the extent possible, to counter or mitigate these negative repercussions (*Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, 2022 FCA 14 [*Commissioner*] at para 163).

B. *Reasonable prospect of success*

[13] In this case, the PBC argues that Mr. Moreau's assertion that section 41 of the Act creates an obligation on the part of the employer to provide language training to all its employees has no reasonable prospect of success, since Mr. Moreau is not targeting any positive measures for English and French minorities that would be subject to Part VII of the Act, and he errs in challenging the way in which a federal institution implemented a measure with respect to an individual, and not the measure itself.

[14] According to Mr. Moreau, the positive measure is second-language training for federal public servants. Mr. Moreau argues that it is the eligibility criteria for second-language training

(a decision-making process) that contravene subparagraph 41(6)(c)(i) of the Act. In particular, he argues that this provision creates an obligation on the part of the federal government to offer second-language training to all its employees within the meaning of section 33.1 of Part V of the Act.

[15] While Mr. Moreau's argument must be refined, I cannot say that it is bound to fail. The issue is not whether the PBC has an obligation under section 41 of the Act; it is clear that it does, as it is the responsibility of federal institutions—in this case the PBC—to ensure that the federal government's commitments with respect to enhancing the vitality of official language minority communities and fostering English and French, protecting and promoting French, and learning in the minority language, which are set out in subsections 41(1) to 41(3) of the Act and are consistent with the purposes of the Act as set out in section 2, are implemented by the taking of positive measures (subsection 41(5) of the Act) (*Commissioner* at paras 139–141).

[16] The PBC is correct in stating that Mr. Moreau is not challenging the positive measure itself—namely the second-language training offered to federal public servants—but simply the implementation of the measure in respect of an individual by a federal institution, an implementation that excludes certain PBC employees. However, that is exactly the point that Mr. Moreau is making: he submits that it is the second-language training eligibility criteria as such (a decision-making process) that contravene subparagraph 41(6)(c)(i) of the Act and its spirit. It is clear to me that it is by the taking of positive measures that federal institutions are invited to act to mobilize the federal administration and use it in order to further the purpose of the Act through the decisions and initiatives they are called upon to take (*Commissioner* at

para 142). Positive measures would not make sense if their implementation did not meet the minimum threshold needed to meet the government institution's duty set out in subsection 41(5) of the Act.

[17] Regardless, it seems to me that Mr. Moreau should have the opportunity to present his arguments before the Court.

[18] Moreover, the PBC notes that Part V of the Act, not Part VII, deals with language-of-work rights and obligations in the federal public service, so Mr. Moreau should have alleged a violation of that Part, which he did not do. The PBC also cites *Picard v Canada (Commissioner of Patents)*, 2010 FC 86 [*Picard*] at paragraph 77 to state that Mr. Moreau cannot use Part VII to expand a duty that exists elsewhere in the Act and thereby create an obligation to provide second-language training to the entire federal public service.

[19] For his part, and contrary to the PBC's assertion, Mr. Moreau argues that his application for a remedy concerns a violation of Part V of the Act because it involves the definition of "employee" used in that part. Mr. Moreau submits that this definition is closely linked to the application for a remedy against the PBC under Part VII and to the factual context: the student in question was denied language training because she is not deemed to be an employee under the disputed directive. Mr. Moreau submits that he cannot base his claim on subsection 34 (2) of the Act, as the PBC asserts, because that provision does not apply to students and, regardless, is only a [TRANSLATION] "principle". Mr. Moreau asserts that he is not trying to [TRANSLATION] "revive

the duties" of another part of the Act by partially relying on Part VII of the Act, but that he is proposing that Part VII can remedy a breach of Part V.

[20] I do not agree with the PBC's argument that only Part V of the Act deals with the rights and duties pertaining to language of work and that Mr. Moreau is trying to have Part V apply indirectly, through Part VII. First, I note that the principle set out in *Picard*, cited by the PBC, concerns the remedy, not the cause of action. I also believe that there is a distinction to be made between language of work as dealt with in Part V and the positive duty to provide language training as set out in Part VII. The fact that the PBC may have failed to fulfill one of its positive duties to provide language training in the workplace may only be a coincidence in this context. More importantly, however, this type of argument from Mr. Moreau is not clearly bound to fail and could be heard at a hearing on the merits.

[21] Finally, the PBC argues that Part VII does not require specific positive measures to be taken. On the contrary, the list in subsection 41(6) of the Act is simply a list of examples of objectives that are not specific positive measures imposed by Parliament but a process that federal institutions must follow to determine what measures to take. According to the PBC, the provisions of section 41 of the Act indicate that federal institutions can take positive measures related to the learning of either official language.

[22] For his part, Mr. Morneau submits that Part VII of the Act requires that specific positive measures be taken. In support of that argument, he relies on subsections 41(1) to (3) and 41(5) of the Act. More specifically, he interprets subsection 41(3) as referring to any learning in the

minority language, regardless of the language of the person receiving that learning. Mr. Moreau also submits that subparagraph 41(6)(c)(i) is a specific measure, not an example of an objective. According to him, the government has a duty to promote and support the learning of French.

[23] The point raised by Mr. Moreau is entirely defensible.

[24] Accordingly, and with respect to the first part of the PBC's challenge of Mr. Moreau's motion to amend, I cannot agree with the PBC that Mr. Moreau's arguments, as set out in the amended application, are bound to fail. To conclude on this point, I note that Mr. Moreau points out that the PBC is silent on his allegation that it had failed to consider the values enshrined in subsection 16 (1) of the Charter. This is a good observation. As stated by the Federal Court of Appeal in *Commissioner*:

> [136] To be clear, the constitutional protection under section 23 of the Charter is not the same as that under Part VII of the OLA and the two should not be conflated. Nevertheless, the OLA has a special status and is broad in scope in that it governs situations where "the existence of language communities and the manner in which those communities perceive their future" are in issue (*Solski*, para. 4). Given the crucial role of Part VII in promoting bilingualism (*Lavigne SCC*, para. 23), preventing the erosion of language communities is also part of the objectives that must guide the "positive measures" to be taken under subsection 41(2).

C. *Reasonable prospect of obtaining remedies*

[25] Alternatively, the PBC claims that, among the range of remedies sought, some should be struck because they are specific to judicial review or are irrelevant to Mr. Moreau's allegations concerning Part VII of the Act and that, as a result, there is no reasonable prospect of these remedies being granted. It notes that the remedies granted under subsection 77(4) of the Act for

violations of Part VII are not necessarily the same as those granted for violations of other parts, such as Part V, and that the remedies for violations of Part VII must be adapted to the nature of the duties set out therein.

[26] Where the Court is of the opinion that a government institution is failing to comply with the Act, subsection 77(4) of the Act authorizes the Court to grant such remedy as the Court "considers appropriate and just in the circumstances". This authority is broad and discretionary (*Commissioner* at para 190). It allows the courts to order the government to take specific measures, with a certain deference:

> [75] As I said earlier, in my opinion, a violation of Part VII of the *Official Languages Act* cannot result in the same remedies as violations of Parts I to V of that Act. Deciding otherwise would amount to eliminating the difference between those provisions and denying the effect of the precise limits that Parts I to V set on the government's obligations in respect of bilingualism. In addition, I agree with the respondents that the decisions of federal institutions to give effect to the government's commitment under Part VII are entitled to a certain deference on the part of the courts.
>
> [76] However, they cannot be conclusive; otherwise, why would Parliament have made those provisions enforceable? Deciding that the courts do not have the power to make orders forcing the government to take specific measures to remedy violations of its obligations under Part VII would make Parliament's choice to "give it teeth" by making it enforceable pointless and ineffective.
>
> *Picard* at paras 75–76.

[27] However, the PBC argues that, if the Court were to order it to amend its directive, it would be ignoring the discretionary framework set out in the Act, which allows federal institutions to choose positive measures. According to the PBC, this is akin to an order in which the Court dictates how a federal institution is to exercise its discretion in developing its financial

directive. It cites *Commissioner* (at paras 140, 142) to assert that this claim for a remedy ignores the principle that institutions have the discretion to choose the appropriate implementation measures and therefore has no reasonable prospect of success.

[28] Mr. Moreau submits that an order requiring the amendment of the financial directive would be consistent with the obligation to take the specific measure set out in subparagraph 41(6)(c)(i). He argues that, since subparagraph 41(6)(c)(i) is a mandatory positive measure, not a discretionary one, it would be appropriate to order the PBC to take this specific measure. He also notes that the Federal Court of Appeal has previously issued a mandatory order under subsection 77(4) of the Act (*Commissioner* at para 195).

[29] It is true that, as pointed out by the PBC, an order of this kind is an order by which the Court would dictate how a government institution is to exercise its discretion and that, as indicated at paragraph 75 of *Picard*, decisions of government institutions are entitled to a certain deference. However, if the Court were to find on the merits that the PBC has failed in its positive obligation, it would have to grant remedies. This would be all the more true if the breach were continuing (*Picard* at para 78; *DesRochers v Canada (Industry)*, 2009 SCC 8 at para 37; *Forum des maires* at para 20).

[30] The remedy sought by Mr. Moreau is not unusual. The Court has previously ordered a government institution to amend a regulation, agreement or policy. In *Picard*, the Court ordered the respondent to “make abstracts of patents available in both official languages” (*Picard* at para 79 [emphasis omitted]). It was a compromise, as the applicant wanted “a series of

declarations to require the Patent Office to make certain parts of patents . . . available in both official languages" (*Picard* at para 71). In *Commissioner*, the Court of Appeal ordered that federal institutions terminate the agreement that violated their positive obligations under Part VII (*Commissioner* at para 195). I will leave it to the trial judge to decide whether this remedy is available to Mr. Moreau should he be successful.

[31] Second, the PBC argues that an order referring the decision back to the administrative decision-maker would be inconsistent with an application instituted under the Act. It notes that this order would be exactly the same as the order sought by the applicant in his original notice of application, namely, "an order in the nature of *certiorari* remitting the decision to the Respondent for redetermination", which the Court has already struck.

[32] For his part, Mr. Moreau submits that an order referring the decision back to the administrative decision-maker is consistent with an application instituted under the Act, citing subsection 18(1) of the *Federal Courts Act*, RSC 1985, c. F-7) [FCA]. He notes that, although his claim is not an application for judicial review, this provision applies because subsection 18(3) of the FCA does not take away any remedy pursuant to section 24 of the Charter (*Ewert v Canada*, 2021 FC 1132 at para 24), while subsection 77(4) of the Act derives its legitimacy from subsection 24(1) of the Charter.

[33] I agree with the PBC that this alternative remedy is not appropriate. As noted by Ngo J in her order to strike, the remedy provided for in section 77 of the Act cannot be equated with an application for judicial review within the meaning of section 18.1 of the FCA (*Bossé c Canada*

(Agence de la santé publique), 2023 CAF 199 [*Bossé*] at para 15). When considering an application for a remedy under section 77, the Court is not concerned with the Commissioner's report but rather with the merits of the complaint itself (*Bossé* at para 15). The matter is therefore heard *de novo*, and the Court's decision replaces that of the decision-maker. An order referring the matter back to the decision-maker is therefore not appropriate in such a proceeding.

[34] Finally, the PBC submits that a declaration that its decision contravenes subparagraph 41(6)(c)(i) of the Act would be an inappropriate remedy for the alleged breach. Thus, this request for relief would be [TRANSLATION] "bound to fail" as Mr. Moreau is challenging a decision related to an individual, not a failure to take positive measures, and it [TRANSLATION] "is not appropriate to seek an individual remedy for institutional and collective obligations".

[35] For his part, Mr. Moreau alleges that a declaration that the PBC decision is contravening subparagraph 41(6)(c)(i) of the Act would be an appropriate remedy for the alleged breach (*Thibodeau v Air Canada*, 2014 SCC 67 at para 132). Mr. Moreau submits that his application for a remedy concerns the PBC's failure to take a positive measure that implements subparagraph 41(6)(c)(i), namely second-language training offered to all federal employees. Thus, a declaration that the PBC breached this obligation would be an appropriate remedy. He points out that the Court has broad discretion and that the issue of an appropriate remedy should be considered on its merits, not in a motion to strike.

[36] I do not agree with the PBC's argument that this remedy has no chance of being granted on the basis that Mr. Moreau's application for a remedy does not concern a failure to take a positive measure. As I mentioned earlier, a generous reading of the amended notice of application supports the conclusion that Mr. Moreau is alleging that the PBC's policy concerning language training for its employees is insufficient for it to fulfill its duty to take positive measures. This remedy would therefore be appropriate.

IV. Conclusions

[37] For the above reasons, I allow Mr. Moreau's motion, save that the request that the decision be set aside and that the matter be referred back to the PBC for reconsideration must be removed. Mr. Moreau is not seeking costs.

ORDER in T-2134-23

THIS COURT ORDERS that:

1. The applicant's motion to amend his originating document is allowed; however, the remedy sought in paragraph 2 of the amended originating document requesting that the Court refer the matter back to the PBC for reconsideration is removed.
2. The applicant must withdraw this remedy from his application and, within 10 days, serve and file a new amended originating document.
3. Without costs.

"Peter G. Pamel"
Judge

Certified true translation
Johanna Kratz

ANNEX

***Official Languages Act*, RSC 1985, c 31 (4th Supp)**	***Loi sur les langues officielles*, LRC 1985, c 31 (4e suppl)**
Commitment — enhancing vitality of communities and fostering English and French	**Engagement — épanouissement des minorités et promotion du français et de l'anglais**
41 (1) The Government of Canada is committed to	41 (1) Le gouvernement fédéral s'engage à favoriser l'épanouissement des minorités francophones et anglophones du Canada et à appuyer leur développement, compte tenu de leur caractère unique et pluriel et de leurs contributions historiques et culturelles à la société canadienne, ainsi qu'à promouvoir la pleine reconnaissance et l'usage du français et de l'anglais dans la société canadienne.
(a) enhancing the vitality of the English and French linguistic minority communities in Canada and supporting and assisting their development, taking into account their uniqueness, diversity and historical and cultural contributions to Canadian society; and	
(b) fostering the full recognition and use of both English and French in Canadian society.	
Commitment — protection and promotion of French	**Engagement — protection et promotion du français**
(2) The Government of Canada, recognizing and taking into account that French is in a minority situation in Canada and North America due to the predominant use of English, is committed to protecting and promoting the French language.	(2) Le gouvernement fédéral, reconnaissant et prenant en compte que le français est en situation minoritaire au Canada et en Amérique du Nord en raison de l'usage prédominant de l'anglais, s'engage à protéger et à promouvoir le français.

. . . . . .

Duty of federal institutions — positive measures

(5) Every federal institution has the duty to ensure that the commitments under subsections (1) to (3) are implemented by the taking of positive measures.

Positive measures

(6) Positive measures taken under subsection (5)

. . .

(c) may include measures, among others, to

(i) promote and support the learning of English and French in Canada,

. . .

Application for remedy

77 (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

. . .

Order of Court

(4) Where, in proceedings under subsection (1), the Court concludes that a federal

Obligation des institutions fédérales — mesures positives

(5) Il incombe aux institutions fédérales de veiller à ce que les engagements énoncés aux paragraphes (1) à (3) soient mis en œuvre par la prise de mesures positives.

Mesures positives

(6) Les mesures positives visées au paragraphe (5) :

. . .

c) peuvent notamment comprendre toute mesure visant :

(i) à promouvoir et à appuyer l’apprentissage du français et de l’anglais au Canada

. . .

Recours

77 (1) Quiconque a saisi le commissaire d’une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l’article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

. . .

Ordonnance

(4) Le tribunal peut, s’il estime qu’une institution fédérale ne s’est pas

institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

. . .

. . .

***Federal Courts Rules*, SOR/98-106**

Amendments with leave

75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.

***Règles des Cours fédérales*, DORS/98-106**

Modifications avec autorisation

75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2134-23
STYLE OF CAUSE:	MICHAEL MOREAU v HIS MAJESTY THE KING (PAROLE BOARD OF CANADA)

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	PAMEL J
DATED:	AUGUST 16, 2024

APPEARANCES:

Michael Moreau	FOR THE APPLICANT (ON HIS OWN BEHALF)
Stéphanie Dion Sarah Rajguru	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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