Federal Court of Appeal  Cour d'appel fédérale

Date: 20120925

Docket: A-358-11

Citation: 2012 FCA 246

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
TRUDEL J.A.

BETWEEN:

AIR CANADA

Appelant

and

MICHEL THIBODEAU
and
LYNDA THIBODEAU

Respondents

and

THE COMMISSIONER OF OFFICIAL LANGUAGES

Intervener

Heard at Ottawa, Ontario, on April 25, 2012.

Judgment delivered at Ottawa, Ontario, on September 25, 2012.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] In this appeal, the Court is called to review the exercise of the remedial power of the Federal Court in response to an application by the respondents, Michel and Lynda Thibodeau (the

Thibodeaus), under subsection 77(1) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA) for violations of their language rights that occurred in the course of international air flights.

[2] Under this subsection, any person having filed a complaint with the Commissioner of Official Languages concerning, among others, a right under Part IV of the OLA, may apply to the Federal Court to obtain relief. The judge hearing such an application is not bound by the Commissioner's investigation report related to this complaint, and must rather determine whether there has been a breach of the OLA after weighing the evidence presented by the parties (*Forum des maires de la Péninsule acadienne v. Canada (Canadian Food Inspection Agency)*, 2004 FCA 263, [2004] 4 F.C.R. 276 at paragraph 21 [*Forum des maires*]) and then, eventually, grant such remedy as the Court considers "appropriate and just in the circumstances" (subsection 77(4) of the OLA).

[3] In their application, the Thibodeaus alleged that the carrier Air Canada (or the appellant) had breached the linguistic duties imposed on it by Part IV of the OLA, specifically, under subsection 23(1), under which it must ensure that members of the travelling public:

> …can communicate with and obtain those services in either official language from an office or facility of the institution in Canada or elsewhere where there is a significant demand for those services in that language.

Hence, the Thibodeaus sought a declaratory judgment that Air Canada breached its linguistic duties, a letter of apology and damages, including exemplary and punitive damages. They also submitted that Air Canada's breaches of its linguistic duties are systemic. Consequently, they asked the Federal Court to render a so-called structural (or institutional) order to remedy this situation.

[4] The facts of the case are very simple. The Thibodeaus complained to the Commissioner that on two separate round trips between Canada and the United States, Air Canada did not offer them the service in French to which they were entitled at each point of service in their itinerary. The Commissioner found that some of these complaints were justified. The grounds for complaint accepted by the Commissioner included not only in flight services but also ground services (the absence of services in French at the check-in counters and during announcements directed at passengers concerning changes in luggage carousels). These incidents are described more specifically in paragraphs 14 to 17, inclusive, of the reasons issued by a judge of the Federal Court (the Judge). Air Canada and Jazz are the airlines involved.

[5] On the basis of subsection 77(4) of the OLA, the Judge ruled as follows:

JUDGMENT

THE COURT ALLOWS this application:

DECLARES that Air Canada breached its duties under Part IV of the *Official Languages Act*. More specifically, Air Canada breached its duties by:

- failing to offer services in French on board (Jazz-operated) flight AC8627, a flight on which there is significant demand for services in French, on January 23, 2009;
- failing to translate into French an announcement made in English by the pilot who was the captain of (Jazz-operated) flight AC8622 on February 1, 2009;
- failing to offer service in French on board (Jazz-operated) flight AC7923, a flight on which there is significant demand for services in French, on May 12, 2009;
- making a passenger announcement regarding baggage collection at the Toronto airport on May 12, 2009, in English only.

ORDERS Air Canada to:

- 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;
- make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*;
- 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;
- pay the amount of $6,000 in damages to each of the applicants;
- pay the applicants the total amount of $6,982.19 in costs, including the disbursements.

[6] Air Canada is appealing from that judgment (2011 FC 876), submitting that it is vitiated by errors of law calling for the intervention of our Court. During the appeal, Air Canada obtained a stay of execution of the judgment of the Federal Court (order of Chief Justice Blais, 2011 FCA 343). In the appeal, the Commissioner, just as in the proceeding before the Federal Court, was recognized as intervener (order of Chief Justice Blais, 2012 FCA 14).

[7] Air Canada submits that it should not be ordered to pay any damages whatsoever for the three incidents which occurred during international air carriage, specifically, for the absence of services in French on flights AC 8627, AC 8622 and AC 7923, since Article 29 of the *Convention for the Unification of Certain Rules Relating to International Carriage By Air* signed in Montréal, on May 28, 1999, incorporated under Canadian law under the *Carriage by Air Act*, R.S.C. 1985, c. C-26, Schedule IV (Montreal Convention) provides an exclusive remedy for such breaches. In addition to the legal principle cited, the amount at stake is $4,500 for each Thibodeau. Air Canada

also submits that the Federal Court erred in law and in fact in rendering the general and structural orders found in the judgment reproduced above.

[8] That said, the appeal book shows that Air Canada agreed to submit a letter of apology to the Thibodeaus with respect to certain specific breaches, to pay them damages of $3,000 ($1,500 each) with respect to an announcement to passengers made in English only concerning baggage claim and procedures for connecting flights at the Toronto airport on May 12, 2009, as well as a total of $6,982.19 in costs including disbursements (Appellant's Memorandum of Fact and Law at paragraphs 3 and 7; letter of apology, Appeal Book, Schedule A at page 84).

[9] Thus, the parties agree that the appeal raises the three issues below, to which I propose to respond as follows:

> A) Does Article 29 of the Montreal Convention exclude the action in damages brought by the Thibodeaus under Part IV of the OLA for incidents having occurred during international carriage? Yes.
>
> B) Was the Judge entitled to a general order against Air Canada to comply with Part IV of the OLA dealing with the obligations of federal institutions in the area of communication with the public and provision of services? No.
>
> C) Was the Judge entitled to a structural order against Air Canada? No.

[10] In my discussion, I will refer to the relevant passages of the judgment appealed from and to the respective position of the parties with regard to each of these questions.

Discussion

Preliminary remarks: the legislative framework

[11] The Judge meticulously presented the legislative regime which applies to the appellant's commercial activities: the OLA, the *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.) (ACPPA) and the *Official Languages Regulations*, SOR/92-48.

[12] I will quote the very apt comments of the Judge found at paragraphs 7 to 12, inclusive:

> [7] The OLA, which applies to federal institutions, gives concrete expression to the principle of equality of Canada's two official languages, which is enshrined at section 16 of the *Canadian Charter of Rights and Freedoms* (the Charter), and the right of members of the public to communicate with any central office in the official language of their choice, set out at section 20 of the Charter. The courts have consistently held that the OLA has quasi-constitutional status (*Canada (Attorney General) v. Viola*, [1991] 1 FC 373 (available on QL) [*Viola*]; *R. v. Beaulac*, [1999] 1 SCR 768 (available on CanLII); *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773[*Lavigne*]; *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 SCR 194 [*DesRochers*]).
>
> [8] According to section 2 of the OLA, the purpose of this statute is to ensure respect for English and French as official languages, their equality of status and equal rights and privileges concerning their use in all federal institutions with respect to various aspects of federal institutions' activities, including communications with, or the provision of services to, the public.
>
> [9] The OLA concerns the federal institutions identified at section 3 of this statute.
>
> [10] Air Canada was initially created as a Crown corporation and, as such, was subject to the *Official Languages Act*, R.S.C. 1970, c. O-2 and, then, to the OLA, which replaced it. In 1988, Air Canada was privatized, and the *Air Canada Public Participation Act*, [abbreviated reference and citation omitted] provided for the continuance of Air Canada under the *Canada Business Corporations Act*. Otherwise, under section 10 of the ACPPA, Air Canada is still subject to the OLA. Subsections 1 and 2 of section 10 of the ACPPA read as follows:

10. (1) The *Official Languages Act* applies to the Corporation.

Duty re subsidiaries

(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.

10. (1) *La Loi sur les langues officielles* s'applique à la Société.

Communication avec les voyageurs

(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.

[11] Part IV of the OLA applies to communications with and the provision of services to the public. This part includes the following provisions:

Rights relating to language of communication

21. Any member of the public in Canada has the right to communicate with and to receive available services from federal institutions in accordance with this Part.

Where communications and services must be in both official languages

22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities

Droits en matière de communication

21. Le public a, au Canada, le droit de communiquer avec les institutions fédérales et d'en recevoir les services conformément à la présente partie.

Langues des communications et services

22. Il incombe aux institutions fédérales de veiller à ce que le public puisse communiquer avec leur siège ou leur administration centrale, et en recevoir les services, dans l'une ou l'autre des langues officielles. Cette obligation vaut également pour leurs bureaux — auxquels sont assimilés,

(a) within the National Capital Region; or

(b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

pour l'application de la présente partie, tous autres lieux où ces institutions offrent des services — situés soit dans la région de la capitale nationale, soit là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

Travelling public

23. (1) For greater certainty, every federal institution that provides services or makes them available to the travelling public has the duty to ensure that any member of the travelling public can communicate with and obtain those services in either official language from any office or facility of the institution in Canada or elsewhere where there is significant demand for those services in that language.

Voyageurs

23. (1) Il est entendu qu'il incombe aux institutions fédérales offrant des services aux voyageurs de veiller à ce que ceux-ci puissent, dans l'une ou l'autre des langues officielles, communiquer avec leurs bureaux et en recevoir les services, là où, au Canada comme à l'étranger, l'emploi de cette langue fait l'objet d'une demande importante.

Services provided pursuant to a contract

(2) Every federal institution has the duty to ensure that such services to the travelling public as may be prescribed by regulation of the Governor in Council that are provided or made available by another person or organization pursuant to a contract with the federal institution for the provision of those services at an office or facility referred to in subsection (1) are provided or made available, in both official languages, in the manner prescribed by regulation of the Governor in Council.

Services conventionnés

(2) Il incombe aux institutions fédérales de veiller à ce que, dans les bureaux visés au paragraphe (1), les services réglementaires offerts aux voyageurs par des tiers conventionnés par elles à cette fin le soient, dans les deux langues officielles, selon les modalités réglementaires.

. . .

[…]

Where services provided on behalf of federal institutions	Fourniture dans les deux langues
25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.	25. Il incombe aux institutions fédérales de veiller à ce que, tant au Canada qu'à l'étranger, les services offerts au public par des tiers pour leur compte le soient, et à ce qu'il puisse communiquer avec ceux-ci, dans l'une ou l'autre des langues officielles dans le cas où, offrant elles-mêmes les services, elles seraient tenues, au titre de la présente partie, à une telle obligation.

[12] According to section 22 of the OLA, federal institutions are required to communicate and provide services in both official languages where there is significant demand for those services in the minority language and where it is warranted by the nature of the office or facility. Under the *Official Languages Regulations*, SOR/92-48 (the Regulations), there is significant demand for the use of an official language in an airport where over a year, the total number of emplaned and deplaned passengers at that airport is at least one million and, for the other airports, where over a year, at least 5 percent of the demand from the public for services at that airport is in that language (subsections 7(1) and 7(3)). With regard to services on board flights, the Regulations provide that some flights are automatically designated as routes on which there is significant demand in the minority language, whereas others are so designated in accordance with the volume of demand. In that regard, subsection 7(2) and paragraph 7(4)(*c*) of the Regulations provide as follows:

7. (2) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public from an office or facility of a federal institution in an official language where the office or facility provides those services on a route and on that route over a year at least 5 per cent of the demand from the travelling public for services is in that language.	**7.** (2) Pour l'application du paragraphe 23(1) de la Loi, l'emploi d'une langue officielle fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs lorsque le bureau offre ces services sur un trajet et qu'au moins cinq pour cent de la demande de services faite par les voyageurs sur ce trajet, au cours d'une année, est dans cette langue.

. . .	[…]
(4) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public from an office or facility of a federal institution in both official languages where	(4) Pour l'application du paragraphe 23(1) de la Loi, l'emploi des deux langues officielles fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs, dans l'une ou l'autre des cibconstances suivantes :
. . .	[…]
(c) the office or facility provides those services on board an aircraft	*c)* le bureau offre les services à bord d'un aéronef :
(i) on a route that starts, has an intermediate stop or finishes at an airport located in the National Capital Region, the CMA of Montreal or the City of Moncton or in such proximity to that Region, CMA or City that it primarily serves that Region, CMA or City,	(i) soit sur un trajet dont la tête de ligne, une escale ou le terminus est un aéroport situé dans la région de la capitale nationale, dans la région métropolitaine de recensement de Montréal ou dans la ville de Moncton, ou un aéroport situé à proximité de l'une de ces régions ou ville qui la dessert principalement,
(ii) on a route that starts and finishes at airports located in the same province and that province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province, or	(ii) soit sur un trajet dont la tête de ligne et le terminus sont des aéroports situés dans une même province dont la population de la minorité francophone ou anglophone représente au moins cinq pour cent de l'ensemble de la population de la province,
(iii) on a route that starts and finishes at airports located in different provinces and each province has an English or French linguistic minority population that is equal to at least 5 per cent of the total population in the province;	(iii) soit sur un trajet dont la tête de ligne et le terminus sont des aéroports situés dans deux provinces dont chacune a une population de la minorité francophone ou anglophone représentant au moins cinq pour cent de l'ensemble de la population de la province;

[13] In addition to these legislative instruments, there is the Montreal Convention, whose relevant portions were cited by the Judge at paragraph 51 of her reasons:

> [51] The following provisions of the Convention are relevant:
>
> | CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR | CONVENTION POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL |
> | --- | --- |
> | THE STATES PARTIES TO THIS CONVENTION | LES ÉTATS PARTIES À LA PRÉSENTE CONVENTION |
> | RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law; | RECONNAISSANT l'importante contribution de la Convention pour l'unification de certaines règles relatives au transport aérien international, signée à Varsovie le 12 octobre 1929, ci-après appelée la « Convention de Varsovie » et celle d'autres instruments connexes à l'harmonisation du droit aérien international privé, |
> | RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments; | RECONNAISSANT la nécessité de moderniser et de refondre la Convention de Varsovie et les instruments connexes, |
> | RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution; | RECONNAISSANT l'importance d'assurer la protection des intérêts des consommateurs dans le transport aérien international et la nécessité d'une indemnisation équitable fondée sur le principe de réparation, |
> | REAFFIRMING the desirability of an orderly development of international air transport operations and the | RÉAFFIRMANT l'intérêt d'assurer le développement d'une exploitation ordonnée du transport aérien |

smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

. . .

Article 1 — Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two

international et un acheminement sans heurt des passagers, des bagages et des marchandises, conformément aux principes et aux objectifs de la Convention relative à l'aviation civile internationale faite à Chicago le 7 décembre 1944,

CONVAINCUS que l'adoption de mesures collectives par les États en vue d'harmoniser davantage et de codifier certaines règles régissant le transport aérien international est le meilleur moyen de réaliser un équilibre équitable des intérêts,

[…]

Article 1 — Champ d'application

1. La présente convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transport aérien.

2. Au sens de la présente convention, l'expression transport international s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est pas

points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

considéré comme international au sens de la présente convention.

. . .

[…]

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Chapitre III

Responsabilité du transporteur et étendue de l'indemnisation du préjudice

Article 17 — Death and Injury of Passengers — Damage to Baggage

Article 17 — Mort ou lésion subie par le passager — Dommage causé aux bagages

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

1. Le transporteur est responsable du préjudice survenu en cas de mort ou de lésion corporelle subie par un passager, par cela seul que l'accident qui a causé la mort ou la lésion s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement ou de débarquement.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

2. Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés, par cela seul que le fait qui a causé la destruction, la perte ou l'avarie s'est produit à bord de l'aéronef ou au cours de toute période durant laquelle le transporteur avait la garde des bagages enregistrés. Toutefois, le transporteur n'est pas responsable si et dans la mesure où le dommage résulte de la nature ou du vice propre des bagages. Dans le cas des bagages non enregistrés, notamment des effets personnels, le transporteur est responsable si le dommage résulte de sa faute ou de

	celle de ses préposés ou mandataires.
. . .	[…]
Article 18 — Damage to Cargo	*Article 18 — Dommage causé à la marchandise*
1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.	1. Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de la marchandise par cela seul que le fait qui a causé le dommage s'est produit pendant le transport aérien.
2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:	2. Toutefois, le transporteur n'est pas responsable s'il établit, et dans la mesure où il établit, que la destruction, la perte ou l'avarie de la marchandise résulte de l'un ou de plusieurs des faits suivants :
. . .	[…]
Article 19 — Delay	*Article 19 — Retard*
The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.	Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.
. . .	[…]

Article 21 — Compensation in Case of Death or Injury of Passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

. . .

Article 29 — Basis of Claims

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or

Article 21 — Indemnisation en cas de mort ou de lésion subie par le passager

1. Pour les dommages visés au paragraphe 1 de l'article 17 et ne dépassant pas 100 000 droits de tirage spéciaux par passager, le transporteur ne peut exclure ou limiter sa responsabilité.

2. Le transporteur n'est pas responsable des dommages visés au paragraphe 1 de l'article 17 dans la mesure où ils dépassent 100 000 droits de tirage spéciaux par passager, s'il prouve :

a) que le dommage n'est pas dû à la négligence ou à un autre acte ou omission préjudiciable du transporteur, de ses préposés ou de ses mandataires, ou

b) que ces dommages résultent uniquement de la négligence ou d'un autre acte ou omission préjudiciable d'un tiers.

[…]

Article 29 — Principe des recours

Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits

any other non-compensatory damages shall not be recoverable.	respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

[14] Air Canada readily concedes that it is subject to Part IV of the OLA, and in no wise disputes the objectives of that law or its quasi-constitutional status. It is also agreed that the appellant's linguistic obligations apply to "services to the travelling public as may be prescribed by regulation of the Governor in Council that are provided or made available by another person or organization pursuant to a contract" (subsection 23(2) of the OLA), in this instance Jazz, which entered into a commercial agreement with Air Canada whereby Air Canada purchases almost all of Jazz's fleet capacity at predetermined prices.

[15] In addition, as seen in its letter of apology mentioned above, Air Canada does not deny that it failed to observe its linguistic obligations with regard to the Thibodeaus on three occasions by failing to offer services in French on international flights during which the use of the French language was required (Appellant's Memorandum at paragraph 3).

A) The first issue: Does Article 29 of the Montreal Convention exclude the action in damages brought by the Thibodeaus under Part IV of the OLA for incidents having occurred during international carriage?

[16] In this case, the first issue is whether, in view of Article 29 of the Montreal Convention, the Judge erred in law in ordering Air Canada to pay damages in the amount of $4,500 to each of the

respondents for the three breaches of their linguistic rights. The interpretation of Article 29 of the Montreal Convention and its interaction with the remedial provisions of the OLA in the context of international air carriage are questions of law subject to a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paragraph 8.

[17] After expressing some hesitation as to the scope of Article 29 of the Montreal Convention, the Judge undertook to resolve the conflict of laws which, in her opinion, was raised by the application initiated by the Thibodeaus. At the end of the day, the Judge ruled in favour of the application of the OLA, resulting in the damages awarded to the Thibodeaus for the complaints concerning incidents during international carriage.

[18] Indeed, the Judge said that, at first glance, she was "tempted to accept the Commissioner's argument," also that of the Thibodeaus, that the Montreal Convention in no way limits the remedial power of the Federal Court under the OLA because

> …the Montreal Convention cannot apply in this case because it concerns situations that are totally foreign to the ambit of the OLA . . . (Reasons at paragraph 67).

[19] It is not disputed that the facts giving rise to the Thibodeaus' complaints do not fall under Articles 17 to 19 of the Montreal Convention (death and injury of passengers; damage to baggage or cargo; delay in air carriage). In addition, I note that the Thibodeaus do not argue that the incidents which gave rise to their complaints constituted "accidents" within the meaning of Article 17 of the Montreal Convention. Nor has it been disputed that Air Canada's linguistic duties are not connected

to international air carriage, that they do not stem from the Montreal Convention and further do not concern the other signatory States.

[20] That being said, the Judge did not accept the argument of the Commissioner and of the Thibodeaus. Rather, she concluded as follows:

> …that in interpreting the Montreal Convention as allowing compensation on the basis of a cause of action which is not contemplated by the Convention, I would depart from the Canadian and international case law (*ibidem* at paragraph 77).

[21] Although with "reservations," the Judge thus accepted the doctrine of this case law:

> [t]he liberal interpretation given to the Warsaw and Montreal Conventions leads me to acknowledge the very broad ambit of the Montreal Convention, which comes into play once an incident or a situation occurs during international carriage and sets out, in a limited way, the causes of action which may give rise to compensation and the compensable types of damage (*ibidem* at paragraph 75).

[22] I am in agreement with this interpretation of the Montreal Convention. My disagreement with the Federal Court's position stems from the fact that the Judge went on to conclude that there was a conflict of laws and that she was unable to harmonize the two legislative instruments, thus rejecting Air Canada's argument to the contrary. The Judge wrote:

> …it does not seem possible to me to reconcile the two instruments. If I were to conclude that subsection 77(4) of the OLA excludes the award of damages when the violation occurs during an international flight, this would weaken the OLA considerably (*ibidem* at paragraph 77).

[23] In order to resolve this apparent conflict of laws, the Judge undertook to determine which of the two instruments must prevail over the other. Citing subsection 82(1) of the OLA, which provides that, in the event of inconsistency with any Act of Parliament or regulation thereunder, the provisions of Part IV of the OLA "prevail to the extent of the inconsistency," the Judge ruled in favour of the primacy of the OLA on the basis of, on the one hand, the implicit precedence of "the remedy provisions by means of which breaches of the duties set out in Part IV of [the OLA] may be enforced" (*ibidem* at paragraph 82) and, on the other hand, of the quasi-constitutional nature of the OLA (*Viola*, above at page 386; *Lavigne*, above at paragraph 21; *DesRochers*, above at paragraph 2).

[24] With respect, my examination of the record and of the applicable law leads me to conclude otherwise. In my view, the legislative instruments, properly construed, can be harmonized. They can both be applied concurrently without producing an unreasonable result or one which fails to respect the objectives of each.

A.1) Article 29 of the Montreal Convention

[25] Although I have already stated my agreement with the Federal Court's conclusion as to the correct interpretation of Article 29 of the Montreal Convention, I feel that it is useful, at this stage, to present a brief discussion of the international and Canadian case law that the Judge cited in her reasons, and which the parties have argued before our Court. The parties have taken diametrically opposed positions, often interpreting the same case differently. Air Canada's argument, which was accepted by the Judge, correctly in my view, save for her reservation, is that the Montreal

Convention constitutes the sole remedy for a passenger against a carrier for any loss, bodily injury or property damage incurred during or arising out of international air carriage. In opposition to this, the argument advanced by the Thibodeaus and the Commissioner is that the Montreal Convention has no force except in cases where it provides for a remedy. In their submissions, if the Montreal Convention does not provide for a remedy for a loss suffered, the applicant is free to seek damages under domestic law, in this case, under the OLA.

[26] In *Sidhu v. British Airways,* [1997] 1 All ER 193 [*Sidhu*], the leading case in this field, the House of Lords addressed the purpose of Article 24 of the *Convention for the Unification of Certain Rules Relating to International Carriage By Air*, signed in Warsaw on October 12, 1929, reproduced in the *Carriage by Air Act*, Schedule I, [Warsaw Convention], the previous version of Article 29 of the Montreal Convention. The following comments are found at page 27 of that decision:

> The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate. Benefits are given to the passenger in return, but only in clearly defined circumstances to which the limits of liability set out by the Convention are to apply. To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier. Thus, the purpose is to ensure that, in all questions relating to the carrier's liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies, whether under the common law or otherwise, which may be available within the particular country where he chooses to raise his action. The carrier does not need to make provision for the risk of being subjected to such remedies, because the whole matter is regulated by the Convention.
>
> [Emphasis added.]

[27] Then, in *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 US 155 (1999) 119 S. Ct. 662, [*Tseng*], the Supreme Court of the United States followed *Sidhu*, writing ". . . recovery for a personal injury suffered 'on board [an] aircraft or in the course of any of the operations of embarking or disembarking,' . . . if not allowed under the Convention, is not available at all" (at page 161). Mr. Tseng had brought an action against the airline following an invasive security search conducted before boarding , alleging assault (without bodily injury), and false imprisonment.

[28] *Morris v. KLM Royal Dutch Airlines*, [2001] EWCA Civ 790, [2001] 3 All ER 126 and *King v. Bristow Helicopters Ltd*, [2002] UKHL 7, [2002] 2 AC 628, decide that the Warsaw Convention precludes the award of damages for mental injury not connected to bodily injury, because that cause of action is not provided for in Articles 17 to 19 of the Montreal Convention. Thus, damages for stress or anxiety could not be awarded, in view of the exclusive nature of the Convention regime.

[29] By and large, the Canadian case law is to the same effect (see *Plourde v. Service aérien FBO Inc. (Skyservice)*, 2007 QCCA 739, [2007] Q.J. No. 5307 (application for leave to appeal to the Supreme Court dismissed, [2007] S.C.C.A. No. 400); *Croteau v. Air Transat AT Inc.*, 2007 QCCA 737, [2007] J.Q. no 5296 (application for leave to appeal to the Supreme Court dismissed, [2007] S.C.C.A. No. 401); *Walton v. Mytravel Canada Holdings Inc.*, 2006 SKQB 231, [2006] S.J. No. 373; for instance, in *Lukacs v. United Airlines Inc.*, 2009 MBQB 29, [2009] M.J. No. 43, the following comment is found at paragraph 66: "[t]he Montreal Convention does not permit claims against a carrier based on domestic law").

[30] Finally, *Stott v. Thomas Cook Tour Operators Ltd. and others*, [2012] EWCA Civ 66 [*Stott*] must be considered. As that case was decided after the judgement appealed from herein was rendered, the Federal Court did not have the opportunity to benefit from its reasoning. In *Stott*, the Court of Appeal of England and Wales (Civil Division) addressed the cases of Messrs. Stott and Hook, two travellers suing their respective air carrier for damages for a lack of accommodation meeting their needs as disabled persons during international carriage. Messrs. Stott and Hook based their action on *Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air*, [2005] OJ L 204/1 [*EC Regulation*] and on the British regulation adopted under the latter (*The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations* 2007, S.I. 2007/1895 [*UK Regulation*]). While the *EC Regulation* specified that member states must provide for effective rules and penalties to discourage any infringements of the latter (Article 16), the United Kingdom regulation added that the remedy granted for a violation of the *EC Regulation* could include financial compensation for the harm suffered (article 9 of the *UK Regulation*). The Court of Appeal accepted the argument that it was to harmonize the above regulations with the Montreal Convention; yet, at the end of the day, the Court of Appeal dismissed the actions brought by Messrs. Stott and Hook:

> …, once one is within the timeline and space governed by the Convention, it is the governing instrument in international, European and domestic law. (*Stott* at paragraph 53)

[31] Thus, I cannot agree with the argument of the Thibodeaus and of the Commissioner, who submit that *Sidhu* supports their contention (Intervener's Memorandum of Fact and Law, paragraphs

19-25). Their position is accepted in a small number of isolated cases that are not really relevant in the case at bar. For example, one case held that a regulatory provision aimed at compensation and assistance to passengers in the event of major flight delay was not incompatible with the Montreal Convention because the provision "simply operates at an earlier stage than the system which results from the Montreal Convention" (*International Air Transport Association*, C-344/04, [2006] ECR I-00403, [2006] 2 CMLR 20); another case held that the alleged incidents occurred outside of the period covered by Articles 17 to 19 of the Montreal Convention, before or after the carriage period as defined in the Warsaw Convention or the Montreal Convention (*Ross v. Ryanair Ltd.*, [2004] EWCA Civ 1751, [2005] 1 WLR 2447). Finally, a few other cases included more specific discussions of the concept of "accident" within the meaning of the Warsaw Convention (*Tandon v. United Airlines*, 926 F. Supp. 366 (S.D.N.Y. 1996); *Abramson v. Japan Airlines Co.*, 739 F. 2d 130 (3rd Cir. 1984); *Walker v. Eastern Air Lines Inc.*, 775 F. Supp 111 (S.D.N.Y. 1991), see also *Naval-Torres v. Northwest Airlines Inc.*, [1998] O.J. No. 1717).

[32] I emphasize once again, the three incidents involved in this appeal occurred in the course of international carriage, which is indubitably governed by the Montreal Convention. The Thibodeaus are not arguing that the Air Canada's breaches of their linguistic rights are "accidents" within the meaning of the Convention. In addition, Air Canada does not contest the award of damages for the incident that occurred at the baggage counter of the Toronto airport, for which the Judge awarded $1,500 to each of the Thibodeaus. Air Canada agrees that damages may be awarded in relation to situations having occurred outside of the periods of international carriage covered by the Convention.

[33] In conclusion, in light of the Canadian and international case law cited above, as relevant to Article 24 of the Warsaw Convention as it is to Article 29 of the Montreal Convention, I find that the latter precludes the award of damages for causes of action not specifically provided for therein, even when the cause of action does not arise out of a risk inherent in air carriage (for example, an invasive body search before embarking (*Tseng*) or discrimination based on race (*King v. American Airlines*, 284 F. 3d 352 (2nd Cir. 2002)) or on physical disability (*Stott*)). Thus, although the Montreal Convention, like that of Warsaw, does not address all aspects of international air carriage, it constitutes a complete code as concerns the aspects of international air carriage that it expressly regulates, such as the air carrier's liability for damages, regardless of the source of this liability. The purpose of the Montreal Convention, following the example of the one preceding it (the Warsaw Convention), is to provide for consistency of certain rules regarding the liability incurred during international air carriage. The doctrine propounded by *Sidhu*, *Tseng* and *Stott* promotes this goal.

A.2) Conflict of laws

[34] As stated previously, the Judge concluded that there was a conflict of laws in this case. Considering that Part IV of the OLA governing the appellant's linguistic obligations has precedence over any incompatible provision of another law, the remedial provisions of the OLA were held to prevail over those of the Montreal Convention. Thus, the Thibodeaus were entitled to the damages sought for the three incidents occurring during the period of application of the Montreal Convention. According to the Federal Court, if it were impossible to award damages for violations of linguistic rights committed during international carriage, this "would weaken the OLA considerably" (reasons at paragraph 77).

[35] The appellant submits that the Federal Court made an error of law when it concluded that there was a conflict between the OLA and the Montreal Convention. The Judge should have first attempted to reconcile the texts. Had she done so, she would have accepted Air Canada's argument (Appellant's Memorandum of Fact and Law, paragraphs 23 et seq.). As for the Commissioner, he is rather of the view that there is no conflict of laws, since the Montreal Convention does not govern language rights. Thus, there is no need to harmonize or reconcile instruments addressing completely separate subject-matters, especially when this results in a failure to respect the intent of Parliament and a restriction of the scope of a quasi-constitutional statute such as the OLA (Commissioner's Memorandum of Fact and Law, paragraphs 12 et seq.).

[36] The Commissioner's position is based on an examination of the legislative instruments in question that ignores the context. There is no question that a side by side comparison of the OLA and of the Montreal Convention leads to the conclusion he draws. However, there is a conflict of laws [TRANSLATION] "when a given situation is connected to two or more legal regimes and it must be determined which system governs the issue or issues it poses." (Claude Emanuelli, *Droit international privé québécois*, 3rd ed., (Montréal: Wilson & Lafleur, 2011) at paragraph 378). In this case, the two legal regimes in question offer differing responses to the question at the centre of the dispute, i.e., are the Thibodeaus entitled to damages for the violation of their language rights? Under the Montreal Convention, the answer is negative if the violation occurred during international carriage. Under the OLA, the answer may be affirmative, inasmuch as the judge hearing an application under subsection 77(1) of the OLA rules that damages are a just and appropriate remedy.

[37] Air Canada correctly submits that, before concluding that legal provisions are in conflict, there should be an attempt to harmonize them, in view of the general presumption that the law is coherent:

> [TRANSLATION] 1150. […] The law, the product of the rational legislator, is deemed to be a reflection of coherent and logical thought. Interpretations consistent with the premise of legislative rationality are therefore favoured over those that are incoherent, inconsistent, illogical or paradoxical.
>
> […]
>
> 1152. […] The statute is to be read as a whole, and each of its components should fit logically into its scheme. This coherence should extend to rules contained in other legislation… Accompanying this "horizontal" consistency, a "vertical" consistency is also presumed. Enactments are deemed to fit into a hierarchy of legal norms.
>
> (Pierre-André Côté et al. *Interprétation des lois*, 4e éd. (Montréal, Thémis, 2009)) [Côté, "Interprétation des lois 2009"]

[38] This was also the approach proposed in *Stott*. The appellants Stott and Hook argued that a liberal interpretation of the Montreal Convention, or the majority interpretation, had the effect of weakening a guaranteed fundamental right protecting them against discrimination based on disability, an argument similar to the one raised by the Thibodeaus concerning the protection of their language rights (Memorandum of Fact and Law of the Thibodeaus at paragraphs 90-102). In *Stott*, the Court of Appeal (civil chamber) of the United Kingdom wrote:

> It is therefore incumbent upon us to construe EU and domestic legislation so as to avoid a conflict with the Montreal Convention. To the extent that the EC Disability Regulation permitted (but did not require) domestic compensatory remedies, and to the extent that Regulation 9 of the UK Disability Regulations provides one, it is axiomatic that they should be construed, if they can be, in a manner consistent with the Montreal Convention. This militates strongly against a conclusion that, in order to be "effective, proportionate and dissuasive" the remedial structure must embrace

> something which would bring it into conflict with the Montreal Convention. Such a conclusion would be wrong (Paragraph 50).

[39] At paragraph 51 of its decision, the Court of Appeal added that the application of the *Charter of Fundamental Rights of the European Union* would in no way alter its conclusion.

[40] Under *Stott*, the proper course is to reconcile subsection 77(4) of the OLA and Article 29 of the Montreal Convention, to the greatest possible extent:

> [TRANSLATION] 1301. It has long been recognized that statutes are not inconsistent simply because they overlap, occupy the same field or deal with the same subject matter. There is always the possibility that they complement each other. [Côté, "Interprétation des lois 2009"]

[41] Although the Thibodeaus did not specifically argue the issue of conflict of laws, they placed great emphasis on Parliament's intent to subject Air Canada to the same duties under the OLA as other federal institutions, duties which entail the award of damages in the event of a violation. Hence their argument for the precedence of the OLA. The Thibodeaus submit that Parliament's intent is revealed in the Government Response to the Seventh Report of the Standing Joint Committee on Official Languages on the provision of bilingual services at Air Canada. The Committee had recommended that the government enact a system of remedies and penalties in the event of non-compliance with the OLA. The government responded that the OLA granted courts [TRANSLATION] "the power to award damages <u>in appropriate situations</u>" (Government Response to the Seventh Report of the Standing Joint Committee on Official Languages, Appeal Book, Volume III at page 578). [Emphasis added.]

[42] The use of the words "appropriate situations" seems to me to indicate that the award of damages in the event of breach of the OLA does not always constitute the most suitable remedy.

[43] In my view, Article 29 of the Montreal Convention represents one of the circumstances a trial judge must take into account when fashioning a "just and appropriate" remedy under subsection 77(4) of the OLA; he is not supposed to view the former as an encroachment on the large remedial power granted to the courts by the latter.

[44] There is no implicit conflict of laws here. The cumulative application of the Montreal Convention and of the OLA to the circumstances of the Thibodeaus does not produce an unreasonable or absurd result (Pierre-André Côté et al., *Interprétation des lois*, 4th ed., (Montréal: Thémis, 2011) at paragraph 1312). Subsection 77(4) is flexible enough to allow an interpretation reconciling its objectives with those of Article 29 of the Montreal Convention. Such reconciliation does not in any way diminish the force of section 82 of the OLA. This approach does not deprive the Thibodeaus of all of their rights and remedies under the OLA, except that they are not entitled to compensatory or non-compensatory damages for incidents occurring during international carriage, where the Montreal Convention has full force. In addition, the appellant is at all times subject to Part IV of the OLA.

[45] It must be kept in mind that, according to the preamble to the Montreal Convention, the Member States recognized the importance of ensuring the protection of consumers' interests in international carriage by air and the need for fair relief based on the principle of compensation. It is important that these provisions be construed and interpreted in a uniform and consistent manner by

the signatory States who have endorsed collective measures harmonizing certain rules governing international air carriage (*Connaught Laboratories Ltd. v. British Airways* (2002) 61 O.R. (3d) 204 (Ont.S.C.) affirmed on appeal by (2005) 77 O.R. (3d) 34 (C.A.)). Even the slightest "bending" of Article 29 of the Montreal Convention will impair the objectives of the Convention.

[46] It must also be recalled that the award of damages is not the sole possible remedy where there is a violation of a right (*Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 at paragraph 21), even if the right is constitutional or quasi-constitutional in nature. Since the parties did not present arguments as to other possible remedies in the case, I will refrain from discussing them, except to state that, at the hearing, the appellant's counsel acknowledged that Air Canada's arguments would have been different if the Federal Court had awarded the Thibodeaus a lump sum as damages for all of the incidents. There has also been no definitive response as to whether the remedy could have taken the form of a gift to an organization defending minority language rights, a type of relief often awarded by consent or in a criminal context. This Court may, someday, have the opportunity to address these issues.

[47] At the hearing of this appeal, the Thibodeaus firmly submitted that damages are the sole effective deterrent for the appellant's violation of language rights, in the context of international carriage; otherwise, the appellant will feel free to disregard the rights of Francophones, since it will merely be exposed to the obligation of writing a letter of apology to the affected passengers a few months later. This is a very legitimate concern, but the judicial remedies and subsection 77(4) of the OLA are not the only avenue accepted by Parliament to bring to order any offender who does not take seriously the rights and obligations enshrined by this law.

[48] Indeed, section 58 of the OLA grants the Commissioner the power to investigate complaints

> arising from any act or omission to the effect that, in any particular instance or case,
> (a) the status of an official language was not or is not being recognized,
> (b) any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being complied with, or
> (c) the spirit and intent of this Act was not or is not being complied with in the administration of the affairs of any federal institution.

[49] In this case, some of the Thibodeaus' complaints were immediately excluded by the Commissioner (affidavit of Mr. Thibodeau, Exhibits 7, 8 and 9, Appeal Book, Volume II at pages 282-288), while others were found to be justified, including those regarding the three incidents which concern us most, and the one for which Air Canada agreed to pay damages (affidavit of Mr. Thibodeau, Exhibits 10 and 11, *ibidem* at pages 290-294). The Commissioner's investigation reports show that the files pertaining to the four justified complaints were closed following the adoption, by Air Canada, of remedial measures in response to his intervention (*ibidem*). Thus, the Commissioner stated that he was confident that the training Air Canada offered to its employees on the active offer of bilingual service would help unilingual employees to better serve the public in both official languages (*ibidem* at page 290), and also noted that the entire staff of the Air Canada baggage counter at the Ottawa airport was bilingual, with the exception of two employees (*ibidem* at page 293).

[50] In addition, in parallel with the legal action brought by the Thibodeaus, the Commissioner in 2010 initiated an audit of Air Canada. In September 2011, following the judgment appealed from, this audit resulted in a report entitled *Audit of Service Delivery in English and French to Air Canada Passengers*. Counsel of Air Canada discussed this report during the hearing of this appeal.

Appendix B of this report lists 12 recommendations to enable Air Canada to improve its delivery of bilingual services. It should be noted that in Appendix C of the report, the Commissioner compares his recommendations to the action plan provided by Air Canada. He declares that he is satisfied with the appellant's follow-up to the report, except as to the eleventh recommendation, which has no impact on this dispute.

[51] In addition, under section 63 of the OLA, after carrying out an investigation, the Commissioner issues a report with reasons to the Treasury Board if he believes that such follow-up is necessary, that other acts or regulations should be reconsidered, or that any other action should be taken. Similarly, he can also send his report and the list of his recommendations to the Governor in Council (subsection 65(1) of the OLA). The Governor in Council can then take the necessary actions in relation to the report and the recommendations it contains (subsection 65(2) of the OLA). Finally, subsection 65(3) provides that the Commissioner may submit his investigation report to Parliament when appropriate action has not been taken thereon.

[52] It goes without saying, then, that the Commissioner can use the process set out in sections 63 and 65 of the OLA in the event that the appellant does not implement his recommendations. The Commissioner may also, depending on the case, apply for the section 77 remedy (see section 78 of the OLA).

[53] In conclusion, on this issue, I am of the view that the judgment under appeal is vitiated by an error of law. The Federal Court could not award damages for the three incidents that occurred during international carriage.

B) The second issue: Was the Judge entitled to issue a general order against Air Canada to comply with Part IV of the OLA dealing with the obligations of federal institutions in the area of communication with the public and provision of services?

[54] In an appeal with respect to remedies, our Court will not intervene except in the case of error of law (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 [*Doucet-Boudreau*]). I am of the opinion that the Federal Court's judgment on this issue is vitiated by an error of law. The Federal Court, referring to subsection 10(2) of the OLA (above at paragraph 12 of these reasons), which provides that the appellant "has the duty to ensure" (in French: "est tenu de veiller") that clients can communicate with it in either official language, concluded that this obligation requires "Air Canada to make every reasonable effort to fulfill its duties" (reasons at paragraph 144). This led to the general order requiring Air Canada to "make every reasonable effort to comply with all of its duties under Part IV of the [OLA]."

[55] The law in itself constitutes an injunction directed at those on whom duties are imposed. While it is true that the appellant cannot hide behind the general principle of exhaustion of remedies provided for by the OLA "to buy the right to break the law repeatedly with no further consequences" (*Pharmascience Inc. v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513 at paragraph 55), it remains that a general order to comply with the law, in whole or in part, should be granted only in exceptional circumstances, for example, in the event that a party announces that it intends to deliberately break the law or breaks it with impunity without regard for its duties and the rights of others (*Métromédia CMR Inc. v. Tétreault*, [1994] R.J.Q. 777, [1994] J.Q. no 2785 (C.A.Q.) at pages 23-24).

[56] In this case, the order, as drafted, is not precise enough. Under it, Air Canada may be held in contempt of court, in addition to being exposed to the remedies provided for under the OLA:

> Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.
>
> (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612 at paragraph 24)

[57] In my view, the orders issued in *Doucet-Boudreau* and *Quigley v. Canada, (House of Commons)*, 2002 FCT 645, [2003] 1 F.C. 132 (F.C.) [*Quigley*], to which the Commissioner refers to support the wording of the order in this case, are more precise and adhere more closely to the principle of specificity discussed hereinabove. Thus, in *Doucet-Boudreau* at paragraph 7, the order read as follows:

> 3. In Île Madame-Arichat (Petit-de-Grat), the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades 9 through 12 by September 2000 and the Respondent Department of Education shall use its best efforts (a) to provide a homogeneous French facility (on an interim basis) for grades 9 through 12 by September 2000 and (b) to provide a permanent homogeneous French facility by January 2001.
>
> 4. In Argyle, the Respondent CSAP shall use its best efforts to provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall provide a homogeneous French facility for grades Primary through 12 by September 2001.
>
> 5. In Clare, the Respondent CSAP shall provide a homogeneous French program for grades Primary through 12 by September 2000 and the Respondent Department of Education shall take immediate steps to provide homogeneous French facilities for grades Primary through 12 by September 2001.

[58] In *Quigley* at paragraph 60, the formal judgment read as follows:

> IT IS ORDERED that:
>
> A declaration will issue that the current method of the respondents, Canada (House of Commons) and Canada (Board of Internal Economy) for providing television broadcasts of parliamentary proceedings contravenes section 25 of the Act.
>
> The above named respondents shall, within one year of the date of this decision, take the necessary steps to bring its practices into compliance with section 25 of the Act.

[59] In both cases, the respondents were able to know exactly what was expected of them, while having a certain amount of latitude in the choice of the method used to achieve the result ordered. However, this case is fundamentally different, in that Part IV of the OLA encompasses all communications with the public by Air Canada and its subcontractors, whether on board airplanes, in airports or call centres, both in Canada and abroad. These are continuous obligations, which Air Canada meets essentially through its bilingual staff which is responsible for interacting with the public at about 161 500 000 points of contact per year (affidavit of Chantal Dugas, General Manager, Linguistic Affairs at Air Canada, Appeal Book, Volume V, page 917 at paragraph 72).

[60] The order, as drafted, would have to be interpreted by the court hearing contempt of court proceedings. In such a case, the order would not be able to remedy the harm (*Picard v. Johnson & Higgins Willis Faber Ltée*, [1988] R.J.Q. 235, [1987] J.Q. no 2099 (C.A.Q.) at page 239; Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aurora, Ont.: Canada Law Book, 1992) at paragraph 1.410). The court would have to address the meaning of the words "reasonable efforts" both qualitatively and quantitatively. Even when read in the context of the institutional order

accompanying it, whose interpretation presents challenges which I will discuss below, the general order is still vague and lacking in specificity.

C) The third issue: Was the Judge entitled to issue a structural order against Air Canada?

[61] The Federal Court issued a structural order, having concluded that there was a systemic problem at Air Canada. To reach this conclusion, it used, in particular, the content of previous annual reports of the Commissioner, and his investigation reports concerning similar complaints filed by third parties. Air Canada argues that the Federal Court could not admit this evidence on the basis of section 79 of the OLA. This section reads as follows:

Evidence relating to similar complaint **79.** In proceedings under this Part relating to a complaint against a federal institution, the Court may admit as evidence information relating to any similar complaint under this Act in respect of the same federal institution.	Preuve — plainte de même nature **79.** Sont recevables en preuve dans les recours les renseignements portant sur des plaintes de même nature concernant une même institution fédérale.

[62] Air Canada contends that the legislative history of this section, in particular, the parliamentary debates, shows that section 79 of the OLA [TRANSLATION] "is solely intended to permit the Commissioner himself to group various complaints into a single procedure before the Federal Court" (Appellant's Memorandum of Fact and Law at paragraph 87). According to the appellant, the Judge could not allow the Thibodeaus, as private parties, to submit this evidence and

thus to argue on behalf of others, without establishing the merits of the complaints made by third parties. The appellant adds that if this practice were permitted, a federal institution would risk being sanctioned several times for the same violation, since complainants could, one by one, simply repeat all of the complaints previously filed against the targeted institution. In the same breath, Air Canada argues that the Thibodeaus do not have standing to act on behalf of the public interest and seek an institutional order. At any rate, Air Canada adds, an institutional order cannot be rendered against a private party. This is an extraordinary public law remedy intended to protect the constitutional rights of citizens against the Executive Branch when the latter refuses, or is unable to take measures to ensure that these rights are respected (*ibidem* at paragraph 95).

[63] It will not be necessary to discuss these preliminary objections. Assuming, for the purposes of this appeal, that the Judge could have, under section 79, admitted evidence of complaints by third parties, and that the Thibodeaus have public interest standing to seek the remedies already discussed, I am of the view that the structural order issued by the Federal Court is not justified in the light of the evidence on the record. It cannot stand because, among other things, it is imprecise and disproportionate with regard to the prejudice suffered by the Thibodeaus.

[64] The portion of the institutional order issued by the Judge orders Air Canada 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 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;

[65] The Supreme Court, in *Doucet-Boudreau* (at paragraphs 52-58), sets out the principles that must guide the court in determining whether a structural order is a just and appropriate remedy. These principles, applied by our Court in *Forum des maires* at paragraph 57, are as follows:

> (i) … the judge must "exercise a discretion based on his or her careful perception of the nature of the right and of the infringement, the facts of the case, and the application of the relevant legal principles". The solution that is adopted "must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied". The remedy must be effective, realistic, and adapted to the facts of the case.
>
> (ii) It must be respectful of "the relationships with and separation of functions among the legislature, the executive and the judiciary",
>
> (iii) [It must draw on] the role of the courts, which is one of "adjudicating disputes and granting remedies that address the matter of those disputes", and not leap into "the kinds of decisions and functions for which [the] design and [their] expertise are manifestly unsuited".
>
> (iv) The remedy must be "fair to the party against whom the order is made" and not "impose substantial hardships that are unrelated to securing the right".
>
> [References to paragraphs of *Doucet-Boudreau* omitted]

[66] The institutional order rendered against the appellant does not satisfy these criteria. I conclude that this part of the judgment contains an error calling for the intervention of our Court.

[67] First, I note that the evidence is vague as to the systemic nature of Air Canada's breaches of its linguistic obligations. In that respect, I believe it is relevant to reproduce here paragraph 153 of the Judge's reasons:

> [153] I therefore find that, even though Air Canada is making efforts to comply with its linguistic duties, problems persist, and both Air Canada and Jazz have not completely developed a reflex to proactively implement all the tools and procedures required to comply with their duties, to measure their actual performance in the provision of services in French and to set improvement objectives. This finding, combined with Jazz's admission that it still has difficulty complying with all its duties, leads me to conclude that there is a systemic problem at Air Canada. However, my conclusion should not be understood as being a finding that there is a general problem within the organization. I do mean a "systemic problem", as opposed to one-off or isolated problems that are out of Air Canada's control. I recognize that it is impossible to be perfect, and despite all efforts, there are always likely to be flaws. It is my view, however, that the breaches in question cannot be characterized as being isolated or out of Air Canada's control. In fact, Air Canada itself does not seem to know how often it fails in its duties. As is noted in *Fédération Franco-Ténoise*, at para 862, "[f]urther, it is difficult for the [Government of the Northwest Territories] to maintain that it "is doing its best", in the absence of a regular, well established process for auditing the available services." I find that at Air Canada, and particularly at Jazz, there are procedures that are likely to create situations in which Air Canada is unable to fulfill all its language rights duties or to verify to what extent it breaches its duties.

[68] The Federal Court thus defined a systemic problem as being one which is neither isolated, nor one-off, nor out of the appellant's control. In *Fédération Franco-Ténoise v. Canada (Attorney General)*, 2008 NWTCA 06, [2008] N.W.T.J. No. 46 at paragraph 73, it was stressed that "[s]ystemic breaches of any right are repetitive and will often involve hundreds, if not thousands, of allegations of the failure to respect the underlying right." In that case, "[t]he evidence [had] disclosed pervasive systematic breaching of minority language rights by myriad GNWT departments and offices, that, under the OLA, were required to provide services in French." The Court even went so far as to describe the breaches as innumerable (see paragraph 86).

[69] Our Court recently addressed allegations of systemic discrimination in *Canada (Attorney General) v. Jodhan*, 2012 FCA 161 [*Jodhan FCA*] commenting on the quality of evidence required in that kind of case. It was decided that the conclusions of the trial judge as to the systemic nature of the discrimination against Ms. Jodhan had to be upheld, because they rested on very substantial evidence, consisting of several internal and external reports confirming the inaccessibility of government websites to the blind. In *Jodhan FCA*, our Court concluded that the trial judge (*Jodhan v. Canada (Attorney General)*, 2010 FC 1197, [2011] 2 F.C.R. 355 [*Jodhan FC*]) had before him a wealth of evidence in the form of an internal audit conducted by the Common Look and Feel Office showing that the websites of 47 federal government agencies were not in compliance with accessibility standards for the blind (*ibidem* at paragraph 28), two external audits conducted by the Coopérative AccessibilitéWeb and by the Alliance for Equality of Blind Canadians identifying numerous gaps in compliance with accessibility standards (*ibidem*), and a series of reports on electronic passes noting 254 locations where the electronic pass did not comply with accessibility requirements (*ibidem* at paragraph 29). In addition, the testimonial evidence included the affidavit of Mrs. Jodhan, explaining, supported by five concrete examples, the difficulties she encountered when attempting to access online government services (*ibidem* at paragraphs 30-43), as well as the testimony of the first vice-president of the Alliance for Equality of Blind Canadians and of an Internet accessibility expert. The trial judge had also admitted the evidence by affidavit of two expert witnesses and the testimony of ten government employees relative to government websites (*ibidem* at paragraphs 49-74). Thus, this Court did not hesitate to reject the Attorney General's argument that "…the various reports and audits before the judge [fell] short of being able to support the judge's broad ranging conclusions." (*Jodhan FCA* at paragraph 92).

[70] The evidence in this case is not such that it can be described as substantial. On the one hand, the Judge's conclusions as to the nature of the systemic problems at Air Canada are equivocal. She recognizes the non-negligible efforts made by Air Canada and Jazz, which invest significant sums to ensure compliance with their linguistic duties and to improve their employees' language skills despite the difficulties connected to Canada's geographic and linguistic disparities, which complicate the hiring of bilingual personnel in some regions. On the other hand, she emphasizes that the situation is not perfect, that corrections were made to Jazz's personnel assignment system only after the complaints were filed by the Thibodeaus, and that Jazz had acknowledged that it was not always able to assign bilingual personnel to certain flights with significant demand.

[71] In addition, and still assuming for the sake of argument that complaints by third parties are admissible under section 79 of the OLA, I would point out that, for most of these complaints, the files were closed by the Commissioner, which makes it difficult to evaluate them because of the appellant's inability to challenge their validity. The Commissioner's reports filed in evidence essentially consist of statistics concerning complaints made, and do not really give us information on their content. The affidavits filed by Air Canada set out the challenges posed by the implementation of the OLA at Air Canada and at Jazz, but they also present a series of corrective measures and substantial improvements in the bilingual ability of the companies' personnel.

[72] The affidavit of Chantal Dugas establishes that the number of complaints regarding service in French involves only 0.000033% of the situations where the appellant's employees may be in contact with members of the public (Appeal Book, Volume V at pages 917-918).

[73] As a percentage, 61% of Jazz's flight attendants are able to provide services in French, and this company is now able to offer services in French for all flights with significant demand from or to Quebec, Ontario and the Maritimes (affidavit of Manon Stuart, Manager, Corporate Communications at Jazz, *ibidem*, pages 896-897 at paragraphs 33 and 36). Air Canada is also able to assign bilingual flight attendants to all flights with significant demand for services in French (affidavit of Chantal Dugas, *ibidem*, page 914 at paragraph 54). Finally, Air Canada, proposed measures to implement 11 of the 12 recommendations formulated by the Commissioner at the end of his audit. All corrective actions taken since the filing of the application and known at the time of the hearing before the Federal Court should be taken into consideration in the determination of the appropriate and just remedy (*DesRochers* at paragraph 37).

[74] In my view, this evidence does not support the Judge's finding that there are systemic problems at Air Canada. With respect, I am thus of the view that the structural order granted was not supported by a careful assessment of the facts and the application of relevant legal principles, constituting a serious error in itself. In the alternative, I am also of the opinion that a structural order is not a solution that is effective, realistic, and adapted to the facts of the case because, as I stated previously, it is imprecise and disproportionate in relation to the prejudice suffered by the Thibodeaus. In this case, we are not witnessing countless violations, occurring almost deliberately, or which the appellant perpetuates in the course of its activities. The order exceeds the normal role of courts, which is to resolve disputes.

[75] By ordering Air Canada 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 … particularly by introducing a procedure to identify and document occasions on which Jazz…" does not assign bilingual flight attendants on flights on which there is significant demand for services in French, the Federal Court assumed a role for which it does not have the necessary expertise. [Emphasis added.] As the appellant argues, a monitoring system may take very different forms depending on the corporate organization, all the more so in cases where an independent business partner is involved, pursuant to a contract. Which system would meet the Court's expectations? And how will this improve the delivery of bilingual services by Air Canada or its partners? I do not see in the record any solid evidence of the relevance and utility of such an order.

[76] The imprecise wording of the order leads me once again to expect that its implementation would be problematic for the appellant, and for any court called to intervene in the event of a future dispute. Nothing in the record reveals what a proper and quick monitoring system is. The use of the word "particularly" shows that the assignment of bilingual flight attendants by Jazz is only one of the elements which call for action on the part of the appellant. What are the other elements? By encompassing the obligations set out in Part IV of the OLA, the order concerns not only in-flight services, but services offered at the various sales and baggage check-in counters, call centres, etc. The scope of the order goes much further than what is necessary to remedy the violation of the Thibodeaus' language rights.

[77] Consequently, for all of these reasons, I am also of the view that this third ground for appeal must be accepted. That being said, however, I acknowledge, just as the Judge did at paragraph 88 of her reasons that the Thibodeaus take to heart their language rights, which "are clearly very

important to them". They had alleged, before the Federal Court that the violation of their language rights had caused them moral prejudice, pain and suffering and loss of enjoyment of their vacation. However, section 29 of the Montreal Convention does not provide for compensation of these types of claims in the context of international carriage.

[78] In addition, the Judge had concluded that the award of damages would serve "the purpose of emphasizing the importance of the rights at issue and will have a deterrent effect" (*ibidem*). My conclusion is based on my interpretation of Article 29 of the Montreal Convention and its interaction with the remedial provisions of the OLA. This is in no way a question of weakening the language rights protected by the OLA, of challenging the importance of the latter or of discounting the gravity of the violations reported by the Thibodeaus, which Air Canada acknowledges. As for the Judge's objective of deterrence, I believe that it is well served by the part of her judgment which remains unchanged, since it is not appealed from. In my view, the multi-faceted legal declaration against Air Canada, the letter of apology and the damages for the incident occurring inside the Toronto airport on May 12, 2009 constitute a just and appropriate remedy in the circumstances.

Costs

[79] The respondents, invoking section 81 of the OLA, are asking to be awarded costs in this case, even if they are not successful in the result.

[80] Subsection 81(2) of the OLA reads as follows:

Where the Court is of the opinion that an application under section 77 has	Cependant, dans les cas où il estime que l'objet du recours a soulevé un

raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.	principe important et nouveau quant à la présente loi, le tribunal accorde les frais et dépens à l'auteur du recours, même s'il est débouté.

[81] As previously stated, in issue in this appeal was the interaction of the OLA and the Montreal Convention, an important and novel question.

[82] At the hearing of this appeal, Mr. Thibodeau stated that he and his wife had spent about 60 hours on these proceedings (50 for Mr. Thibodeau and 10 for Ms. Thibodeau). Their expenses amounted to $235.

[83] Having examined all the relevant factors, I am of the view that they should be awarded costs, in the amount of $1,500, including disbursements, *i.e.*, $1, 250 for Michel Thibodeau and $250 for Lynda Thibodeau.

Conclusion

[84] In conclusion, I propose to allow the appeal and to award costs to the respondents, in the amount of $1 500, including disbursements, ie., $1,250 for Michel Thibodeau and $250 for Lynda Thibodeau and to quash part of the judgment of the Federal Court, such that it will read henceforth as follows:

JUDGMENT

THE COURT ALLOWS, IN PART, this application:

DECLARES that Air Canada breached its duties under Part IV of the *Official Languages Act*. More specifically, Air Canada breached its duties by:

- failing to offer services in French on board (Jazz-operated) flight AC8627, a flight on which there is significant demand for services in French, on January 23, 2009;
- failing to translate into French an announcement made in English by the pilot who was the captain of (Jazz-operated) flight AC8622 on February 1, 2009;
- failing to offer service in French on board (Jazz-operated) flight AC7923, a flight on which there is significant demand for services in French, on May 12, 2009;
- making a passenger announcement regarding baggage collection at the Toronto airport on May 12, 2009, in English only.

ORDERS Air Canada to:

- 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;
- pay the amount of $1,500 in damages to each of the applicants;
- pay the applicants the total amount of $6,982.19 in costs, including the disbursements.

"Johanne Trudel"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	PELLETIER J.A. GAUTHIER J.A.
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APPEARANCES:

Louise-Hélène Sénécal David Rhéault	FOR THE APPELLANT
Michel Thibodeau Lynda Thibodeau	ON THEIR OWN BEHALF
Pascale Giguère Kevin Shaar	FOR THE INTERVENER

SOLICITORS OF RECORD:

Air Canada Centre Law Branch (1276) Dorval, Quebec	FOR THE APPELLANT
Office of the Commissioner of Official Languages Legal Affairs Branch Ottawa, Ontario	FOR THE INTERVENER