Federal Court of Appeal | Cour d'appel fédérale

CANADA

**Date: 20111212**

**Docket: A-358-11**

**Citation: 2011 FCA 343**

**Present: BLAIS C.J.**

**BETWEEN:**

**AIR CANADA**

**Appellant**

**and**

**MICHEL THIBODEAU**
**and**
**LYNDA THIBODEAU**

**Respondents**

**and**

**COMMISSIONER OF OFFICIAL LANGUAGES**

**Respondent/Intervener**

Heard at Ottawa, Ontario, on November 22, 2011.

Order delivered at Ottawa, Ontario, on December 12, 2011.

REASONS FOR ORDER BY: BLAIS C.J.

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## REASONS FOR ORDER

**BLAIS C.J.**

[1] This is a motion by Air Canada to stay an order pending appeal under paragraph 398(1)(*b*) of the *Federal Courts Rules*.

[2] For the reasons that follow, Air Canada's motion is allowed.

**RELEVANT FACTS**

[3] The respondents, Michel Thibodeau and Lynda Thibodeau, initially filed eight complaints with the Commission of Official Languages concerning the service they received from Air Canada on eight different flights.

[4] The Federal Court, in a judgment dated July 13, 2011, held that Air Canada had by its own admission failed to comply with the requirements of the *Official Languages Act* on four occasions, more specifically, the following:

- Flight AC8627: Air Canada acknowledges that there were no bilingual flight attendants on board the Toronto–Atlanta flight, a flight with a significant demand for services in French;

- Flight AC8622: Air Canada admits that the pilot's announcement concerning the arrival time and weather was not translated by the bilingual flight attendant, even though this was a flight with a significant demand for services in French;

- Flight AC7923: Air Canada acknowledges that there were no bilingual flight attendants on board this flight with a significant demand for services in French;

- Toronto Airport: Air Canada admits that the announcement made to the passengers of Flight AC7923 regarding baggage collection was not made in French, despite the significant demand for services in French at Toronto Airport.

[5] To remedy the situation, the Court ordered Air Canada to

1. give the applicants a letter of apology containing the text appearing in Schedule "A" to this order, which is the text of the draft apology letter filed by Air Canada;

2. make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*;

3. introduce, within six months of this judgment, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, as set out at Part IV of the OLA and at section 10 of the ACPPA,

particularly by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendants able to provide services in French on board flights on which there is significant demand for services in French;

4. pay the amount of $6,000 in damages to each of the applicants;

5. pay the applicants the total amount of $6,982.19 in costs, including the disbursements.

[6] Further to this order, Air Canada paid a total amount $18,982.10, which is the total amount provided for at paragraphs 4 and 5 of the order, and wrote a letter of apology in accordance with paragraph 1 of the order.

[7] On September 28, 2011, Air Canada nevertheless filed in the Federal Court of Appeal a notice of appeal asking the Court to set aside paragraphs 2, 3 and 4 of the order, as well as the award for damages and the so-called structural order made by the Federal Court.

[8] On October 28, 2011, Air Canada filed this motion, by which it asks this Court to grant a stay of the second and third elements of the order.

**ISSUE**

[9] Should the Court stay the decision of the Federal Court pending Air Canada’s appeal?

**ANALYSIS**

[10] The parties agree on the test applicable to a stay application. The test was laid down by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[11] According to that judgment, a motion to stay may be granted only if the applicant demonstrates that

- there is a **serious question** to be determined;
- **irreparable harm** will result if the stay is not granted;
- the **balance of convenience** favours the applicant.

**Serious question**

[12] To determine whether there is a serious question, the judge hearing the motion must carry out a limited review of the merits of the case to ensure that it is not frivolous or vexatious.

[13] Air Canada submits that there is a serious question. It argues that the Federal Court judge erred in making a general order to comply with the Act, as well as a structural order. Air Canada further submits that the general order to comply with the Act leaves it perpetually exposed to the threat of contempt of court proceedings.

[14] The respondents, for their part, admit that *Charter* rights and the public interest are serious questions. Consequently, at paragraph 13 of their submissions, they concede that Air

Canada's motion meets the serious question requirement. The Commissioner of Official Languages also concedes that there is a serious question.

[15] Considering the exceptional nature of the Federal Court judge's order and the admissions of the respondents and the intervener/respondent, I have no hesitation in concluding that the questions raised on appeal by Air Canada are indeed serious.

**Irreparable harm**

[16] The irreparable harm requirement refers to the nature of the harm rather than its magnitude (*RJR-MacDonald*, above, at paragraphs 79–80). Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald*, above, at paragraph 59). The fact that one party may be impecunious does not automatically determine the motion, although it may be a relevant consideration (*RJR-MacDonald*, above, at paragraph 59).

[17] At this stage of our examination, I believe it is helpful to review paragraphs 2 and 3 of the disposition of the judgment, which are problematic for Air Canada. It is important to determine whether having to discharge the duties set out at paragraphs 2 and 3 of the order would cause Air Canada irreparable harm.

[18] At paragraph 2, the Federal Court judge orders Air Canada to "make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*".

[19] Structural injunctions are few and far between in Canada. In the judgments reviewed, the structural injunctions sometimes provided for an order to make every reasonable effort to comply with the order, not the legislation. For example, in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paragraph 7, the trial judge had ordered the respondents to "use their best efforts to comply with this Order." [Emphasis added.] Another example can be found in *Brown v. Board of Education*, 349 U.S. 294 at paragraph 6, a judgment of the United States Supreme Court: "[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling."

[20] An order to make every reasonable effort is a vague order. I have not found any commentary on this subject, judicial or doctrinal. In my view, this is an order that accompanies complex structural injunctions. It generally precedes an order by which the trial judge reserves jurisdiction to oversee the enforcement of the order.

[21] In the present case, the order requires Air Canada to make every reasonable effort to comply with the Act, not the order. Indeed, as stated in Air Canada's submissions at paragraph 9, there was no need to make an order to make every reasonable effort to comply with the *Official Languages Act* because the Act is in itself an injunction to comply with the standards set out in its provisions. Here, I adopt the comments of the Quebec Court of Appeal in *Métromédia CMR inc. c. Tétreault*, [1994] J.Q. No. 2785 at paragraph 36, [1994] R.J.Q. 777 (C.A.Q.):

> [TRANSLATION]
> 36. The general rule is that any offence must be punished by the penalty provided for by the act creating the offence. Normally, superior courts do not have to make injunctive orders to tell people to obey the law. The law is in itself an injunction. However, there are exceptional cases where certain persons make it clear that they are firmly resolved to disobey the law and systematically commit the same offences over and over again, preferring to pay the fine.

[22] I think it is reasonable to say that Air Canada is required to meet its duties under the Act. Clearly, it will be up to the appeal judges to thoroughly examine this part of the order which appears to add an additional duty to comply with the Act. The vagueness of this part of the order leads me to conclude that it is preferable to stay its application until such time as the Court of Appeal rules on its merits and scope. It is very clear, however, that the duty to comply with the *Official Languages Act* is not stayed.

[23] Air Canada argues that implementing the judge's order, particularly in respect of paragraph 3, would require the immediate deployment of complex, expensive and irreversible measures. It notes that the order forces it to make major systemic changes within six months. It states that it will have to develop procedures and systems for identifying, quantifying and documenting the work of thousands of Air Canada and Jazz employees.

[24] In its submissions, Air Canada states that the order affects more than 10,100 airport employees, including 7,500 flight attendants and 2,600 passenger services employees working in airports in such areas as boarding kiosks, concierge services, private lounges, check-in counters,

luggage drop-off counters, ticket offices, baggage claim counters and special boarding and deplaning assistance.

[25] Air Canada adds that such a system-wide effort would involve a complex and irreversible process whose cost is difficult to quantify. It adds that a *mandatory* order may in itself cause irreparable harm. In this regard, it refers to the Quebec Court of Appeal's judgment in *Université Laval c. Syndicat des employés et employées de l'Université Laval*, J.E. 2001-214 at paragraph 15, 102 A.C.W.S. (3d) 953 (C.A.Q.):

> [TRANSLATION]
> In this case, conclusions 1, 2 and 3 consist of mandatory orders, which by law are not enforceable orders notwithstanding appeal. This is so because the enforcement of mandatory orders generally makes it impossible for the parties to undo what has been done and be restored to the status quo. In this sense, the situation becomes "irreparable".

[26] I note that in that case, the Quebec Court of Appeal granted a motion to stay an order of the Human Rights Tribunal to change the applicant's pay structure.

[27] According to Air Canada, the possibility of going back once the order is enforced, particularly with respect to paragraph 3, becomes a moot question and will not make the harm any less irreparable. Air Canada therefore seeks maintenance of the *status quo ante* pending the proceedings to preserve its right of appeal.

[28] For their part, the respondents Thibodeau submit that Air Canada has not shown irreparable harm. They argue, on the contrary, that the structural order is consistent with Air Canada's mission statement on official languages, as described in its Annual Report 2010.

[29] The respondents also refer to the report of the Commissioner of Official Languages published after an audit of Air Canada in 2010–2011. In the report, it is stated that Air Canada promised to take a series of measures to remedy breaches of the *Official Languages Act.*

[30] At the hearing, Air Canada conceded that a partial stay of paragraph 3 would suffice. More specifically, it stated that it had already set up the process described in the second part of that paragraph, which reads as follows:

> . . . by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendants able to provide services in French on board flights on which there is significant demand for services in French.

[31] Air Canada argues that it was able to set up a process that complies with the Federal Court judge's order with respect to the requirements concerning Jazz but submits that the first part of paragraph 3 of the order is far too vague and almost impossible to carry out in the circumstances. Indeed, it is the first part of the order which, according to Air Canada, forms the very basis of the appeal it has brought before this Court.

[32] For his part, the Commissioner submits that Air Canada has not described the nature of the harm in sufficient and specific detail.

[33] In this regard, the Commissioner refers to the original English version of the judgment of Justice Stratas of this Court in *Shotclose v. Stoney First Nation*, 2011 FCA 232 at paragraphs 48–49:

> On the issue of the irreparable nature of the harm, the evidence offered by the appellants also falls short. The evidence offered in support of a stay must demonstrate with particularity - not just assert with generality - the actual existence or real probability of harm that cannot be repaired later. It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert - not demonstrate to the Court's satisfaction - that the harm is irreparable.
>
> A stay of a judgment must be regarded for what it is. It is the temporary prevention of a judgment - made on the basis of evidence, submissions and due consideration - from having force according to its terms. To get that sort of remedy, the moving party must do more than identify harm or inconvenience. The moving party must demonstrate (along with the other branches of the *RJR-Macdonald* test) that harm will actually be suffered and that it will not be able to be repaired later. It must do this by providing evidence concrete or particular enough to allow the Court to be persuaded on the matter.
>
> [At the time of the hearing, only the original English version was available.]

[34] However, I am not satisfied that *Shotclose* applies here. In that case, the order that was the subject of the motion to stay ordered that elections be held for a First Nations band council. The advantages of holding an election clearly outweighed the fears of the chaos that would allegedly result from the absence of governance in the community while the election was being held. In the present case, the harm that Air Canada would sustain if a stay were denied is far from hypothetical.

[35] The Commissioner adds that Air Canada's fears of contempt of court proceedings are speculative and hypothetical. He argues that the risk of conviction for contempt of court is not irreparable harm within the meaning of *RJR-MacDonald*, but a usual consequence of a Federal Court order.

[36] In this respect, I fully agree with the Commissioner that fears of contempt of court are never sufficient grounds for finding irreparable harm.

[37] Having considered the particular language used in paragraph 3 of the Federal Court order, I have no choice but to side with Air Canada: enforcement of the structural order, particularly the first part of paragraph 3, would in my opinion result in irreparable harm.

[38] Clearly, the structural changes required to discharge the very broad duty to identify and document potential breaches of the Act could place a significant financial burden on Air Canada, one for which the respondents could never compensate should Air Canada's appeal be allowed. Moreover, these structural changes would affect over 10,000 Air Canada employees who are in contact with more than 223,000 passengers a day. Air Canada would have difficulty not only meeting the requirements of a vague order, but also, if victorious on appeal, dismantling a system that no doubt would have taken months to set up.

[39] I therefore have no hesitation in concluding that not granting a stay would cause Air Canada irreparable harm.

**Balance of convenience**

[40] According to the test established in *RJR-MacDonald*, above, this branch of the test requires me to consider the harm that each party would suffer, depending on the outcome of the motion, as well as the public interest.

[41] I have already discussed the harm that Air Canada would suffer. Air Canada submits that, should a stay be denied, neither the respondents nor the public would suffer any harm comparable to the permanent structural changes that it would have to make even before exercising its right to appeal.

[42] Air Canada further suggests that the public interest would be protected if a stay were granted, since Air Canada would still be required to comply with the entire *Official Languages Act*, and the public would continue to have access to the remedies under that legislation.

[43] As a last argument, Air Canada adds that this does not appear to be an urgent case, since the trial judge found that Air Canada and Jazz were making significant efforts and investing considerable amounts to meet their official languages duties. The judge also noted the low rate of complaints, 12 complaints in approximately 47 million points of contact (0.0000255%). Air Canada stresses that this rate is far below the 0.006% rate in *Via Rail Canada Inc. and Canadian Transportation Agency*, T-2311-03, T-2312-03 (December 19, 2003).

[44] The respondents Thibodeau disagree with Air Canada's arguments. They counter that a stay would amount to an endorsement of the current situation where the constitutionally guaranteed language rights of the public are being violated, and that the public interest must prevail over the economic considerations raised by Air Canada.

[45] Admittedly, the decision whether or not to stay the application of paragraphs 2 and 3 of the Federal Court judge's order will not drastically change the day-to-day situation. Indeed, setting up a monitoring system to identify, document and quantify possible breaches of Air Canada's language duties will in no way limit, control or reduce the number of infractions that may be committed, at least in the short term. Consequently, the public interest will not be compromised by a stay, since implementing the system proposed by the judge will only serve to identify and advance knowledge of breaches of these language duties.

[46] In the circumstances, I have no doubt that the balance of convenience favours Air Canada. Indeed, Air Canada continues to strive to offer services to passengers in French, although it has not achieved 100% compliance with its duties under the *Official Languages Act*.

**CONCLUSION**

[47] Whereas Air Canada's motion meets the three criteria of the test in *RJR-MacDonald* in that there is a serious question, irreparable harm would result from denying a stay, and the balance of convenience undeniably favours Air Canada, I have no hesitation in concluding that a stay is warranted in the circumstances.

[48] Obviously, I am taking into consideration Air Canada's admission concerning the third element of the order. Without prejudice to its arguments on appeal, Air Canada submits that it has already set up a process for identifying and documenting cases where Jazz does not assign flight attendants who are able to provide services in French on board flights with a significant demand for services in French, as stipulated by paragraph 3 of the Federal Court judge's order. It will be up to the judges at the hearing on the merits to decide the issue for the long term.

[49] Now therefore, the Court

1. orders that this motion to stay an order pending appeal be allowed;

2. orders that a stay be granted regarding the duty to make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*;

3. orders that a stay be granted regarding the duty to introduce, within six months of this judgment, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, as set out at Part IV of the *Official Languages Act* and at section 10 of the *Air Canada Public Participation Act*;

4. with costs in the cause;

5. further orders that the hearing on the merits of the appeal be scheduled for April 25, 2012, for four hours; and

6. directs the parties to comply with the provisions of the *Federal Courts Rules* regarding the filing of documents and to ensure that the record is perfected and ready for hearing 30 days before the hearing, that is, no later than March 22, 2012.

"Pierre Blais"

Chief Justice

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-358-11 |

**Appeal from an order rendered by the Federal Court on July 13, 2011 in files T-450-10 and T-451-10.**

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| **STYLE OF CAUSE:** | Air Canada v. Michel Thibodeau and Lynda Thibodeau and The Commissioner for Official Languages |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | November 22, 2011 |
| **REASONS FOR JUDGMENT BY:** | CHIEF JUSTICE BLAIS |
| **DATED:** | December 12, 2011 |

**APPEARANCES:**

| | |
|---|---|
| David Rhéault | FOR THE APPELLANT |
| n/a | FOR THE RESPONDENTS |
| Pascale Giguère<br>Kevin Shaar | FOR THE RESPONDENT/ INTERVENER |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Legal Services, Air Canada | FOR THE APPELLANT / APPLICANT |
| n/a | FOR THE RESPONDENT |
| Legal Services, Office of the Commissioner for Official Languages | FOR THE RESPONDENT/ INTERVENER |