Date: 20070322

Dockets: A-442-05
A-630-05

Citation: 2007 FCA 115

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
NOËL J.A.

BETWEEN:

AIR CANADA

Appellant

and

MICHEL THIBODEAU

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

Hearing held at Ottawa, Ontario, on March 20, 2007.

Judgment delivered at Ottawa, Ontario, on March 22, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: DESJARDINS J.A.
NOËL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal against two decisions of Mr. Justice Beaudry (judge) of the Federal Court, dated August 24, 2005 (2005 FC 1156), and December 1, 2005 (2005 FC 1621).

[2] In these decisions, Beaudry J. allowed the respondent's application for remedy against the appellant under subsection 77(1) of the *Official Languages Act*, R.S.C. 1985 (4th Supp.) (OLA).

[3] In Federal Court, the respondent, representing himself, alleged an infringement of his language rights insofar as, contrary to section 10 of the *Air Canada Public Participation Act*, R.S.C. 1985 (4th Supp.) (ACPPA), Air Ontario, a subsidiary of Air Canada, was unable to serve him in French on a flight from Montréal to Ottawa. The flight took place on August 14, 2000. The fact that the lone flight attendant on duty was a unilingual Anglophone is not contested.

[4] The decision dated December 1, 2005, ordered the appellant to send the respondent a formal letter apologizing for the violation of his language rights. The decision also ordered the appellant to pay the respondent $5,375.95, including $1,876.95 in disbursements. The difference of $3,500 was awarded to the respondent for his review and analysis of the case law.

[5] The respondent has filed a cross-appeal against the $5,375.95 lump sum determined by Beaudry J. He claims fees and disbursements totalling $43,920 instead of the amount awarded by the judge.

Analysis of the grounds in support of the appeal

[6] Six grounds of appeal, five of which are incidental, were invoked by the appellant against the two decisions. Only one of these grounds concerns the merits of the case. I will consider only this ground, since it is sufficient to dispose of this matter.

[7] I will then deal with the appellant's argument to the effect that the respondent is not entitled to costs because he represented. I hasten to add that the appellant has paid the respondent $5,375.95 in execution of the Federal Court judgment. The appellant added at the hearing that it did not intend to claim the reimbursement of this amount should the appeal be allowed. Nevertheless, the appellant submits that this remains an important matter of principle, considering the cross-appeal, in which a considerable increase in this amount is sought.

[8] As was done at the hearing for greater efficiency, I will deal with this issue when analysing the cross-appeal.

[9] In Federal Court, there was a debate over the nature and intensity of the obligation under subsection 10(2) of the ACPPA. The first two subsections of section 10 read as follows:

10. (1) The Official Languages Act applies to the Corporation.	**10.** (1) La Loi sur les langues officielles s'applique à la Société.
(2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the Official Languages Act to be provided in either official language.	(2) Sous réserve du paragraphe (5), la Société est tenue de veiller à ce que les services aériens, y compris les services connexes, offerts par ses filiales à leurs clients le soient, et à ce que ces clients puissent communiquer avec celles-ci relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, offrant elle-même les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles, à une telle obligation.

[10] Following arguments, the judge concluded that the appellant was subject to an obligation of result under section 10, not a mere obligation of means. While the former is met by delivering a a

specific and defined result, the later is met where the debtor of the obligation has acted with prudence and diligence with a view to obtaining the agreed result.

[11] On appeal, the intervener, the Commissioner of Official Languages, submitted that the intensity of the appellant's obligation under subsection 10(2) of the ACPPA should not be assessed in accordance with the Quebec civil law model, but rather on the basis of the statutory framework established under Part IV of the OLA and section 20 of the *Canadian Charter of Rights and Freedoms*.

[12] Relying on a literal interpretation of section 10 and a comparative interpretation with sections 26, 28 and 29 of the OLA and subsections 705.43(1) and 705.43(2) of the *Canadian Aviation Regulations*, SOR/96-443, the appellant argued that, no matter what model is used, it was entitled to raise a due diligence defence to explain and justify its failure to comply with section 10. In other words, the obligation under section 10 is not absolute and does not entail absolute liability in case of breach.

[13] No matter what the nature and intensity of the obligation under subsection 10(2) of the ACPPA may be, and assuming, without deciding the point, that the appellant is entitled to a due diligence defence, there is no evidence on record giving rise to such a defence.

[14] In fact, nothing in the affidavit of Chantal Dugas in support of the appellant's submissions allows me to infer, much less conclude, that the appellant acted with diligence so as to comply with the ACPPA and the obligations imposed on it under subsection 10(2).

[15] The amendment adding the second subsection to section 10 of the ACPPA came into force on July 7, 2000. However, the appellant and Air Ontario had known since February 2000, when the bill to amend the SCPPA was tabled, that language obligations would soon be imposed on Air Ontario, although I realize that they did not know what the final content of those obligations would be: Appeal Record, volume 1, page 196. However, the evidence on record does not show that the appellant took any steps between February to June 2000 (when the bill was passed) to comply with or enforce the language obligations imposed by the ACPPA.

[16] Moreover, when the bill was passed in June 2000, only 9 of Air Ontario's 179 flight attendants had working knowledge of French. In spite of that and the fact that subsection 10(2) of the ACPPA came into force at the beginning of July, it was only on some unspecified date in September 2000, after the incident involving the respondent, that the appellant began offering intensive language training courses to its flight attendants.

[17] As far as the courses are concerned, the record does not contain any evidence about their duration, frequency or availability or about how many participants registered for them.

[18] Finally, there is no evidence on record to the effect that efforts were made to assign the nine persons who had working knowledge of French to routes where the use of French was required.

[19] The due diligence defence, which is well known in the context of regulatory offences under penal law, requires more than passivity: see *Lévis (City of) v. Tétreault*, [2006] 1 S.C.R. 420. At

paragraph 30 of this unanimous judgment of the Supreme Court, Lebel J. wrote, “The concept of diligence is based on the acceptance of a citizen’s civic duty to take action to find out what his or her obligations are”. Once those obligations are known, they must be respected or precautions must be taken which a reasonable person would have taken to respect them under the circumstances: *ibidem*, at paragraph 15, *R. v.Chapin* [1979] 2 S.C.R. 121.

[20] The appellant has the burden of proving due diligence. Assuming without deciding that such a defence was available, the appellant did not discharge that burden.

Analysis of the cross-appeal

[21] The purpose of awarding costs is limited to providing the party receiving them with partial compensation: *Sherman v. The Minister of National Revenue*, 2004 FCA 29, at paragraph 8. Under Rule 407 of the *Federal Courts Rules*, they are assessed in accordance with Column III of the table in Tariff B. Tariff B is a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party. Column III concerns cases of average or usual complexity: *ibidem*, paragraphs 8 and 9.

[22] I do not consider it appropriate to derogate from the principle of Rule 407 and proceed as the respondent did in Federal Court and on appeal by calculating costs according to Column V of the table in Tariff B. The nature and content of the issues do not warrant derogation from this principle.

[23] In addition, the respondent is not a lawyer and cannot receive legal fees, including those specified in the Tariff.

[24] However, given the three-fold objective of costs, i.e. providing compensation, promoting settlement and deterring abusive behaviour, case law has acknowledged that it is appropriate to award some form of compensation to self-represented parties, particularly when that party is required to be present at a hearing and foregoes income because of that: see *Sherman v. Minister of National Revenue*, [2003] 4 FCA 865. However, the compensation awarded may at best be equal to what the party could have obtained under the Tariff if it had been represented by a lawyer: see *Sherman*, *supra*, 2004 FCA 29, at paragraph 11. It is generally a fraction of that amount. This is what the Federal Court judge did.

[25] I do not see in the award of $5,375.95 any error in the judge's exercise of his discretion which would warrant or require our intervention. The $1,876.95 in disbursements were incurred for the proceedings before the Federal Court. The amount awarded by the judge was less than the amount of disbursements actually incurred by the respondent. The judge was bound by the terms of the Ontario Superior Court's orders dated April 1, 2003, and September 30, 2004, ratifying the Consolidated Plan of Reorganization, Compromise and Arrangement: see *In the Matter of the Companies' Creditors Arrangement*, C.S. Ont., docket No. 03-CL-4932. The respondent could not be compensated for the time spent and the disbursements incurred before September 30, 2004.

[26] As far as the disbursements for this appeal are concerned, the respondent submitted a claim in the amount $284.62 to which he is entitled. He claims costs in an amount of $10,800 calculated,

as already mentioned, according to Column V of the table in the Tariff. This amount includes some 63 units for legal fees which he cannot claim and 10 units for the assessment of these fees. Since I plan to award a lump sum, no amount may be awarded for the assessment of costs.

[27] However, the respondent was required to defend himself on appeal. He had to analyze the appellant's memorandum and prepare a written reply. To say the least, the appellant was not stingy with the written material it produced: two voluminous binders of legislation; four binders of authorities, which were even more voluminous; and seven impressive binders for the Appeal Record, all for an appeal based on a due diligence defence not supported by the evidence. Even with substantial compensation, the respondent, who legitimately and successfully asserted quasi-constitutional rights, will continue pay the price for having to fight an appeal that seems far more oppressive than deserving.

[28] There is no doubt that the respondent had to devote time and energy to defending himself, not to mention the fact that he had to be present in Court to answer the oral arguments made by the opposing party. I am of the opinion that in this appeal it is necessary to derogate from Rule 407 and award costs according to Column V. Considering Rules 400(3)(*a*) (result of the proceeding) and 400(3)(*i*) (any conduct of a party that tended to unnecessarily lengthen the duration of the proceeding), as well as the regulatory and deterrent functions of costs, I would award the respondent the disbursements claimed, namely, $284.62 plus costs established at $7,000 for a total of $7,284.62.

Conclusion

[29] I would dismiss the appeal with costs established at $7,284.62, including disbursements, and I would dismiss the cross-appeal.

"Gilles Létourneau"
J.A.

"I concur.
Alice Desjardins J.A."

"I concur.
Marc Noël J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATED:	March 22, 2007

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