

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20241125**

**Docket: A-112-22**

**Citation: 2024 FCA 196**

[ENGLISH TRANSLATION]

**CORAM: BOIVIN J.A.  
LEBLANC J.A.  
GOYETTE J.A.**

**BETWEEN:**

**EDMONTON REGIONAL AIRPORTS AUTHORITY**

**Appellant**

**and**

**MICHEL THIBODEAU**

**Respondent**

**and**

**ASSOCIATION OF CANADIAN PORT AUTHORITIES**

**Intervener**

Heard at Ottawa, Ontario, on April 11, 2024.  
Judgment delivered at Ottawa, Ontario, on November 25, 2024.

**REASONS FOR JUDGMENT BY:**

**BOIVIN J.A.**

**CONCURRED IN BY:**

**LEBLANC J.A.  
GOYETTE J.A.**

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**REASONS FOR JUDGMENT**

**BOIVIN J.A.**

I. INTRODUCTION

[1] The appellant, Edmonton Regional Airports Authority (ERAA), appeals from a judgment rendered by Grammond J. of the Federal Court (Federal Court) on April 21, 2022 (2022 FC 565) (Decision). In its decision, the Federal Court ruled in favour of the respondent, Mr. Thibodeau, and awarded him \$5,000 in damages as a remedy for ERAA's violations of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA). Since ERAA has admitted the breaches, the only issue before this Court concerns the damages awarded by the Federal Court under subsection 77(4) of the OLA.

[2] By order of this Court rendered on November 28, 2022, the Association of Canadian Port Authorities was given leave to intervene in this appeal on the legal principles and factors to be considered in an award of damages under section 77 of the OLA.

[3] This Court has also heard an appeal by St. John's International Airport Authority against Mr. Thibodeau. Judgment on that appeal is rendered simultaneously with the one in this case: *St. John's International Airport Authority v. Thibodeau*, 2024 FCA 197 (*St. John's FCA*).

[4] For the following reasons, the appeal should be dismissed with costs.

## II. BACKGROUND

[5] ERAA is a designated airport authority under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (ATA) and operates the Edmonton Airport, among others. The ATA sets out certain terms and conditions governing the transfer of airports belonging to the federal government to not-for-profit corporations. Under subsection 4(1) of the ATA, ERAA is subject to several parts of the OLA, including Part IV respecting the language of communications with and services to the public.

[6] In 2018, Mr. Thibodeau filed various complaints with the Commissioner of Official Languages (COL) against ERAA alleging that several of its communications were available in English only, including some on its website and social media, and that it used unilingual English slogans in various contexts.

[7] The COL conducted an investigation and, in October 2019, concluded in his report that Mr. Thibodeau's complaints were founded and that ERAA had committed several breaches of the OLA.

[8] In his report, the COL made three recommendations for ERAA to apply within six months of the date of the report to correct the identified breaches. He recommended that ERAA:

[TRANSLATION]

1. take all necessary measures to ensure that communications accessible to the public produced by [ERAA], including signage in public areas of the Edmonton International Airport, are at all times of equal quality in both official languages;

2. take all necessary measures to ensure that the content produced and published by ERAA on the social media accounts of the Edmonton International Airport, including YouTube, Facebook, Instagram, and any other social media, is published simultaneously and is of equal quality in both official languages;
3. take all necessary measures to ensure that the content of the Edmonton International Airport's website, including documents of public interest (annual reports, press releases, etc.) is at all times of equal quality in both official languages.

[9] Following the COL's report, Mr. Thibodeau brought an application against ERAA before the Federal Court under section 77 of the OLA, seeking a declaratory judgment and an order for damages. Shortly after his application was filed with the Federal Court, counsel for ERAA wrote Mr. Thibodeau a letter apologizing for ERAA's breaches of the OLA. They refused to pay him damages, however.

[10] After bringing his application against ERAA before the Federal Court, Mr. Thibodeau filed additional complaints against it with the COL. It appears that these additional complaints concern both new breaches and ones the COL had already investigated and dealt with in a report, for which ERAA had refused to provide a remedy. At the time of the hearing, however, the COL had not yet filed a report on these new complaints.

### III. FEDERAL COURT DECISION

[11] After hearing Mr. Thibodeau's application under the OLA, the Federal Court noted that the only real issue it had to decide concerned damages, and specifically whether they were appropriate and just. As it had done in *Thibodeau v. St. John's International Airport Authority*, 2022 FC 563 (*St. John's FC*), the Federal Court applied the four-step analysis developed by the

Supreme Court in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 (*Ward*), adapting it to the context of the OLA (at para. 4):

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

[12] Since ERAA had acknowledged that Mr. Thibodeau's complaints were founded, the Federal Court immediately found that the first step in the analysis developed by the Supreme Court in *Ward*, i.e., the breach, was established.

[13] The Federal Court then addressed the second step, which requires identifying the objectives of an award of damages. It found that the circumstances of this case were similar to those in *St. John's FC* and that "the award of damages fulfills the same functions" (Decision at para. 20). It then found that an award of damages against ERAA was necessary to help "fulfill the other two functions established in *Ward*, namely, vindication of [language] rights and deterrence" (Decision at para. 22). The Federal Court added that "[a] concrete sanction is necessary to remind ERAA and other federal institutions of the need to comply with the [OLA] and to reassure the public of the importance of language rights" (Decision at para. 22).

[14] The Federal Court went on to assess the countervailing factors that could defeat the functional considerations that support a damage award and render damages inappropriate or

unjust. It rejected ERAA's claims that Mr. Thibodeau had developed a strategy to "commodify" language rights. The Court characterized ERAA's accusations as "outrageous" and recognized the "enormous personal investment required to pursue an application under section 77 of the [OLA]" (Decision at paras. 26 and 28). According to the Federal Court, the monetary aspect and the sums Mr. Thibodeau received "cannot overshadow the immense personal investment he has made in the defence of language rights" (Decision at para. 29).

[15] The Federal Court also rejected ERAA's argument that it would be more judicious to allow it to preserve its financial resources to remedy OLA violations instead of requiring it to pay damages to Mr. Thibodeau (Decision at para. 33).

[16] Ultimately, given the lack of evidence, the Federal Court did not accept ERAA's submission that it had complied with its language obligations under the OLA by the time of the hearing (Decision at paras. 34 and 35).

[17] As a result, the Federal Court assessed the quantum of damages at \$5,000, an amount lower than what Mr. Thibodeau was seeking. To determine the amount, the Court considered all the circumstances and the factors demonstrating the seriousness of the breaches at issue, while also taking the mitigating factors into account (Decision at paras. 38 and 39).

IV. ISSUES

[18] ERAA's appeal raises the following issues:

- (1) What is the standard of review?
- (2) Did the Federal Court err in finding that an award of damages was an appropriate and just remedy?
- (3) Did the Federal Court reverse the burden of proof at the second step of the *Ward* analysis?
- (4) Did the Federal Court err in failing to consider certain countervailing factors negating an award of damages?

V. ANALYSIS

- (1) *What is the standard of review?*

[19] Although ERAA submits that the standard of correctness should apply in this case, the Federal Court's findings with respect to the award of damages are actually mixed questions of fact and law, which may be set aside only on the basis of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).



- (2) *Did the Federal Court err in finding that an award of damages was an appropriate and just remedy?*

[20] An award of damages is deemed appropriate and just to the extent that it vindicates a right and deters future breaches by state actors (*Ward* at paras. 24 and 25). In this case, the Federal Court relied on the evidence in the record and was convinced that a damage award was necessary “to vindicate language rights and to achieve deterrence” (Decision at paras. 17 and 22).

[21] More specifically, concerning the objective of the vindication of language rights, the Federal Court noted that ERAA was subject to Part IV of the OLA respecting communications with and services to the public. Mr. Thibodeau’s complaints targeted ERAA’s digital platforms and slogans at the airport, which were primarily or exclusively in English. As for the additional complaints Mr. Thibodeau filed after this application, section 79 of the OLA allows the Federal Court to consider them in its assessment of the situation at issue. This OLA provision states that “information relating to any similar complaint” against the same federal institution may be submitted as evidence, so that the Court can have an overall view and thus an idea of the scope of the problem over a defined period of time (*Canada (Commissaire aux langues officielles) v. Air Canada*, 1999 CanLII 8095 (FCA), 167 F.T.R. 157 at para. 13).

[22] In this case, the additional complaints filed by Mr. Thibodeau, the merits of which remain to be determined, generally tend to show that a problem exists within several airport authorities throughout Canada, such as the one in St. John’s (*St. John’s FC* and *St. John’s FCA*). More specifically, they appear to show that the breaches Mr. Thibodeau identified in his initial

complaints against ERAA were not settled and that the COL's recommendations were not followed, calling into question the sincerity of ERAA's apology to Mr. Thibodeau in 2020, in which it had stated that action had already been taken [TRANSLATION] "to implement the COL's recommendations" (Appeal Book at 691).

[23] Regarding the objective of deterrence, it is sufficient to note that Mr. Thibodeau's initial and additional complaints, combined with ERAA's indifference to the COL's recommendations, justify a damage award to ensure that airport authorities take their language obligations under the OLA seriously. No palpable and overriding error in the Federal Court's reasoning has been demonstrated in this respect.

[24] ERAA also faults the Federal Court for awarding the same amount of damages in this case as it did in *St. John's FC*, namely, \$5,000. ERAA's reasoning can be summarized as follows: the Federal Court erred in awarding the same amount of damages in each case because it failed to perform an [TRANSLATION] "independent analysis of the facts in this case" (ERAA's memorandum of fact and law at para. 48).

[25] The Federal Court knew that *St. John's FC* and this case are related. Therefore, it is not incongruous that it referred to *St. John's FC* in this matter, especially since both cases concern breaches of section 22 and 23 of the OLA by the airport authorities in issue. In both cases, the Federal Court awarded damages based on the same objectives, namely, the vindication of language rights and deterrence. Although the Federal Court awarded an identical amount of

damages in both cases, the fact remains that it based its decisions on the facts and the evidence specific to each.

- (3) *Did the Federal Court reverse the burden of proof at the second step of the Ward analysis?*

[26] ERAA submits that the Federal Court made an additional error at the second step of the *Ward* analysis by reversing the burden of proof. To support its argument, it refers to the Federal Court's finding in paragraph 22: "ERAA has not provided any evidence of the concrete measures that it claims to have taken to comply with the [OLA]". ERAA argues that the Federal Court erred by requiring it to file evidence to demonstrate that the award of damages did not fulfill the objectives of vindication or deterrence, whereas this burden belonged to Mr. Thibodeau.

[27] ERAA's argument is without merit. The Federal Court had already received additional evidence from Mr. Thibodeau establishing that ERAA was still not in compliance with the OLA, and it gave ERAA leave to submit its own evidence to rebut the additional evidence Mr. Thibodeau had filed. ERAA did not take this opportunity. In the circumstances, this Court cannot find that the burden of proof was reversed, as ERAA asks it to do.

- (4) *Did the Federal Court err in failing to consider certain countervailing factors negating an award of damages?*

[28] ERAA alleges that the Federal Court erred in its analysis of the countervailing factors negating an award of damages by failing to consider the following: (i) the powers conferred on the COL by the OLA, and (ii) Mr. Thibodeau's commodification of his language rights.

[29] Specifically, ERAA first submits that the OLA establishes a robust scheme conferring on the COL all the necessary powers to deal with Mr. Thibodeau's complaints and ensure compliance with the law. Accordingly, it argues that Mr. Thibodeau's frequent applications under section 77 of the OLA and the court judgments awarding him damages are inconsistent with the COL's mandate as language ombudsman under the OLA and limit the COL's powers under Parts IX and X of the OLA. According to ERAA, the Federal Court should have considered this factor as a counterweight to the need to award damages.

[30] ERAA's argument is untenable. For another proceeding, in this case the application to the COL, to act as a counterweight to damages, the burden is on ERAA to establish that the proceeding provides a sufficient and appropriate remedy for the situation. The evidence, however, shows the contrary: ERAA ignored the COL's recommendations, and the breaches identified by the COL were not corrected (*Ward* at paras. 34 and 35). Given the conduct of ERAA, for which respecting the OLA remains a problem, it is also clear that the COL's reports do not fulfill the objectives of vindication or deterrence.

[31] To avoid potential actions in damages, however, it would be sufficient for ERAA to cease minimizing the role of the COL, follow his recommendations and comply with the OLA by offering communications and services equally in both official languages. To reach the conclusion that ERAA seeks would open the door to systematically invoking the OLA scheme and the COL's mandate to neutralize the application Parliament provides for in subsection 77(4) of the OLA. In this respect, it is sufficient to note paragraph 97 of *St. John's FCA*: "Parliament certainly did not enact subsection 77(4) of the OLA with the intention that it have no practical effect".

[32] ERAA then goes on to suggest the addition of a new factor to those established by the Supreme Court in *Ward*, namely, the commodification of language rights. According to ERAA, this additional element must be taken into consideration as a countervailing factor in actions in damages under the OLA. Specifically, ERAA claims that, by filing numerous complaints with the COL and then bringing applications under section 77 of the OLA, Mr. Thibodeau [TRANSLATION] "found a way to commodify his language rights", and the damages he receives [TRANSLATION] "serve a single purpose, the improvement of [Mr. Thibodeau's] financial situation". ERAA argues that this commodification of language rights should be considered a countervailing factor negating the need for damages (ERAA's memorandum of fact and law at paras. 81, 85–86).

[33] The numerous complaints filed by Mr. Thibodeau and the remedies he has received in other cases do not truly serve as counterweights to the need to award damages and have no effect in this case. According to the Federal Court decision, the evidence establishes that damages

fulfill a useful function in this case because of the seriousness of the breaches and the systemic nature of the problem in ERAA's organization. The fact that damages fulfill a useful function in more than one case does not bring the administration of justice into disrepute. As the Federal Court explains in paragraph 30:

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

[34] Although ERAA admits that the Federal Court can order damages, it nevertheless submits that damages should not be paid [TRANSLATION] "in all cases, and especially not in this case" (ERAA's memorandum of fact and law at para. 91). This argument is also without merit. First, an award of damages is not automatic, as ERAA suggests it is; it falls within the discretionary power conferred on the judge by subsection 77(4) of the OLA. Moreover, in a case involving a federal institution, if it appears that the institution complied with its obligations under the OLA, damages are usually not an appropriate remedy (*Forum des Maires de la Péninsule acadienne v. Canada (Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276 at para. 62). In this case, the Federal Court ruled that ERAA had not adduced any evidence that it had complied with its language obligations under the OLA (Decision at para. 35).

[35] ERAA also faults the Federal Court for awarding damages to [TRANSLATION] "reward [Mr. Thibodeau] for his decision to bring a legal action" (ERAA's memorandum of fact and law

at para. 88). But that is not the case. In paragraph 29 of its decision, the Federal Court reported that Mr. Thibodeau “has received significant sums in damages since 2017”, but it also recognized the “immense personal investment he has made in the defence of language rights”. It is clear from reading the reasons of the Federal Court that the damages awarded Mr. Thibodeau were not intended as a “reward” but as vindication and deterrence.

[36] In exercising its discretion, the Federal Court considered the circumstances as a whole, rightly rejected Mr. Thibodeau’s proposal to award a fixed amount for each complaint, and awarded \$5,000 in damages.

[37] It follows that the conclusions of the Federal Court contain no palpable and overriding error that would allow this Court to intervene.

## VI. CONCLUSION

[38] For all these reasons, I would dismiss the appeal with costs to Mr. Thibodeau.

“Richard Boivin”

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J.A.

“I agree.  
LeBlanc J.A.”

“I agree.  
Goyette J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-112-22

**STYLE OF CAUSE:** EDMONTON REGIONAL  
AIRPORTS AUTHORITY v.  
MICHEL THIBODEAU AND  
ASSOCIATION OF CANADIAN  
PORT AUTHORITIES

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 11, 2024

**REASONS FOR JUDGMENT BY:** BOIVIN J.A.

**CONCURRED IN BY:** LEBLANC J.A.  
GOYETTE J.A.

**DATED:** NOVEMBER 25, 2024

**APPEARANCES:**

Jean-Simon Schoenholz  
Simon Gollish

FOR THE APPELLANT

Nicolas M. Rouleau

FOR THE RESPONDENT

Marion Sandilands  
Maritza Woël

FOR THE INTERVENER



**SOLICITORS OF RECORD:**

Norton Rose Fulbright Canada LLP  
Ottawa, Ontario

FOR THE APPELLANT

Nicolas M. Rouleau  
Professional Corporation  
Société Professionnelle  
Toronto, Ontario

FOR THE RESPONDENT

Conway Baxter Wilson LLP/s.r.l.  
Ottawa, Ontario

FOR THE INTERVENER