

FEDERAL COURT OF APPEAL

BETWEEN:

ST. JOHN'S INTERNATIONAL AIRPORT AUTHORITY

Appellant

Online ID:#1

FEDERAL COURT OF APPEAL	
COUR D'APPEL FÉDÉRALE	
F	24-MAY-2022
I	
L	Ahmed Lagrani
E	
D	
MONTRÉAL, QC	
	1

-AND-

MICHEL THIBODEAU

Respondent

-AND-

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener before the Federal Court

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Montréal, preferably by videoconference.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: 24-MAI-2022

Issued by: Ahmed Lagrani, Registry officer, Montreal

Address of local office: 30 McGill Street, Montréal, Québec, H2Y 3Z7

TO: THE CHIEF ADMINISTRATOR
Federal Court of Appeal
30 McGill
Montréal, Québec
H2Y 3Z7

AND TO: MICHEL THIBODEAU
336 McEachern Crescent
Ottawa, Ontario
K1E 3P5

T. 613.834.2946

The Applicant

**AND TO: OFFICE OF THE COMMISSIONER OF OFFICIAL
LANGUAGES OF CANADA**
30 Victoria Street, 6th Floor
Gatineau, Québec
K1A 0T8

Élie Ducharme (elie.ducharme@clo-ocol.gc.ca)

Isabelle Hardy (isabelle.hardy@clo-ocol.gc.ca)

T. 819.420.9019

F. 819.420.4837

Lawyers for the Intervener

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Justice Grammond dated April 21, 2022, by which he ordered the St. John’s Airport Authority (“SJIAA”) to pay damages to the respondent in the amount of \$5,000 and costs in the amount of \$6,000.

THE APPELLANT ASKS that:

1. That the damage award to Mr. Thibodeau be vacated.
2. That the cost award to the respondent Mr. Thibodeau be vacated, or in the alternative, be reduced by \$1,864.77.
3. That the SJIAA be awarded the costs of this appeal at the middle of Column III.

THE GROUNDS OF APPEAL are as follows:

1. The Federal Court erred in law by treating section 4 of *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5, as creating a mere presumption, when in fact it creates a deeming rule.
2. The Federal Court erred in law by adopting an interpretation of section 4 of *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5, which renders certain portions of that section redundant and without effect, contrary to the rule that Parliament does not speak in vain.
3. The Federal Court erred in law by applying a residual presumption to the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5, which is not a quasi-constitutional statute.
4. The Federal Court erred in law by finding that a “head office” could be located inside an airport, when such a finding is contrary to the definition of an “office or facility” under the *Official Languages Act* and to Parliament’s intent in enacting the *Airport Transfer (Miscellaneous Matters) Act*, SC 1992, c 5.
5. The Federal Court erred in law by finding that the SJIAA had a “head office” and attributing services and communications to that “head office” when:
 - a. There was no evidence of any kind that the SJIAA had a “head office” separate from the airport.
 - b. Even if the SJIAA had a head office, there was no evidence of any kind that would allow the judge to attribute specific services and communications to the SJIAA’s “head office” as opposed to the airport.
 - c. Given the absence of evidence, the trial judge either made these findings in the absence of evidence and/or reversed the burden of proof on these issues, either of which would be an error of law.
6. The Federal Court erred in law by neither following nor distinguishing past Federal Court decisions on the definition of “travelling public” which are binding on all Federal Court judges by virtue of *R v Sullivan*, 2022 SCC 19.

7. Even if the Federal Court correctly interpreted the scope of the travelling public, it erred in law by failing to apply its own definition (found at paragraph 49 of its reasons) to the communications and services which it analysed later in its reasons (such as paragraph 62).
8. The Federal Court erred in law by applying a differential scrutiny to the portions of the SJIAA's evidence that were favourable to Mr. Thibodeau than to the portions of its evidence that were unfavourable to Mr. Thibodeau.
9. The Federal Court erred in law by presuming that "unless otherwise stated" all of the SJIAA's online communications were directed to travellers, when, in fact, the SJIAA had filed extensive affidavit evidence "stating otherwise", and explaining which communications were directed at travellers and which were not.
10. The Federal Court erred in law by failing to address the SJIAA's argument that Mr. Thibodeau was not a member of the travelling public under any definition proposed by any of the parties at the hearing or the definition ultimately adopted by the Court itself, since the SJIAA did not rely solely on the "travel document" rule referenced in the Federal Court's reasons.
11. The Federal Court erred in law by failing to address the SJIAA's argument that Mr. Thibodeau could not claim damages for breaches of the *Official Languages Act* that did not involve his own personally-held language rights.
 - a. Instead, the Federal Court erroneously treated this as a standing argument, even though the SJIAA had stated that it did not contest Mr. Thibodeau's standing at the hearing, and that its argument did not depend on standing: "[T]he question of what remedies are appropriate, that is sort of a different question than whether you have standing to complain or be an applicant."
 - b. There is a background legal principle under the Act that damages may not be awarded to a person unless that person's own, personally-held language rights have been breached.
 - c. Mr. Thibodeau failed to show a breach of his personally-held rights under sections 21 and 23 of the *Official Languages Act*, thus damages could not be an appropriate and just remedy here.
12. The Federal Court made a palpable and overriding error of fact by stating that the SJIAA "has consciously adopted a narrow interpretation of the scope of its duties and has ignored the Commissioner's recommendations."
 - a. Not only are the Commissioner's recommendations not binding, but the legal issues raised in this case are novel, and the SJIAA's position was far from frivolous.
 - b. Indeed, the Commissioner's factum in this proceeding acknowledged that it raised novel issues: "For the first time, the Court is being called upon to establish the scope of language obligations of local airport authorities under the *Airports Transfer (Miscellaneous Matters) Act* [...] as well as the concept of 'travelling public' under section 23 of the *Official Languages Act* [...]."

- c. Even if this Court ultimately affirms the Federal Court’s rulings, it is unfair to equate a disagreement over a novel legal issue with “ignoring” the Commissioner as part of the damages analysis.
 - d. Indeed, the SJIAA’s *Official Languages Act* compliance program was based on guidance received from the Treasury Board of Canada, which is charged with coordinating the application of the *Official Languages Act*.
13. The Federal Court erred in law by declining to give any weight to the SJIAA’s efforts to comply with the *Official Languages Act*, which should have been a major factor in any damages award in light of *Forum des maires de la Péninsule acadienne v Canada (Food Inspection Agency)*, 2004 FCA 263.
14. The Federal Court’s damage award in this case cannot be reconciled with the damage award issued on the same day by the same judge in *Thibodeau v Edmonton Regional Airports Authority*, 2022 FC 565:
- a. In both cases, Mr. Thibodeau was awarded \$5,000 in damages for similar complaints.
 - b. Yet the SJIAA had worked hard to remedy the problems identified by the Commissioner, while the Edmonton Airport did not file any evidence that the breaches had been remedied.
 - c. The same damages should not be awarded against an airport that addressed the problem (even partially) and an airport that did not.
15. The Federal Court’s treatment of Mr. Thibodeau’s other complaints against the SJIAA cannot be reconciled with how similar complaints were treated in *Thibodeau v Edmonton Regional Airports Authority*, 2022 FC 565:
- a. In the *Edmonton* case, the same Federal Court judge took account of Mr. Thibodeau’s other complaints against the Edmonton airport, using the existence of these complaints to find that the airport authority was not complying with the *Official Languages Act*: “Moreover, the evidentiary record contains the list of complaints filed by Mr. Thibodeau since 2017. This list shows new complaints against ERAA regarding the matters at issue in this application. While I am not called upon to rule on the merits of these complaints, their existence prevents me from giving credence to the statements of ERAA’s counsel [that the airport was now compliant].”
 - b. Yet when the SJIAA filed similar evidence showing that it had fully addressed the other complaints filed by Mr. Thibodeau (mostly about signage), the judge refused to consider these complaints: “I recognize that SJIAA has made an effort to identify and rectify various breaches of the Act that were not mentioned in Mr. Thibodeau’s complaints. Since these breaches are not the subject of this application, it would be inappropriate for me to comment on them.”

- c. It is unfair to only consider additional complaints against an airport where they are helpful to Mr. Thibodeau's case, and to decline to consider the same complaints when they helpful to the respondent airport authority.
16. The Federal Court erred in law by omitting to address the following relevant factors in its damages analysis:
- a. The fact that Mr. Thibodeau's ATM signage complaint had been fully resolved, and that this evidence was not contradicted.
 - b. The genuine progress made by the SJIAA towards resolving the issues that were the subject of Mr. Thibodeau's website and social media complaints.
 - c. The SJIAA's reasonable reliance on guidance provided by the Treasury Board of Canada about the scope of the SJIAA's obligations under the *Official Languages Act*.
 - d. The fact that alleged compliance deficiencies identified by the Commissioner in a follow-up report were based on a highly unrepresentative time period chosen by the Commissioner for that report (namely, a week-long period during which there was a once-in-a-century blizzard in St. John's resulting in a declared state of emergency, employees being unable to attend work, and massive disruption to all airport activities). Before and after this blizzard, the SJIAA was posting simultaneous bilingual messages.
 - e. Language rights exist to serve communitarian and cultural goals, rather than individual self-interest. Mr. Thibodeau's damage claim diverts resources from public purposes and applies them to private benefit.
 - f. The fact that Mr. Thibodeau had not suffered any damages.
 - g. The fact that Mr. Thibodeau's own personally-held rights have not been breached.
 - h. Because the SJIAA is subject to section 23 of the *Official Languages Act*, but not section 22, several of Mr. Thibodeau's other complaints are unfounded.
17. Finally, even if the Federal Court was correct on the merits of this case, it made an unreasonable cost award:
- a. Mr. Thibodeau was awarded substantially all of the costs that he claimed in his bill of costs (\$6,000 award on a \$6,258 claim). Yet his bill of costs included two airplane tickets and two overnight hotel stays in order to personally serve the Notice of Application on the SJIAA. The total cost of this travel was \$1,864.77.
 - b. Service of the notice of application could instead have been accomplished using a bailiff for \$50. Rather than use the cheaper option, Mr. Thibodeau spent close to \$2,000 to fly across two time zones to serve the pleadings personally. The SJIAA should not have to bear the costs of that decision. The airplane tickets and hotel stays were unreasonable disbursements and should have been disallowed.
 - c. The cost award, if it stands at all, should be reduced by \$1,864.77.

18. The SJIAA relies on the *Federal Courts Act*, *Federal Courts Rules*, *Official Languages Act*, *Official Languages (Communications with and Services to the Public) Regulations*, *Charter of Rights and Freedoms*, and the *Airports Transfer (Miscellaneous Matters) Act*.

Respectfully submitted on:

May 24, 2022



FASKEN MARTINEAU DUMOULIN LLP
800 Square Victoria, Suite 3500
Montréal, Québec
H4Z 1E 9

Michael Shortt (mshortt@fasken.com)

T. 514-397-7400

F. 514-397-7600

Lawyers for the Appellant