Federal Court  Cour fédérale

Date : 20110713

Dockets: T-450-10
T-451-10

Citation: 2011 FC 876

[REVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 13, 2011

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

MICHEL THIBODEAU and LYNDA THIBODEAU

Applicants

and

AIR CANADA

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES

Intervener

REASONS FOR JUDGMENT AND JUDGMENT

TABLE OF CONTENTS

[1] This is an application made under subsection 77(1) of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA).

[2] Michel Thibodeau and Lynda Thibodeau ("the applicants" or "Mr. and Ms. Thibodeau") submit that the respondent, Air Canada, failed to fulfill its duties or obligations under Part IV of the OLA to ensure them services in French, and are seeking damages in relief. They also submit that Air Canada's breaches of its official languages duties are systemic; therefore, they are asking the Court to make institutional orders against Air Canada and to order it to pay exemplary and punitive damages.

[3] The applicants have made separate applications, which were joined by an order of Prothonotary Aronovitch, dated May 5, 2010. Furthermore, it was agreed at the hearing that only Mr. Thibodeau would make representations, which would be entered in the file of his spouse, Ms. Thibodeau.

I. Issues

[4] This application raises the following issues:

A. *Did Air Canada breach its linguistic duties towards the applicants?*

B. *What remedies are appropriate and just in the circumstances?*

(1) Is it appropriate and just to award damages to the applicants?

(2) Is it appropriate and just to make institutional orders against Air Canada?

(3) Is it appropriate and just to award exemplary and punitive damages?

II. Facts and legislative framework

[5] This application was filed after each applicant had filed eight complaints with the Commissioner of Official Languages (the Commissioner) regarding the services they received from Air Canada on two trips they made between January and May 2009. The applicants claimed that on various occasions, at the Atlanta, Ottawa and Toronto airports and aboard three flights between Canada and the United States, they did not receive the services in French to which they were entitled.

[6] To properly grasp the nature of this dispute, it is useful to identify the legislation applicable to Air Canada with regard to language rights.

[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); *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; *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*, R.S.C. 1985, c. 35 (4th Supp.) (ACPPA) 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.	10. (1) L*a Loi sur les langues officielles* s'applique à la Société.
Duty re subsidiaries	Communication avec les voyageurs
(2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation,	(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

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.	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	Droits en matière de 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.	**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.
Where communications and services must be in both official languages	Langues des communications et services
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	**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, pour l'application de la présente partie, tous autres lieux où ces
(*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.

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:

(2) For the purposes of subsection 23(1) of the Act,	(2) Pour l'application du paragraphe 23(1) de la Loi,

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 percent of the demand from the travelling public for services is in that language.

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 circonstances 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] Air Canada acknowledges that it is subject to the OLA and that, under section 25 of the OLA, it is responsible for the services provided by Jazz, with which it has a capacity purchase agreement.[1] The flights identified as those on which there is significant demand for services in French because at least 5 percent of the travelling public on that route requests service in that language are determined by surveys conducted every three years by Air Canada under the Treasury Board's supervision.

[14] The alleged breaches of Air Canada's language duties, which led to this dispute, occurred on two trips made by the applicants, which involved routes between Canada and the United States. The applicants made a first round trip between Ottawa and Atlanta, Georgia, with the following flight itineraries:

[1] Air Canada purchases substantially all of the seat capacity of Jazz, which is essentially a contract carrier for Air Canada. Jazz resulted from the consolidation of regional carriers that were subsidiaries of Air Canada. In 2001, the regional carriers Air BC, Air Nova, Air Ontario and Canadian Regional came together to form Air Canada Regional Inc.,

DATE	FLIGHT	ORIGIN	DESTINATION
January 23, 2009	AC457	Ottawa	Toronto
January 23, 2009	AC8627	Toronto	Atlanta

DATE	FLIGHT	ORIGIN	DESTINATION
February 1, 2009	AC8622	Atlanta	Toronto
February 1, 2009	AC484	Toronto	Ottawa

[15] The applicants submit that, on five occasions on this trip, Air Canada breached its duty to provide services in French to them:

- No services in French on board (Jazz-operated) flight AC8627 flying the Toronto-Atlanta route on January 23, 2009;
- No services in French at the check-in counter for (Jazz-operated) flight AC8622 at the Atlanta airport on February 1, 2009;
- No services in French at the boarding gate for (Jazz operated) flight AC8622 at the Atlanta airport on February 1, 2009;
- No services in French on board flight AC8622 flying the Atlanta-Toronto route on February 1, 2009;
- Announcement to passengers made in English only regarding a change of baggage carousel at the Ottawa airport on February 1, 2009.

---

a subsidiary of Air Canada. In 2002, Air Canada Regional Inc. became Air Canada Jazz. In February 2006, Jazz became a public corporation.

[16] The applicants made a second trip, a round trip between Toronto and St. Maarten with a connection in Philadelphia on the departing flight and in Charlotte, North Carolina, on the returning flight.

DATE	FLIGHT	ORIGIN	DESTINATION
May 2, 2009	AC7916	Toronto	Philadelphia
May 3, 2009	US1209	Philadelphia	St. Maarten

DATE	FLIGHT	ORIGIN	DESTINATION
May 11, 2009	US1556	St. Maarten	Charlotte
May 12, 2009	AC7923	Charlotte	Toronto

[17] The applicants submit that, on two occasions on this trip, Air Canada breached its duty to ensure that they received services in French:

- No services in French on board (Jazz-operated) flight AC7923 flying the route from Charlotte to Toronto on May 12, 2009;
- Announcement to passengers regarding baggage collection at the Toronto airport on May 12, 2009, made in English only.

[18] The applicants filed a complaint with the Commissioner regarding each of these incidents.

[19] The Commissioner plays an important role in official languages protection. Its mandate is set out at section 56 of the OLA:

56. (1) It is the duty of the Commissioner to take all	**56.** (1) Il incombe au commissaire de prendre, dans le

actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.	cadre de sa compétence, toutes les mesures visant à assurer la reconnaissance du statut de chacune des langues officielles et à faire respecter l'esprit de la présente loi et l'intention du législateur en ce qui touche l'administration des affaires des institutions fédérales, et notamment la promotion du français et de l'anglais dans la société canadienne.

[20] Section 58 of the OLA gives the Commissioner the authority to investigate any complaint regarding an act or omission to the effect that, in any particular instance or case, the status of an official language was not or is not being recognized, 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 the spirit and intent of the OLA was not or is not being complied with.

[21] Upon completion of his investigation, the Commissioner may report his or her opinion and the reasons therefore and make such recommendations as he or she sees fit (sections 63 and 64). However, the Commissioner does not have the authority to award remedies.

[22] In this case, the Commissioner did not accept the complaints as to the absence of services in French at the Air Canada check-in counter and gate at the Atlanta airport because it was not an airport where there is significant demand requiring the provision of services in French. The Commissioner also did not accept the complaint regarding the announcement made to passengers at the Ottawa airport because the Commissioner was of the opinion that he could not confirm whether

Air Canada had committed the impugned acts. However, the Commissioner did confirm that the other complaints filed by the applicants had merit.

[23] According to subsection 77(1) of the OLA, a remedy is available to any person who has made a complaint to the Commissioner in respect of a right or duty provided by various provisions of the OLA, including the sections under Part IV:

77. (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.	77. (1) Quiconque a saisi le commissaire d'une plainte visant une obligation ou un droit prévus aux articles 4 à 7 et 10 à 13 ou aux parties IV, V, ou VII, ou fondée sur l'article 91, peut former un recours devant le tribunal sous le régime de la présente partie.

[24] Section 76 specifies that the Federal Court has jurisdiction to hear this application.

[25] After the Commissioner's report was filed, the applicants made this application.

[26] Subsection 77(4) of the OLA gives the Court jurisdiction to grant a remedy.

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.	(4) Le tribunal peut, s'il estime qu'une institution fédérale ne s'est pas conformée à la présente loi, accorder la réparation qu'il estime convenable et juste eu égard aux circonstances.

[27] Under subsection 78(1) of the OLA, the Commissioner has the power to apply to the Court for a remedy after carrying out an investigation on a complaint. The Commissioner may also apply for leave to intervene in proceedings (subsection 78(3)). In this case, the Commissioner applied for, and was granted, intervener status.

[28] In *Forum des Maires de la Péninsule Acadienne v Canada (Canadian Food Inspection Agency)*, 2004 FCA 263, [2004] 4 FCR 276 [*Forum des maires*],[2] the Federal Court of Appeal discussed the respective mandates of the Commissioner and the Court and the nature of the remedy provided for by section 77 of the OLA. Justice Décary, writing for the Court, made the following comments:

> 16 The Commissioner, it is important to keep in mind, is not a tribunal. She does not, strictly speaking, render a decision; she receives complaints, she conducts an inquiry, and she makes a report that she may accompany with recommendations (subsections 63(1), 63(3)). If the federal institution in question does not implement the report or the recommendations, the Commissioner may lodge a complaint with the Governor in Council (subsection 65(1)) and, if the latter does not take action either, the Commissioner may lodge a complaint with Parliament (subsection 65(3)). The remedy, at that level, is political.
>
> 17 However, to ensure that the *Official Languages Act* has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned to unceasing battles with no guarantees at the political level alone, Parliament has created a "remedy" in the Federal Court that the Commissioner herself (section 78) or the complainant (section 77) may use. This remedy, the scope of which I will examine later, is designed to verify the merits of the complaint, not the merits of the Commissioner's report (subsection 77(1)), and, where applicable, to secure relief that is appropriate and just in the circumstances (subsection 77(4)).
>
> . . .

[29] In the light of the relevant enactments, I must first ascertain whether the applicants' complaints have merit and whether Air Canada breached its duty to ensure that the applicants received services in French in accordance with Part IV of the OLA. If so, I will have to decide which remedy is appropriate and just.

III. Analysis

A. *Did Air Canada breach its linguistic duties towards the applicants?*

[30] The application filed by Mr. and Ms. Thibodeau initially concerned all of the complaints they filed with the Commissioner. In the course of proceedings, Air Canada admitted certain breaches and Mr. and Ms. Thibodeau withdrew some of their allegations.[3] As such, five incidents remain at issue in this case, in respect of four of which Air Canada acknowledges having breached its duty to provide services in French. These four incidents are the following:

- No services in French on board flight AC8627 flying the Toronto-Atlanta route on January 23, 2009: Air Canada acknowledges that there was no bilingual flight attendant on this flight, although it was a flight on which there was significant demand for services in French.
- No translation of an announcement made in English by the pilot concerning the arrival time and weather on flight AC8622 flying the Atlanta-Toronto route on February 1, 2009: Air

---

[2] These comments were subsequently reiterated by the Supreme Court in *DesRochers*

[3] The withdrawn allegations concerned the complaints made regarding the services at the Air Canada check-in counter and gate at the Atlanta airport. The Commissioner concluded that the complaints were without merit because the Atlanta

Canada acknowledges that the announcement should have been translated by the flight attendant (who was bilingual) because it was a flight on which there was significant demand for services in French.

- No services in French on board flight AC7923 flying the Charlotte-Toronto route on May 12, 2009. Air Canada acknowledges that there was no bilingual flight attendant on this flight and that it was a flight on which there was significant demand for services in French.
- Announcement made in English only to passengers concerning baggage collection at the Toronto airport on May 12, 2009: Air Canada admits that this announcement should have been made in English and French because the Toronto airport is an airport where there is significant demand for services in French.

[31] Air Canada, however, denies having breached its duties with respect to the announcement made to passengers concerning a change of baggage carousel at the Ottawa airport on February 1, 2009. Air Canada denies that it was its responsibility to make those announcements and submits that the airport authority had this responsibility since the airlines did not have access to the transmission device to make those announcements themselves. That being said, Air Canada acknowledges that there is significant demand for services in French at the Ottawa airport and submits that the situation has now been corrected and that it can now make the announcements to passengers itself.

[32] The Commissioner had not admitted that complaint because he had been unable to determine, with absolute certainty, whether the airport authority or Air Canada had committed the offence. The Commissioner wrote the following in his report:

---

airport was not identified as being an airport at which there is significant demand for services in French and, therefore, Air Canada did not have a duty to provide services in French in that location.

> [TRANSLATION]
>
> . . .
>
> . . . We received confirmation from Air Canada that, since the announcement reported malfunctioning equipment, it had been made by a representative of the Ottawa Airport Authority rather than by the employees at the Air Canada baggage counter. Therefore, we informed you by letter on June 16, 2009, that responsibility for this complaint was transferred to the Ottawa Airport Authority. Our investigation of this institution showed that Air Canada is responsible for announcements concerning baggage collection. In short, from the facts garnered, we cannot determine with certainty which institution committed the offence you described. However, the investigation did reveal that neither Air Canada management at this airport nor the Ottawa Airport Authority was very well versed in their respective official language responsibilities. After our involvement in this file, we asked the Air Canada manager at the Ottawa airport and the person in charge of linguistic matters at the Ottawa Airport Authority to meet in order to clarify Air Canada's linguistic duties on airport premises.
> . . .

[33] I agree with the Commissioner; given the evidence, it is not possible to decide whether or not Air Canada breached its duties when this incident occurred.

[34] However, I conclude that, in the light of Air Canada's admissions, it did breach its duty to provide services in French four times, three times during a flight and once when making the baggage collection announcement at the Toronto airport.

[35] Having concluded that Air Canada breached its duties under the OLA, this Court must now examine its remedial power and the relief sought by the applicants.

B. *What remedy is appropriate and just in the circumstances?*

[36] The language of subsection 77(4) of the OLA and of subsection 24(1) of the Charter is the same language and the parties agree that the principles of interpretation applying to subsection 24(1) of the Charter may be usefully followed with regard to the scope of the Court's power to grant a remedy under subsection 77(4) of the OLA. In *Forum des maires,* at paragraph 56, the Federal Court of Appeal also adopted this view.

[37] In *DesRochers,* above, Justice Charron reiterated as follows, at para 31, the principles that must guide the courts in their interpretation of the provisions of the OLA devoted to language rights:

> Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras. 22, 24 and 25; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation. . . .

[38] The Supreme Court of Canada has made many pronouncements on the scope and interpretation of subsection 24(1) of the Charter. In *R v 974649 Ontario Inc.*, 2001 SCC 81, at para 18, [2001] 3 SCR 575 [*Dunedin*], the Supreme Court stated that subsection 24(1) of the Charter called for a broad and purposive interpretation, that it formed a vital part of the Charter and that it must be construed generously, in a manner that best ensures the attainment of its objects. The Court

also noted that it was a remedial provision commanding a large and liberal interpretation and reiterated that the language of subsection 24(1) of the Charter "appears to confer the widest possible discretion on a court to craft remedies for violations of *Charter* rights". The Court also emphasized the importance of interpreting subsection 24(1) so as to arrive at a full, effective and meaningful remedy. In this regard, the Court made the following remarks:

> 19 . . . If the Court's past decisions concerning s. 24(1) can be reduced to a single theme, it is that s. 24(1) must be interpreted in a manner that provides a full, effective and meaningful remedy for *Charter* violations: *Mills*, supra, at pp. 881-82 (*per* Lamer J.), p. 953 (*per* McIntyre J.); *Mooring*, supra, at paras. 50-52 (*per* Major J.). As Lamer J. observed in *Mills*, s. 24(1) "establishes the right to a remedy as the foundation stone for the effective enforcement of *Charter* rights" (p. 881). Through the provision of an enforcement mechanism, s. 24(1) "above all else ensures that the *Charter* will be a vibrant and vigorous instrument for the protection of the rights and freedoms of Canadians" (p. 881).
>
> 20 Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. . . .

[39] In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet-Boudreau*], the Supreme Court considered the nature of the remedies that are possible under subsection 24(1) of the Charter in a case where the right to education in the minority language was at issue. The trial judge had found that the government had failed to prioritize the section 23 Charter rights and had delayed complying with its duties, despite reports showing that the rate of assimilation had reached a critical level. The judge ruled that there had been a section 23 Charter violation and ordered the provincial government and the school board to make their "best efforts" to provide homogeneous French-language school facilities and programs by certain deadlines. The judge also retained jurisdiction to receive reports on the authorities' efforts. The dispute before the

Supreme Court concerned the extent of the remedial power set forth at subsection 24(1) of the Charter.

[40] The Court gave particular attention to the meaning of the words "appropriate and just in the circumstances" and stated that the determination of an appropriate and just order "calls on the judge to 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" (para 52). The Court refrained from articulating a detailed definition of this phrase but did set out a certain number of general, relevant factors. The Court made the following remarks:

> 55 First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. . . .
>
> 56 Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. . . . The essential point is that the courts must not, in making orders under s. 24(1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
>
> 57 Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the function and powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
>
> 58 Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair

> to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
>
> 59 Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[41] More recently, the Supreme Court decided in *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*] that under subsection 24(1) of the Charter, damages could be awarded for a Charter violation.

[42] The principles set out by the Supreme Court in *Doucet-Boudreau*, above, were followed by the Federal Court of Appeal with regard to the application of the OLA in *Forum des maires*. In that decision, the Federal Court of Appeal also stated that although the alleged violations must be assessed as of the time of the filing of the complaint, the appropriate relief under subsection 77(4) of the OLA must be determined in view of the situation at the time the case is heard. The Court may therefore take account of developments in the situation and the corrective measures that have been taken. In that regard, Justice Décary made the following remarks:

> 19 There are some important implications to the fact that the remedy under Part X is basically similar to an action.
>
> 20 For example, the judge hears the matter *de novo* and is not limited to the evidence provided during the Commissioner's investigation. The remedy is constantly shifting in the sense that even if the merit of the complaint is determined as it existed at the time of the alleged breach, the remedy, if there is one that is appropriate and

> just, must be adapted to the circumstances that prevail at the time when the matter is adjudicated. The remedy will vary according to whether or not the breach continues.

[43] In the light of these principles, what, then, are the just and appropriate remedies in the case at bar? The applicants are seeking a number of remedies. First, they are seeking a declaratory judgment that Air Canada breached its duties under the OLA and violated their language rights, a letter of apology and damages. The applicants also submit that Air Canada's breaches of its linguistic duties are systemic and they are asking the Court to take this element into account in determining an appropriate and just remedy. In that respect, they are asking the Court to make institutional orders against Air Canada and to order it to pay punitive and exemplary damages.

[44] Air Canada does not object to this Court's rendering a declaratory judgment to the effect that it breached its language duties towards the applicants. It also consents to give the applicants a letter of apology. Indeed, the applicants and Air Canada have submitted draft letters of apology to me. However, Air Canada objects to any further remedy and denies any systemic problems.

[45] I will deal with the remedies that are in dispute.

(1) Is it appropriate and just to award damages to the applicants?

[46] Citing *Ward*, the applicants are seeking $5,000 for each violation for a total of $25,000.[4] They are also relying on *Morten v Air Canada*, 2009 CHRT 3 (available on CanLII), in which the

[4] In that case, the violation of the claimant's constitutional rights concerned a strip search for which the trial judge had awarded $5,000. The Supreme Court considered this amount appropriate.

Canadian Human Rights Tribunal awarded $10,000 for pain and suffering resulting from an act of discrimination by Air Canada.[5]

[47] Air Canada, for its part, submits that the Court's power to award damages is limited by the Montreal Convention, which, it alleges, excludes any possibility of awarding damages for the breaches that occurred during the international flights taken by the applicants. Thus, it is submitted that the Court only has the power to award damages for the breach related to the passenger announcement at the Toronto airport.

(a) *Does the Montreal Convention limit the Court's remedial power to award damages?*

[48] The Montreal Convention is an international agreement providing for a uniform liability scheme for international air carriers and users of means of international carriage by air. The Montreal Convention's predecessor was another international agreement, the Warsaw Convention, signed by a number of countries in 1929. That agreement instituted a unified liability regime for the international carriage of passengers, baggage and cargo in lieu of the domestic law of each signatory country. Among other things, this regime subjected air carriers to a set of rules and strict liability in the event of death or bodily injury resulting from an accident occurring during international carriage, loss or theft of baggage, loss of cargo or delayed flights.

[49] The Warsaw Convention, signed by Canada, was incorporated into domestic Canadian law through the *Carriage by Air Act*, R.S.C., 1985, c. C-26. That convention was then amended a few

[5] In this matter, Air Canada had not allowed the complainant, who has visual and hearing disabilities, to travel unaccompanied.

times and, in 1999, replaced by the Montreal Convention, which came into force in November 2003. The *Carriage by Air Act* was amended in December 2001 so that Canadian authorities could ratify and adopt the Montreal Convention, which is thus an update of the Warsaw Convention. This convention maintains the principle of a uniform liability regime for air carriers, although it changes some of the conditions thereof.

[50] Like the Warsaw Convention, the Montreal Convention sets out a limited set of circumstances which can give rise to compensation.

[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	
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	RECONNAISSANT la nécessité de moderniser et de

instruments;

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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the 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

refondre la Convention de Varsovie et les instruments connexes,

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,

RÉAFFIRMANT l'intérêt d'assurer le développement d'une exploitation ordonnée du transport aérien 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

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 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.

. . .

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

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

1. The carrier is liable for damage sustained in case of

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 considéré comme international au sens de la présente convention.

[…]

Chapitre III

Responsabilité du transporteur et étendue de l'indemnisation du préjudice

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

1. Le transporteur est responsable du préjudice

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.

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

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

sustained took place during the carriage by air.

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:

. . .

Article 19 — Delay

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.

. . .

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

transport aérien.

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 — Retard

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 — 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

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 any other non-compensatory damages shall not be recoverable.

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 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.

[52] There is no dispute that the flights in issue in this case meet the definition of "international carriage" set out in the Montreal Convention, since they were flights between Canada and the United States and vice versa. There is also no dispute that the damages sought by Mr. and Ms. Thibodeau cannot be related to the categories of compensable damages set out at Articles 17 to 19 of the Montreal Convention.

[53] Air Canada submits that the Montreal Convention, like the Warsaw Convention, provides for a complete international liability regime that totally displaces the signatory countries' domestic law when an event giving rise to liability occurs during international carriage. Therefore, it is submitted that the Montreal Convention applies immediately when a situation potentially giving rise to liability for an air carrier occurs during international carriage, regardless of whether the cause of action is set out in the Convention or not. If a cause of action related to an incident or event which occurs during international carriage is not set out in the Convention, it simply cannot give rise to compensation by damages.

[54] Air Canada cites Article 29 of the Montreal Convention which, in its opinion, clearly sets out the limited, exclusive liability framework for all air carriers for events which occur during international carriage. Air Canada also submits that if there were any doubt as to the scope of Article 24 of the Warsaw Convention,[6] Article 29 of the Montreal Convention, which provides that

---

[6] Article 24 of the Warsaw Convention. This provision originally read as follows:

> In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> In the cases covered by Article 17, the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

"any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise" [emphasis added], has clarified the scope of the convention and excludes any claim in damages, whatever the cause of the damage.

[55] Air Canada submits that this interpretation, upheld by Canadian and international case law, is the only one consistent with the purpose of the Convention, that is the protection of both carriers and passengers and to strike a balance, a compromise, between rights liabilities.

[56] Air Canada submits that the Court must adopt an interpretation of subsection 77(4) of the OLA that harmonizes with the Convention and that it is not appropriate and just to award damages when breaches of the OLA occur during international carriage. In support of this argument, Air Canada is relying on the principles of interpretation that there is a presumption of conformity with superior rules and with international law. Parliament is deemed, unless it clearly expresses itself otherwise, to have intended to comply with the treaty obligations of the Crown and Air Canada submits that nothing in the OLA indicates that Parliament intended to avoid its international obligations. It submits that, to the contrary, subsection 82(1) of the OLA, which lists the provisions of the OLA that prevail over incompatible provisions in any other Act, does not include subsection 77(4) of the OLA. This means that Parliament did not intend to give overriding status to the Court's remedial power under the OLA.

[57] Air Canada submits that there is an analogy between the case at bar and *Béliveau St-Jacques v Fédération des employées et employés de services publics Inc.*, [1996] 2 SCR 345 (available on

CanLII), in which the Supreme Court recognized the exclusive nature of the Quebec employment injury compensation system, which excludes claims made under the Quebec *Charter of human rights and freedoms* since the legislative intent was to set up a complete and exclusive system. Air Canada submits that this is also the case for the compensation regime set out in the Montreal Convention.

[58] The Commissioner and the applicants take issue with Air Canada's argument, but it is the Commissioner who, for the most part, made the relevant argument. The Commissioner submits that the Montreal Convention in no way limits the Court's remedial power under subsection 77(4) of the OLA.

[59] He submits, first, that there is no conflict between the Montreal Convention and the OLA, because their respective ambits are completely different. He submits that the Montreal Convention applies to international carriage by air and sets out rules of liability for specific situations bearing no relation to the OLA and that the claim and compensation mechanism "in case of death or bodily injury" resulting from an "accident" is simply not relevant with regard to the application of the OLA, which concerns the respect of Canada's official languages. The Commissioner submits that the Convention aims to establish uniform rules governing compensation: the same rules must apply in all signatory countries, for similar situations. He argues that the word "otherwise" found at Article 29 of the Montreal Convention must mean any other proceeding of the same nature. He submits that Air Canada is the only air carrier in the world that is subject to the remedy provided by the OLA and that it would be illogical to conclude that the signatory countries and Canada in

particular wanted to implicitly [TRANSLATION] “achieve uniformity” of the official language rules that apply only to Air Canada.

[60] In the alternative, the Commissioner submits that if there is a conflict between the Montreal Convention and the OLA, the latter must prevail. His argument is based on the OLA’s quasi-constitutional status and on subsection 82(1) of this statute. Contrary to Air Canada, the Commissioner submits that there was no need for subsection 82(1) of the OLA to specify that the remedy provided at Part X of the OLA must prevail; this flows implicitly from the incidental nature of the remedy. The Commissioner submits that the OLA contains two categories of provisions: the first being substantive provisions that impose duties and the second, provisions setting out procedural avenues available in the event of a breach. Parliament chose to give precedence to certain provisions imposing duties, and the remedy set out at subsection 77(1) is purely incidental in nature. The Commissioner submits that it would be absurd to assume that the Parliament legislator wanted to impose the primacy of the language rights set out at Part IV of the OLA without ensuring that those rights could be enforced by effective remedies. That would have the effect of rendering the primacy of Part IV of the OLA, set out at subsection 82(1) of that statute, illusory.

[61] For my part, I consider, on the following grounds, that there is a conflict between subsection 77(4) of the OLA and the Montreal Convention.

[62] I have already discussed the interpretation of subsection 77(4) of the OLA in the section above. It commands a broad and liberal interpretation, and damages are undeniably among the remedies available under subsection 77(4) of the OLA.

[63] Let us now examine the ambit of the Montreal Convention.

[64] The Montreal Convention was incorporated into the domestic law of Canada through the *Carriage by Air Act*, and, since it is an international agreement, it should be interpreted, in the light of the case law developed in the signatory countries, in accordance with the principles of interpretation applicable to international agreements.

[65] In their treatise on the liability of international air carriers and the Montreal Convention,[7] Stephen Dempsey and Michael Milde summarize the principles of interpretation of the Montreal Convention as follows, at pages 45 and 46:

> The 1999 Montreal Convention [M99] is an international multilateral treaty and its construction and interpretation must be governed, *inter alia*, by the international law of treaties; the law of treaties has been codified in the 1968 UN Vienna Convention on the Law of treaties. Since the fundamental provisions of the Vienna Convention codify the customary international of treaties, the Convention is, in principle, applicable, even for States that have not ratified it.
>
> The Vienna Convention on the Law of Treaties provides guidance in treaty interpretation, and effectively reaffirms much of the interpretative jurisprudence given Warsaw even prior to the Vienna Convention: . . .
>
> The provisions of the Vienna convention on the Law of treaties reflect the common national principles of the interpretation of the legal norms - grammatical interpretation (ordinary meaning of the words), logical interpretation (in the context of the legal source) and teleological interpretation (in the light of the aim and purpose of the legal source). Article 32 of the Vienna Convention recognizes also the historic interpretation (preparatory work) as a supplementary means of interpretation.

[7] Stephen Dempsey and Michael Milde, *International Air Carrier Liability, The Montreal Convention* (Centre for Research of Air & Space Law McGill University, 2005)

[66] Professor Sullivan[8] made the following observations on the interpretation of international agreements incorporated into domestic law:

> When an international convention is incorporated, in whole or in part, it acquires the status and force of domestic legislation without being changed in any way. Although it becomes part of domestic legislation, it retains its identity as an instrument of international law and thus carries its international law baggage with it. In interpreting an incorporated convention, the court appropriately applies international law principles of interpretation, looks to international law materials and relies on interpretations of the incorporated law by international courts as well as courts in other jurisdictions.

[67] At first glance, I am tempted to accept the Commissioner's argument that the Montreal Convention cannot apply in this case because it concerns situations that are totally foreign to the ambit of the OLA and is in no way concerned with breaches of that statute. The characteristic of a convention whose purpose is to achieve uniformity of liability and compensation rules is that it applies in circumstances that are likely, if they were to occur in the various signatory countries, to be governed by different legal rules and therefore lead to different results depending on where the event giving rise to liability takes place. The purpose of such a convention is to avoid inconsistencies and contradictions. Therefore, the ambit of the international convention must, in my opinion, be defined by what is common to all of the signatory countries; the aim is to avoid, with regard to certain events and situations, different legal consequences from one signatory country to the next.

[8] Ruth Sullivan, *Sullivan on the Construction of Statutes, fifth edition* (Lexis Nexis, 2008), p. 550.

[68] In *Sidhu v British Airways*, [1997] 1 All ER 193 [*Sidhu*], which is the authority on the interpretation of the Warsaw Convention, the House of Lords commented as follows on the purpose of the Convention:

> I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals—and the liability of the carrier is one of them—the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law. (p. 212)
>
> . . .
>
> . . . The conclusion must be therefore that any remedy is excluded by the Convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme. (p. 213)

[69] The purpose of the Convention was also discussed by the Supreme Court of the United States in *El Al Israel Airlines, Ltd., Petitioner v Tsui Yuan Tseng* (1999), 525 US 155, 119 S Ct 662 [*Tseng*], another leading authority on the interpretation of the Warsaw Convention and the Montreal Convention: The Court commented as follows:

> . . . The Cardinal purpose of the Warsaw Convention we have observed is to "achieve [**672] uniformity of rules governing claims arising from international air transportation . . . (p. 13)

[70] It is clear that the Montreal Convention does not impose linguistic duties . Air Canada is the only carrier subject to the OLA, and the matters that this legislation addreses are unrelated, as such,

to international carriage and also do not concern the other countries that are signatories to the Convention. Therefore, I am tempted to conclude that, given the scope of Article 29, this provision does not exclude remedies based on causes of action that are foreign to the purpose and ambit of the Convention.

[71] However, I cannot disregard the case law pertaining to the scope of the Warsaw Convention and the Montreal Convention.

[72] In *Sidhu*, above, the House of Lords adopted a very broad interpretation of Article 24 of the Warsaw Convention by excluding any possibility of compensation for grounds not set out in the Convention. In that case, passengers had instituted an action against British Airways and were seeking damages for bodily injuries and pain and suffering resulting from their having been taken hostage after the airplane on which they were travelling landed in Kuwait to refuel when the Kuwait War had just begun. The applicants were claiming that British Airways had been negligent. In its discussion of the scope of Articles 17 and 24 of the Convention, the House of Lords made the following comments, at pages 296 and 297:

> The reference in the opening words of article 24(2) to "the cases covered by article 17" does, of course, invite the question whether article 17 was intended to cover only those cases for which the carrier is liable in damages under that article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the article. In its context the purpose seems to me to be to prescribe the circumstances—that is to say, the only circumstances—in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air.
>
> The phrase "the cases covered by article 17" extends therefore to all claims made by the passenger against the carrier arising out of

> international carriage by air, other than claims for damage to his registered baggage which must be dealt with under article 18 and claims for delay which must be dealt with under article 19. The words "however founded" which appear in article 24(1) and are applied to passenger's claims by article 24(2) support this approach. 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.

[73] The Supreme Court of the United States followed that case law in deciding the scope of the Convention in *Tseng*, above. In that case, the Court ruled that a passenger could not institute an action in damages following a search to which he had been subjected in an airport because that claim did not meet the parameters of the Warsaw Convention. The US Second Circuit Court of Appeal, in *King v American Airlines*, 2002 US App Lexis 4611 (USCA 2C) (available on QL), for its part, interpreted the Convention as excluding all possibility of a remedy for discriminatory actions by the air carrier's employees when they occurred during international carriage. In *Gordon T. Carey v United Airlines*, 2001 US App. Lexis 14834 (available on QL), the US Court of Appeals for the Ninth Circuit, ruled to the same effect regarding an action in damages following an incident between a flight attendant and a passenger.

[74] The Canadian case law has been developed mainly in the context of situations in which events giving rise to liability could have been considered under the Warsaw Convention or the Montreal Convention, but in which the types of damage claimed, among others pain and suffering or psychological damage, were not compensable under the convention. By and large, the case law holds that is exclusive the compensation scheme set out under the Warsaw Convention or the scheme provided for by the Montreal Convention; it therefore excludes the exercise of all other remedies (*Simard c Air Canada*, 2007 QCCS 4452, [2007] J.Q. No. 11145; *Chau v Delta Air Lines Inc.*, 67 O.R. (3d) 108 (available on CanLII); *Plourde v Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739 (available on CanLII); *Walton v Mytravel Canada Holdings Inc.*, 2006 SKQB 231, 151 ACWS (3d) 561; *Connaught Laboratories Ltd. v British Airways*, [2002] O.J. No. 3421, 116 ACWS (3d) 322).

[75] The 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.

[76] Since I feel bound by the case law, despite my reservations, I conclude therefore that there is a conflict between the Montreal Convention and the Court's remedial power set out at subsection 77(4) of the OLA.

[77] Moreover, 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. I am also of the opinion 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.

[78] Having concluded that there is a conflict between the two instruments, I must now determine which, subsection 77(4) of the OLA or the Montreal Convention, must prevail. In his doctrinal work, Professor Pierre-André Côté[9] comments as follows:

> [TRANSLATION]
>
> . . .
>
> 1325. Because the legislature is aware of possible inconsistencies, it sometimes adopts explicit rules establishing an order of priority between different enactments.
>
> . . .
>
> 1334. If the legislator has not expressly enacted a formal hierarchy, the usual rules of interpretation are employed to determine which laws have implicitly been given precedence.
>
> . . .

[79] In this case, two instruments of higher rank and two principles of interpretation are at issue: the presumption of conformity with international law and the primacy of quasi-constitutional enactments.

[80] Professor Sullivan[10] describes these two principles as follows:

---

[9] Pierre-André Côté, *Interprétation des lois*, 4th ed. (Les éditions Thémis, 2009).
[10] Ruth Sullivan, *Sullivan on the Construction of Statutes, 5th ed.*, (Lexis Nexis, 2008), p. 550.

> ***Governing principle***. Although international law is not binding on Canadian legislatures, it is presumed that legislation enacted both federally and provincially is meant to comply with international law generally and with Canada's international law obligations in particular.
>
> . . .
>
> As these authorities indicate, there are two aspects to the presumption of compliance with international law. First, the legislature is presumed to comply with the obligations owed by Canada as a signatory of international instruments and more generally as a member of the international community, In choosing among possible interpretations, therefore, courts avoid an interpretation that would put Canada in breach of its international obligations, Second, the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, an interpretation that reflects these values and principles is preferred. [p. 538]
>
> ***Special status of human rights legislation***. Since the Supreme Court of Canada's decision in *Insurance Corporation of British Columbia c. Heerspink*, legislation enacted to protect human rights has been recognized as having a quasi-constitutional status. This has several implications.
>
> (1) Human rights legislation is given a liberal and purposive interpretation. Protected rights receive broad interpretation, while exceptions and defenses are narrowly construed.
> (2) In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adapted not only to changing social conditions but also to evolving conceptions of human rights.
> (3) In case on conflict or inconsistency with other types of legislation, the human rights legislation prevails regardless of which was enacted first. [p. 497]

[81] In this case, I am of the opinion that subsection 77(4) of the OLA must prevail over the Montreal Convention, on two main grounds.

[82] First, I am of the view that, in specifying that the provisions of Part IV (subsection 82(1) of the OLA) prevail, Parliament implicitly gave precedence to the remedy provisions by means of which breaches of the duties set out in Part IV of this statute may be enforced. I am of the opinion that there was no need for Parliament to expressly provide for the primacy of the remedy set out at subsection 77(1) because this flows from its incidental nature in respect of the rights it aims to enforce. To rule otherwise would render meaningless the primacy given to the provisions listed at subsection 82(1) of the OLA.

[83] Second, I am of the opinion that in giving precedence to subsection 77(4) of the OLA over the Montreal Convention, the Court is giving effect to the quasi-constitutional status of the OLA without violating Canada's treaty obligations. Giving precedence to the OLA results in a displacement of the Montreal Convention but, in my opinion, this does not compromise Canada's international obligations or undermine their integrity. The OLA does not apply to any other carrier subject to the Montreal Convention. Furthermore, if Air Canada is subject to the OLA, that is not due to its activities as an international carrier, but its status as an "old" federal institution. Air Canada's duties as to the official languages do not interest or concern any other signatory country of the convention. A departure from the Montreal Convention to ensure the efficacy of proceedings aimed at enforcing Air Canada's duties as to the official languages has no effect on the other signatory countries of the Convention, and does not weaken the Convention or imperil the integrity of the uniform liability regime it enshrines. In this case, this is a very minor circumvention of the Montreal Convention that has no impact on the liability of the other carriers subject to the Convention or on Canada's treaty obligations; thus, the remedy and penalties set out in the OLA receive their full effect.

(b) *Amount of damages*

[84] The applicants are seeking $5,000 each for each violation of their language rights. They are thus seeking a total of $50,000.

[85] Air Canada submits that the applicants did not suffer any compensable damage and should not be awarded damages.

[86] In *Ward*, above, the Supreme Court confirmed that damages could be granted as a remedy under subsection 24(1) of the Charter and defined a test. The first step is to establish that a Charter right has been breached. It was in this case. The applicant must then show that damages are an appropriate and just remedy having regard to the following criteria, which can have a combined effect: compensation for the loss, importance of the right at issue and deterrence. The state (Air Canada in this case) may, for its part, attempt to rebut the appropriate and just nature of the damages on various grounds, such as the availability of other remedies and good governance. If the judge rules that damages are appropriate, he or she must then determine the amount. The damages must correspond to the seriousness of the breach and the purposes of damages awarded under subsection 24(1) of the Charter.

[87] In *Montigny v Brossard (Succession)*, 2010 SCC 51 at para 34, [2010] 3 SCR 64 [*de Montigny*], the Supreme Court also held that moral prejudice could be compensated without categorizing all its various aspects.

[88] I will therefore follow these principles in this case. First, I reject Air Canada's position that the applicants have suffered no prejudice. While I agree that the prejudice they suffered is not comparable to that arising from a search for example, such as in *Ward*, yet, the applicants' language rights are clearly very important to them and the violation of their rights caused them a moral prejudice, pain and suffering and loss of enjoyment of their vacation. It is also my opinion that awarding damages in this case will serve the purpose of emphasizing the importance of the rights at issue and will have a deterrent effect.

[89] There is always some arbitrariness when it comes to determining the appropriate and just amount of damages to award. In *Fédération Franco-Ténoise v Canada (Attorney General)*, 2006 NWTSC 20 at paras 909 to 919 [2006] NWTJ No. 32 [*Fédération Franco-Ténoise*], the Supreme Court of the Northwest Territories reviewed the case law on damages awarded to compensate breaches of constitutional rights and moral damages arising from breaches of constitutional rights. The Court noted that the amounts ranged between $3,000 and $10,000 and that in some instances the amounts were essentially symbolic.

[90] In this case, having regard to the three objectives, namely compensation for the harm sustained, general recognition of the importance of the rights at issue and deterrence, I deem it appropriate and just to order that $6,000 be paid to each of the applicants, namely $1,500 for each breach.

(2) <u>Is it appropriate and just to make institutional orders against Air Canada?</u>

[91] The applicants submit that Air Canada repeatedly breached its linguistic duties over an extended period and that, therefore, the Court should make institutional orders to force Air Canada to comply with its duties. They ask that the Court order Air Canada to

- to take all the steps necessary to ensure that the public can communicate with Air Canada and receive all services from it in French, in accordance with Part IV of the OLA, section 10 of the ACPPA and the Regulations;

  And, without limiting the generality of the foregoing,

- ensure that it has an adequate bilingual capability and takes all the other steps necessary to provide services to the public in French for in-flight services on routes on which there is significant demand for services in French;
- take measures to actively offer service to the public, including making an active offer of services in French by providing signs, notices and other information on services and initiating communication with the public, in accordance with Part IV of the OLA, section 10 of the ACPPA and the Regulations;
- implement an adequate monitoring system and procedures designed to quickly identify, document and quantify potential violations of language rights, which rights are set out in Part IV of the OLA, at section 10 of the ACPPA and in the Regulations;
- ensure that language rights, as described in Part IV of the OLA, at section 10 of the ACPPA and in the Regulations, prevail over any agreement signed by Air Canada and any collective agreements that involve Air Canada.

[92] In order to prove their allegation of systemic breaches, the applicants cite section 79 of the OLA, under which the Court may admit as evidence information relating to similar complainants, is engaged.

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.	**79.** Sont recevables en preuve dans les recours les renseignements portant sur des plaintes de même nature concernant une même institution fédérale.

[93] This Court has ruled on the purpose of section 79 of the OLA on a few occasions and has determined that the purpose of this provision is to allow applicants, or the Commissioner, to argue that the OLA breaches giving rise to recourse may reveal a much larger problem and to allow the Court to consider that larger problem in its assessment of what constitutes an appropriate and just remedy. In *Canada (Commissioner of Official Languages) v Air Canada*, 77 ACWS (3d) 1166 (available on QL), Judge Dubé explained the purpose of section 79 of the OLA as follows:

> 17 This section is one of a kind and does not appear in other similar legislation. Parliament's intention is clearly to present the courts with a full context. I therefore agree with the Commissioner's position that the remedy is not limited to certain types of ground services listed in Paul Comeau's two specific complaints but may apply to all ground services provided by Air Canada at the Halifax airport.
>
> 18 In my view, the purpose of section 79 is to enable the Commissioner to prove to the Court that there is a systemic problem and that it has existed for a number of years. Unless all similar complaints are filed in evidence, the Court cannot assess the scope of the problem and the circumstances of the application.
>
> 19 It is up to the judge presiding at the hearing on the merits of the motion to assess the probative force of all these facts or all this information in the context of more general considerations. . . .

[94] These principles were reiterated by Justice Beaudry in *Thibodeau v Air Canada*, 2005 FC 1156, [2006] 2 FCR 70, [*Thibodeau 1*] and by Justice de Montigny in *Lavigne v Canada Post Corporation*, 2009 FC 756 (available on CanLII).

[95] The Federal Court of Appeal also interpreted the purpose and scope of section 79 of the OLA in *Canada (Commissioner of Official Languages) v Air Canada*, 88 ACWS (3d) 995, 240 NR 390. Judge Décary, writing on behalf of the Court, stated as follows:

> 13 The powers of the Commissioner of Official Languages are unique in that the Act expressly allows him, under section 79, in the context of a court proceeding in relation to a particular instance or case, to file "information relating to any similar complaint". The proceeding does not cease to be an individual one, in that the complaint in question is the one that is the subject matter of the proceeding, but it was Parliament's intention that the Court, which, under subsection 77(4), may "grant such remedy as it considers appropriate and just in the circumstances" (the same language that is found in subsection 24(1) of the *Canadian Charter of Rights and Freedoms*), should be able to have before it an overall view, and thus an idea of the scope of the problem, if a problem exists.
>
> . . .
>
> 16 The Act itself provides that a particular complaint may serve as the gateway into a federal institution's system as a whole. This was Parliament's intention, as a means of giving more teeth to an enactment, the *Official Languages Act*, which serves as a special tool for the recognition, affirmation and extension of the linguistic rights recognized by the *Canadian Charter of Rights and Freedoms*.

[96] In support of their allegation that Air Canada's breaches of its language duties are systemic, the applicants have adduced various documents, including the Commissioner's annual reports and, under section 79 of the OLA, investigation reports of the Commissioner relating to similar complaints, the complaints filed by two other individuals and statistics on complaints filed with the

Commissioner against Air Canada. I conclude that these documents may be admitted as evidence under section 79 of the OLA.

[97] While it denies that the breaches of its linguistic duties are systemic, Air Canada submits that the applicants lack standing to act in the public interest and allege systemic breaches and request institutional orders. Air Canada submits that the applicants only have standing for the incidents that directly concern them.

[98] I will deal with this issue first, before discussing the evidence adduced in support of the claim that the breaches are systemic.

[99] In *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 (available on CanLII), and *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 (available on CanLII), the Supreme Court confirmed that a court called to exercise its discretion to recognize an applicant's public interest standing has to consider the following three factors:

1- The applicant must raise a serious issue; in other words, there must be a real issue;

2- The applicant must have a genuine interest in the issue; and

3- There must be no other more reasonable and effective way to bring the issue before the courts.

[100] Air Canada submits that the Court should not grant the applicants standing to argue systemic breaches since it would be more effective and reasonable that such remedy be exercised by the Commissioner. Air Canada further submits that the Court should consider judicial economy and

emphasizes the Commissioner's memorandum, in which he points out that he is currently carrying out an audit for 2010–2011. Air Canada infers from this that it is not excluded that the Commissioner will institute proceedings according to the outcome of his audit and submits that, in that case, there would be multiple proceedings.

[101] For his part, the Commissioner is of the view that the applicants have as much of an interest as he to file this application and to allege systemic breaches of its duties by Air Canada. He even argues that, in the current context, it is better that it be the applicants who act in the public interest. The Commissioner stated that, in terms of the options available to him, to enforce the OLA, the judicial route, re while important, is only used as a last resort. In addition, he is currently auditing Air Canada and he is of the opinion that it is more appropriate that the applicants act both on their own behalf and in the public interest. The Commissioner insists that, in any event, he is an intervener in this case; if he himself had instituted the proceedings, he would have filed evidence of the same nature as that filed by the applicants.

[102] In *Thibodeau 1*, Justice Beaudry granted Mr. Thibodeau, who, in that case, had also instituted proceedings against Air Canada, standing to act on behalf of the public interest. The facts were similar to the ones in the case at bar: Mr. Thibodeau had filed an application against Air Canada in which he alleged that Air Canada and one of its subsidiaries, Air Ontario, had failed to comply with their duties under the OLA. As in the present case, Mr. Thibodeau alleged that Air Canada's breaches were systemic and asked the Court to make similar orders as those sought in the present case. As in this instance, Air Canada argued that Mr. Thibodeau lacked standing to act on behalf of the public and that the Commissioner was in a better position in that respect.

[103] Following the *Finlay* criteria, Justice Beaudry exercised his discretion and granted Mr. Thibodeau standing on behalf of the public interest:

> [79] In this case there is no doubt that the applicant raises a serious question and that he has a genuine interest in the subject-matter of the application. However, is there some other, more reasonable and effective manner in which the issue may be brought before the courts? Perhaps the Commissioner could have exercised the remedy herself: English version: "78(1)(*a*). . . may apply to the Court for a remedy" following the conclusion of her investigation. But, based on my analysis of paragraph 78(1)(*a*) and subsection 78(2), I think both the complainant (the applicant in this proceeding) and the Commissioner may exercise the remedy under paragraph 78(1)(*a*). In the present circumstances, using my discretion, I grant the applicant standing on behalf of the public interest.

[104] I agree with Justice Beaudry: his remarks are entirely relevant in this case. There is no doubt that the applicants are raising serious issues and that they have an interest in the subject-matter of their application. Moreover, subsection 77(1) of the OLA clearly provides that the remedy is available to any person who has made a complaint to the Commissioner, and section 79, according to which the Court may admit in evidence information relating to any similar complaint under the OLA, makes no distinction as to the identity of the applicant. Parliament did not restrict the admissibility in evidence of such information only to cases where when the remedy is applied for by the Commissioner. It is inconceivable that Parliament would grant applicants other than the Commissioner the possibility to file information on similar complaints and then deprive the same applicants of the standing required to present it before the Court. In enacting section 79, Parliament wanted to allow both the Commissioner and applicants who meet the conditions of subsection 77(1) to raise systemic problems and to adduce in evidence information in support of such allegations.

[105] In this case, the Commissioner stated that if he had instituted the present proceeding, he would have filed the same evidence as Mr. Thibodeau; in fact, much of the evidence was sent to Mr. Thibodeau for the purposes of this proceeding under paragraph 73(*b*) of the OLA.

[106] Lastly, I conclude that Air Canada's position that there would potentially be multiple proceedings should the Commissioner decide to turn to the Court according to the outcome of his audit is speculation. In the exercise of my discretion, I therefore find that the applicants have public interest standing.

[107] I will now move on to the allegations that Air Canada's breaches of its language duties are systemic.

[108] In support of their allegation that there is a systemic problem, the applicants adduced several items of evidence which I shall review.

(i) Complaint filed against Air Canada by Mr. Thibodeau in 2002

[109] The applicants have filed a similar complaint as that filed by Mr. Thibodeau against Air Canada in 2002 concerning the lack of service in French on a flight operated by Air Ontario, then an Air Canada subsidiary, and adduced a number of documents in the course of that proceeding, the outcome of which was *Thibodeau 1*, *Thibodeau v Air Canada*, 2005 FC 1621, 284 FTR 79, and *Air Canada v Thibodeau*, 2007 FCA 115, 165 ACWS (3d) 542. The applicants submit that, even though

they were successful, Air Canada has again violated their language rights, nine years later. In their view, this is an indication that the problems that existed in 2002 have still not been resolved.

(ii) The complaints filed by Member of Parliament Yvon Godin

[110] The applicants obtained federal Member of Parliament Yvon Godin's written authorization to adduce both the complaints he filed with the Commissioner against Air Canada and the Commissioner's report concerning these complaints. The complaints and the reports contain the following information:

Complaint	Commissioner's Report
Complaint filed on March 20, 2001: Written safety instruction on the plane not translated into French.	Report dated March 30, 2004: Complaint valid; undertaking by Air Canada to change signage in its Boeings.
Complaint filed on May 9, 2001: Lack of service in French on an Air Ontario flight between Ottawa and Montréal on May 4, 2001, and passenger baggage announcement made in English only at the Montréal airport. Problem reported to Commissioner and Air Canada on March 4, 2002: Air Canada flight attendants complained because they were to give safety instructions in English only and because the brochure given to flight attendants was in English only.	Investigation interrupted because of Air Ontario going out of business. Investigation of passenger announcement made at airport inconclusive, but Air Canada undertook to implement corrective action.
Complaint dated February 6,	Report dated April 21, 2008:

2008: Lack of service in French at Air Canada's gate at the Ottawa airport for an Ottawa–Montréal flight.	Complaint valid.
Complaint dated March 24, 2010: Lack of service in French on a Montréal–Bathurst (N.B.) flight on March 11, 2010.	No Commissioner's report.
Complaint dated April 1, 2010: Lack of Service in French on Bathurst–Montréal flight on March 29, 2010.	No Commissioner's report.

(iii) Incidents involving Jean Léger

[111] Mr. Léger was president of the Fédération acadienne de la Nouvelle-Écosse. The applicant have adduced documents and two videos describing an incident that occurred on March 26, 2007, when Mr. Léger was about to board an Air Canada aircraft at the Halifax airport and noted that the agents at the gate were unable to provide him services in French. Mr. Léger insisted on being served in French, and, as he was filming the scene, the Air Canada agents denied him boarding and called security. Mr. Léger was able to take another flight a little later. The applicants have adduced a letter of apology sent to Mr. Léger by Air Canada, in which it admitted that service should have been available in French but argued that its attendants had been justified to deny Mr. Léger boarding because of his attitude. Following these incidents, Mr. Léger filed complaints with the Commissioner. In a letter dated July 30, 2007, the Commissioner set out Air Canada's undertakings to improve its capacity to provide services in French at the Halifax airport.

(iv) The Commissioner's annual reports

[112] The applicants have adduced the Commissioner's annual reports for 1999-2000 to 2008-2009. These reports present the Commissioner's findings on compliance with the OLA by various federal institutions and Air Canada. They also contain statistical data on the complaints filed. The reports reveal that the Commissioner severely judged Air Canada's official language performance.

(v) Data on complaints filed with the Commissioner against Air Canada

[113] The applicants adduced statistical data sent to them by the Commissioner. Under section 60 of the OLA, every investigation by the Commissioner under the OLA is conducted on a confidential basis. However, under section 73 of the OLA, the Commissioner may disclose information he has gathered for his investigations in the course of proceedings instituted under Part X of the OLA, should he see fit to do so. In this case, the Commissioner disclosed to the applicants statistical data indicating the number of eligible complaints received since 1999 and the status of these complaints. He also sent the applicants a compilation of summaries of each of these complaints. The following table lists the number of language-of-service-related complaints received by the Commissioner per year and breaks them down according to their status.

Year	# of complaints	Complaints substantiated	Complaints resolved	Active complaints
2009–2010	60	0	9	51
2008–2009	67	0	16	51

2007–2008	76	40	23	13
2006–2007	57	39	18	3
2005–2006	67	47	20	
2004–2005	81	71	10	
2003–2004	52	38	14	
2002–2003	115	86	29	
2001–2002	135	106	29	
2002–2001	128	99	29	
1999–2000	144	79	65	

[114] The applicants and the Commissioner emphasized that several complaint summaries describe arrogance on the part of Air Canada employees and attendants or third parties offering services on Air Canada's behalf.

(vi) Affidavit of Manon Stuart

[115] The applicants have adduced the affidavit of Manon Stuart, Jazz's Manager, Corporate Communications, in which she admitted that Jazz is not always able to comply with the OLA. More specifically, the applicants drew the Court's attention to the following excerpts from this affidavit:

> [TRANSLATION]
>
> . . .
>
> 36. With all the efforts invested since 2001, Jazz now has enough staff to provide service in French for all flights on which there is significant demand and which start or finish in Ontario, Quebec and the Maritime provinces. In total, there about 75 routes on which there is significant demand starting or finishing at a destination in Ontario,

> Quebec and the Maritime provinces, including automatically and survey-designated routes.
>
> 37. All routes automatically considered to be routes on which there is significant demand take off or land in these provinces.
>
> 38. However, the situation is more delicate when it comes to flights operated in the provinces to the west of Ontario, where certain routes are considered to have significant demand according to survey results, even though there are no automatically designated routes on which there is significant demand in these provinces.
>
> 39. Indeed, Jazz has fewer bilingual flight attendants at its Vancouver and Calgary bases to operate these routes. Depending on the time of the flight, staff assignments and last-minute unexpected events, Jazz may occasionally not be able to assign a bilingual employee to a flight on which there is considered to be significant demand, namely, a flight operated on one of the following eight routes:
>
> Vancouver–Victoria
> Calgary–Castlegar
> Calgary–Winnipeg
> Calgary–Victoria
> Edmonton–Fort McMurray
> Edmonton–Winnipeg
> Edmonton–Yellowknife
> Winnipeg–Regina
>
> . . .

[116] The applicants have also adduced the written examination on affidavit of Ms. Stuart and the written answers she gave, in which she admitted that before the applicants filed their complaint, the flight assignment system did not make it possible to identify the routes designated by the surveys as having significant demand for services in French. She also admitted that the flight attendants assigned to the flights that resulted in the applicants' complaints continued to be assigned to flights with a single flight attendant and on which there was significant demand for services in French. The following excerpts from the written examination of Ms. Stuart and her answers are of particular relevance:

[TRANSLATION]

[Answer]

. . .

7. The flights in question are considered to have significant demand for service in French as a result of the surveys carried out in 2007 under the supervision of the Treasury Board Secretariat and are not automatically considered as having significant demand. During our investigation, we have discovered that the routes on which there is significant demand on the basis of the 2007 surveys had not been programmed into our flight assignment system. Jazz is currently implementing the necessary measures so that these routes are identified in the flight assignment system.

8. Jazz is currently implementing measures to ensure that all flights on which there is significant demand be properly identified in the flight assignment system and consequently staffed with bilingual personnel. Having said that, it remains possible that, occasionally, there may not be a bilingual flight attendant available to operate a flight on which there is significant demand. For example, for irregular operations, it may be impossible for a flight attendant to report for the flight assigned to him or her. Sometimes, a bilingual flight attendant initially assigned to a flight on which there is significant demand may not report to work because he or she is sick for example, and it is not always possible to assign another bilingual flight attendant at the last minute.

. . .

[117] A number of the questions asked by the applicants in this written examination of Ms. Stuart were intended to determine the number of times no bilingual flight attendant was assigned to flights on which there is significant demand for services in French. On every occasion, Ms. Stuart indicated that such information could not be obtained from Jazz's flight assignment system. The following is an example on an exchange on that topic.

[TRANSLATION]

[Question]

. . .

1. In your affidavit dated June 14, 2010, you mention at paragraph 10 that Jazz is currently operating about 840 flights a day to several destinations.

(a) Of these 840 daily flights currently operated by Jazz, how many are considered to be flights on which there is significant demand for service in French?

(b) Of these daily flights on which there is significant demand, how many are operated with a single flight attendant?

(c) Of these daily flights on which there is significant demand and which are serviced by a single flight attendant, how many are operated by a single flight attendant, how many are operated with a flight attendant who does not have at least Level 2C proficiency in French, the level described at paragraph 23 of your affidavit?

. . .

[Answer]

(1a) As of the date of this examination, 498 of the daily flights operated by Jazz are considered to be flights on which there is significant demand.

(1b) As of the date of this examination, of the 498 flights considered to be flights on which there is significant demand, 437 are operated using aircraft with a capacity for 37 or 50 passengers, for which there is a single flight attendant.

(1c) We do not have these statistics, and the flight assignment system is not able to determine it automatically. To do so, one would have to go back to each flight, for every day, and the file of every flight attendant in order to determine the level of French of the attendant on board when the flight in question was operated. In fact, because of the French training program, our flight attendants' language skills are constantly improving. This question is therefore unreasonable.

[118] For its part, Air Canada admits that it is not always able to provide all services in French, as required by the OLA, but it submits that breaches are occasional and do not reveal a systemic problem.

[119] Air Canada emphasizes that things are evolving within the organization; it has made commitments and it makes considerable efforts to hire bilingual staff and to develop the language skills of its employees and those of Jazz, that service in French has improved over the years and that its complaints track record has improved substantially.

[120] Air Canada's position is based on the affidavit of Ms. Stuart of Jazz and the affidavit of Chantal Dugas, Air Canada's manager of linguistic affairs.

[121] In her affidavit, Ms. Dugas details some of the reorganizations that Air Canada has undergone since 2001. Air Canada further emphasizes the socio-economic context, which has made it fairly difficult for the company over the last decade. Among other things, it referred to the economic crisis, the events of September 11, 2001, the collapse of the banks, SARS and the volcanic eruption in Iceland that disrupted air traffic. It submits that, even though the situation has often been difficult, Air Canada has always taken, and is still taking, significant measures to provide service in both official languages. Air Canada emphasized its official languages policy, signed by its president and CEO, which focuses on the provision of services in both official languages on board all Air Canada flights.

[122] Ms. Dugas pointed out that Air Canada does not receive all the complaints filed with the Commissioner, which remain anonymous unless they are also filed with Air Canada directly. She confirmed that, upon receipt of Mr. and Ms. Thibodeau's complaints, Air Canada asked Jazz to review its flight assignment system to ensure that the system identifies flights on which there is significant demand for services in French so determined as a result of the surveys and that it automatically requests the assignment of bilingual flight attendants. She confirmed that Jazz was currently making the necessary adjustments.

[123] She also confirmed that the situation at the Ottawa airport had been reviewed and rectified following the complaints filed by the applicants. Air Canada attendants can now make passenger announcements concerning baggage carousel changes themselves. She also confirmed that a system for broadcasting pre-recorded messages would be installed in 2011, which would make compliance with linguistic requirements for public announcements easier.

[124] Ms. Dugas also drew attention to the language training programs given to employees and the substantial amounts of money invested in language training. She specified that between 2005 and 2009, of a total of almost 10,000 Air Canada employees in contact with the public, 1,470 employees on average received French language training. In cooperation with Jazz, Air Canada has also developed French language training programs for Jazz employees. She stated that Air Canada regularly monitored Jazz. Ms. Dugas presented the following picture of the language proficiency of Air Canada personnel as of March 15, 2010:

- 47 percent of flight attendants could be considered to be bilingual;

- 26 percent of Air Canada airport employees who were in contact with the public could be considered to be bilingual;
- 59 percent of Air Canada call centre employees could be considered to be bilingual.

[125] Ms. Dugas stated that Air Canada has a sufficient number of bilingual flight attendants to provide services in French on all flights on which there is significant demand for services in French, on both automatically and survey-designated flights. In airports, Air Canada has a sufficient number of bilingual employees to ensure that service can always be provided to passengers in both official languages.

[126] Air Canada is of the view that it has a good complaints track record and that the number of complaints must be analyzed in the light of the number of contacts Air Canada passengers have with the company's employees. The affidavit of Ms. Dugas contains a table of data on complaints that differ slightly from the data presented by the Commissioner. She states that the total number of complaints have dropped from an average of 85 a year between 2000 and 2004 to an average of 54 between 2005 and 2009. Complaints about in-flight services, for both Air Canada and Jazz, dropped from an average of 25 a year for 2000 to 2004 to an average of 15 for 2005 to 2009. She also stated that since 2007, at the time of the last update of survey-designated flights on which there is significant demand, only 9 complaints about service in French regarding these flights were received by the Commissioner; these included the applicants' 6 complaints.

[127] Ms. Dugas stated that, over the last 3 years, Air Canada has carried about 32,300,000 passengers a year (including on flights operated by Jazz) with about 5 to 6 points of contact with an

Air Canada employee per passenger and that the complaint ratio was an average of 53 complaints a year (for 2007 to 2009) for at least 161,500,000 points of contact a year, that is 0.000033 percent at the most.

[128] Air Canada submits that these data clearly show that there is no systemic problem.

[129] Air Canada's evidence also includes the affidavit of Ms. Stuart, Jazz's manager of communications.

[130] Jazz is Air Canada's seat capacity supplier and operates short- and medium-haul flights for the airline. On behalf of Air Canada, Jazz operates about 840 flights a day to over 85 destinations in North America (including 57 in Canada and 28 in the United States). In total, it operates about 140 different routes in its network.

[131] Ms. Stuart reported on the significant progress made by Jazz when it comes to language issues. She stated that on January 1, 2001, about 27 percent of the flight attendants of all the merged regional carriers were sufficiently proficient in French. She added that since then, substantial sums have been invested and that major training programs have been created. Jazz has invested over 13 million dollars in giving its flight attendants French language training since September 30, 2004. Since 2001, Jazz prioritizes hiring flight attendants that can provide service in both languages. Employees receive training and their language skills are verified regularly.

[132] Ms. Stuart pointed out that approximately 61 percent of Jazz flight attendants are now able to provide service in French. The highest concentration of bilingual flight attendants can be found in eastern Canada (Halifax, Montréal and Toronto), where demand for service in French is higher. Ms. Stuart confirmed that Jazz had enough staff to provide services in French on all its flights on which there is significant demand and which start or finish in Ontario, Québec and the Maritime provinces.

[133] She recognized, however, that the situation is more delicate when it comes to flights operated in the provinces to the west of Ontario where, even though there are no automatically designated routes on which there is significant demand for services in French, some flights are considered to have significant demand as a result of the surveys carried out. Ms. Stuart indicated that Jazz prioritizes the hiring of bilingual employees, but that there are fewer bilingual flight attendants at Jazz's Vancouver and Calgary bases to operate these routes. Ms. Stuart also stated that, depending on the time of the flight, employee assignments and unexpected, last-minute events, Jazz may, on occasion, not be able to assign a bilingual employee to one of the flights on the eight western routes. She indicated that Jazz was focussing on training employees at these bases to be able to provide services in French as widely as possible on these eight routes, while promoting the hiring of bilingual flight attendants.

[134] Ms. Stuart reported on the changes and rectifications made by Jazz after the applicants filed their complaints. She indicated that the flight attendants assigned to the flights taken by the applicants were enrolled in language training programs.

[135] She also explained that flight crews were constituted using the flight assignment system, which prioritized seniority and bilingualism, and that Jazz was currently implementing the necessary measures so that routes designated by survey as having significant demand for services in French are identified in the flight assignment system.

[136] Ms. Stuart emphasized the relative nature of the number of complaints filed against Jazz. She stated that in 2009, 13 complaints (including the applicants' 6 complaints) were filed in regard to flights operated by Jazz. In 2008, there were 17 complaints; 6 in 2007; 6 in 2006; and 12 in 2005. Ms. Stuart stated that there was no systemic problem, given that, over the last 3 years, Jazz had transported about 9,400,000 passengers per year, each of whom had about 5 or 6 points of contact with a Jazz employee. She indicated that the ratio of language complaints represented an average of 12 complaints for about 47 million points of contact, representing a ratio of 0.0000255 percent.

[137] In the light of the evidence, Air Canada vigorously rejects any allegation of there being systemic problems. It admits that occasional breaches of its duties may occur, but submits that, generally, it is able to comply with them and that the situation therefore hardly shows a systemic problem that calls for institutional orders.

[138] Air Canada argues that the events that led the courts to make institutional orders in *Doucet-Boudreau* and *Fédération Franco-ténoise* were completely different from the facts in this case: in both cases, the evidence of violations was overwhelming, and these were considerably more serious.

[139] Air Canada also refers to *Forum des maires* to support its position. In that case, the Federal Court of Appeal refused to cancel an administrative reorganization because the language rights violations were sporadic.

[140] The Commissioner supports the application for institutional orders. He submits that Air Canada has failed to show that the situation resulting in the breaches of its duties have been fully rectified. He also submits that the similar complaints filed by the applicants and his annual reports show that there is a systemic problem, which has persisted for over a decade. He submits that the remedies provided for by the OLA will be useful, effective and complete only if institutional orders are rendered.

[141] Although the parties did not directly address the matter, I believe it to be pertinent, for the purpose of determining whether the evidence shows that there were systemic breaches, to consider the extent of the duties imposed on Air Canada by the OLA.

[142] Section 10 of the ACPPA makes Air Canada subject to the OLA. It is helpful to reproduce again the first two subsections hereunder:

10. (1) The Official Languages Act applies to the Corporation.	10. (1) La Loi sur les langues officielles s'applique à la Société.
Duty re subsidiaries	Communication avec les voyageurs
(2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation,	(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

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.	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.

[143] In *Thibodeau 1*, Justice Beaudry ruled that the OLA imposed an obligation of result on Air Canada instead of an obligation of means. The Supreme Court of the Northwest Territories ruled similarly in *Fédération franco-ténoise*. On appeal in *Thibodeau*, the Commissioner submitted that the duties imposed by the OLA should not be defined according to a civil law approach. In *Air Canada v Thibodeau*, 2007 FCA 115, 165 ACWS (3d) 542, the Federal Court of Appeal decided that it did not have to rule on this issue since there was no evidence on record to give rise to a due diligence defence, but it nonetheless commented on the matter.

[144] I am of the opinion that it is not necessary for me to determine whether Air Canada is subject to an obligation of result or an obligation of means according to a civil law approach. It suffices to note that the ACPPA imposes a clear duty on Air Canada, which "has the duty to ensure" (in French, Air Canada is "tenue de veiller à"). The OLA imposes clearly set out duties that are not formulated as powers whose exercise is optional. In my view, the duties that were imposed by Parliament require Air Canada to make every reasonable effort to fulfill its duties.

[145] My analysis of all the evidence leads me to conclude that Air Canada and Jazz make considerable efforts and invest substantial sums to comply with their linguistic duties. I agree that Jazz's and Air Canada's track record in terms of their employees' language skills has improved over the last 10 years. I also agree that it is more difficult to hire bilingual staff in the western provinces than it is in Quebec, Ontario and the Maritime provinces.

[146] I note, however, that not everything is perfect and that more remains to be done, particularly at Jazz, which admits that it is not always able to provide bilingual service on the routes identified as having significant demand for services in French based on the surveys. It is useful here to reproduce the following excerpt from Ms. Stuart's affidavit:

> [TRANSLATION]
>
> . . .
>
> 38. However, the situation is more delicate when it comes to flights operated in the provinces to the west of Ontario, where certain routes are considered to have significant demand according to survey results, even though there are no automatically designated routes on which there is significant demand in these provinces.
>
> 39. Indeed, Jazz has fewer bilingual flight attendants at its Vancouver and Calgary bases to operate these routes. Depending on the time of the flight, staff assignments and last-minute unexpected events, Jazz may occasionally not be able to assign a bilingual employee to a flight on which there is considered to be significant demand, namely, a flight operated on one of the following eight routes:
>
> Vancouver–Victoria
> Calgary–Castlegar
> Calgary–Winnipeg
> Calgary–Victoria
> Edmonton–Fort McMurray
> Edmonton–Winnipeg
> Edmonton–Yellowknife
> Winnipeg–Regina

. . .
[Emphasis added.]

[147] Air Canada argued that the ratio of complaints filed was low. It is true that the number of complaints filed against Air Canada and/or Jazz is low considering the number of points of contact between passengers and Air Canada and Jazz employees. However, although the number of complaints can serve as an indicator of the level of client satisfaction or even the level of dissatisfaction with the French services offered by Air Canada and Jazz, it is not necessarily a reliable indicator of Air Canada's and Jazz's actual performance in terms of language rights. This conclusion is supported by an analysis of the evidence. Jazz has admitted that the two flight attendants on the flights taken by the applicants and who were not able to ensure service in French continued to be assigned to flights on which there is significant demand for services in French, on over 200 occasions. On each of these occasions, Air Canada breached its language duties. Yet, other than the complaints filed by Mr. and Mrs. Thibodeau, no other complaint was filed concerning these breaches.

[148] I therefore conclude that, given the evidence, the number of complaints filed is not necessarily a reliable indicator of Air Canada's actual performance and the number of times Air Canada and Jazz breached their linguistic duties.

[149] I also conclude that, although the number of complaints filed against Air Canada is lower than it was in the early 2000s, Air Canada is still the subject of a considerable number of complaints, all of which are similar to the complaints impugned herein.

[150] I am also struck by the fact that some of the major improvements made by Jazz and Air Canada were implemented following Mr. and Ms. Thibodeau's complaints and, at the Halifax airport, following Mr. Léger's complaints. It seems undeniable that it was the vigilance of these users of Air Canada services that led Air Canada and Jazz to make changes to their procedures and equipment in order to improve the provision of services in French. It is all the more troubling to note that, had it not been for Mr. and Ms. Thibodeau's complaint, Jazz's staff assignment system would probably still not be identifying flights on which there is significant demand for services in French that are not automatically so designated and which require bilingual personnel. Given the unequivocal duties imposed on Air Canada by the OLA and the Regulations, it would have been fundamental for Jazz, after all these years, to have a staff assignment system that identifies all routes requiring bilingual personnel. This is the least that can be done to ensure that services are provided in compliance with the OLA.

[151] I am equally surprised by the fact that Jazz does not seem to have a monitoring system that enables it to determine the number of times where no bilingual flight attendant is assigned to a flight on which there is significant demand for services in French. In his examination on affidavit of Ms. Stuart, Mr. Thibodeau asked her how often Jazz assigned flight attendants who did not meet the minimum language requirements (Level 2C) to provide services in French on flights on which there is significant demand on which there was a single flight attendant. Ms. Stuart replied that Jazz did not have these figures and that they could not be determined automatically through the flight assignment system.

[152] It is essential that Air Canada provide French-language training so that Air Canada and Jazz employees can improve and maintain their language skills, but it is equally important for the airline to have a procedure for measuring its actual performance regarding its official languages duties.

[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.

[154] I therefore conclude that it is fair and appropriate to require that Air Canada make every reasonable effort to fulfill all its duties under Part IV of the OLA and to ensure that it implement a monitoring process to allow it to identify and document the occasions on which Jazz does not assign the required bilingual personnel on board flights on which there is significant demand for services in French.

[155] I agree that the facts in this case differ from the facts in *Doucet-Boudreau*, *Fédération franco-ténoise* and *Forum des maires*, but there is no catch-all method or grading system for determining the level at which language rights violations warrant the issuance of institutional orders. Every case has to be reviewed on its own merit, and the fair and appropriate remedy must be determined in the light of the context and the particular circumstances of the organization and the breaches in question.

(3) Is it appropriate and just to award punitive and exemplary damages?

[156] Mr. and Ms. Thibodeau are asking the Court for $500,000 in exemplary and punitive damages. They base their claim on the systemic nature of Air Canada's breaches and on the arrogant attitude of Air Canada employees.

[157] In *de Montigny*, the Supreme Court reiterated the guiding principles on exemplary damages:

> 47 While compensatory damages are awarded to compensate for the prejudice resulting from fault, exemplary damages serve a different purpose. An award of such damages aims at expressing special disapproval of a person's conduct. and is tied to the judicial assessment of that conduct, not to the extent of the compensation

> required for reparation of actual prejudice, whether monetary or not. As Cory J. stated:
>
> > Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high handed that it offends the court's sense of decency. Punitive damages [page88] bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant.
> >
> > (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196)
>
> . . .

[158] The applicants allege that the violation of their lingustic rights was aggravated by Air Canada employees' conduct during the incidents that resulted in the present proceeding, which they describe as malicious, oppressive and reprehensible. Mr. Thibodeau described three incidents.

[159] In his affidavit, Mr. Thibodeau described the incident involving the carousel change announcement at the Ottawa airport on February 1, 2009, as follows:

> [TRANSLATION]
>
> . . .
>
> 17. I was at the Air Canada baggage counter, and I asked why there had been no French announcement. The person at the counter did not speak French. He went to get someone who spoke French. I asked him why there had been no announcement in French about the baggage that had been redirected to Carousel No. 4. He said that he could make one.
>
> 18. Several minutes went by, and still there was no announcement in French. I returned to the Air Canada counter. The employee I spoke to was the same employee I had spoken to earlier at the counter and who had told me that he could make an

> announcement in French. I asked him why there had been no announcement in French. He told me to give him a minute since he was in the middle of eating a sandwich.
>
> 19. He laughed, and I asked him why he was laughing. I told him that this was not funny. I told him that Francophones were entitled to the same services as Anglophones.
>
> 20. I told him that the announcement informing the passengers should be made right away. Nonchalantly, he again said to give him a minute. I told him that I would make a complaint. I asked him his name, and he did not want to give it to me.
>
> 21. At 6:20 p.m., there had still not been an announcement in French, and I left the airport with my family and my luggage. Carousel 4 was almost deserted, people having already taken their luggage and left. No announcement in French was ever made to inform Francophone passengers that their luggage had been redirected from Carousel 3 to Carousel 4.
>
> . . .

[160] Mr. Thibodeau also criticized the attitude of a flight attendant on the flight from Charlotte to Toronto on May 12, 2009. His affidavit contains the following statements:

> [TRANSLATION]
>
> 31. When I boarded the plane at 11:00 a.m., I said hello to the flight attendant. She replied in English. I asked her whether she spoke French, and she said “no” in English. She said that there was no service in French. So, no active offer of services in French, and no service in French on that flight.
>
> . . .
>
> 33. At ten past eleven, the flight attendant came by, and she stopped to tell me that she was not obliged to speak French, that she and several other unilingual English flight attendants had been hired in the Nineties and that service in French was not mandatory.
>
> 34. With a sarcastic smile, she asked Lynda and me whether we were from Quebec. We replied that we lived in Ontario, in Ottawa. I asked her her name as I was going to file a complaint about the lack of service in French. . . .

> 38. At 11:46 a.m., the flight attendant came by and asked my wife and me, “Anything to drink folks?” Lynda said, “Rien merci” [No, thank you]. I told her “Je vais prendre un 7-Up s.v.p.” [I would like a 7-Up, please]. She served me a Sprite.
>
> . . .

[161] Regarding the baggage announcement incident at the Toronto airport, Mr. Thibodeau made the following statements in his affidavit:

> [TRANSLATION]
>
> . . .
>
> 40. Upon arrival of flight AC 7923 in Toronto, my wife and I went to get our luggage. We were close to the carousels where the baggage was to arrive. An announcement was made over the airport loudspeaker at around 1:20 p.m. for the passengers from flight AC 7923, telling them where to pick up their luggage, at Carousel 11, and giving them instructions for connecting flights. The announcement was made only in English.
>
> 41. I went to the Air Canada counter close to Carousel 11, and there were two people there, a man and a woman. I said hello and asked the man whether he spoke French. He said no. I asked the lady the same thing, and she, too, did not speak French.
>
> 42. I asked the man in English whether it was he who had made the baggage announcement over the loudspeaker, and he said yes. I asked why the announcement had not been made in French, and he said that he did not speak French.
>
> 43. He continued by saying that airport staff made the announcements. I replied that he had just made an announcement for passengers from the Jazz Air flight. He answered that he made the announcements for [TRANSLATION] “his passengers”. I told him that I was one of [TRANSLATION] “his passengers”. He then said to me that I spoke English and wondered “so what’s the problem?”.
>
> 44. At 1:23 p.m., while I was still at the counter, he made the same announcement again over the airport loudspeaker, informing passengers from flight AC 7923 where to pick up their luggage. Again, the announcement was made only in English.

> 45. I told him that I was entitled to the same service as Anglophone passengers. He replied in English that if I needed service in French, he would get it. I answered that I wanted the announcement that had been made in English to also be made in French. He replied that he could not do that since he did not speak French. He said that I could ask the airport authorities for an announcement to be made in French.
>
> 46. At 1:27 p.m., while I was still at the counter, he again made the announcement over the airport loudspeaker informing passengers from flight AC 7923 where to pick up their luggage. Again, the announcement was made only in English.
>
> 47. I told him that I was not going to run around the airport to get someone to make an announcement in French. He said that if I was not happy, I could go and see his manager a little further away in the airport to get someone to make an announcement in French.
>
> 48. I asked him to call his manager himself to get someone to make the announcement in French, and he failed to do so. He reiterated that if I needed a service in French, he could manage to give it in French. I repeated that what I wanted was for the baggage announcement that had been made in English to be made in French. He said that that he could not do that.
>
> . . .

[162] Air Canada denies that its employees or Jazz's employees displayed an arrogant attitude towards the applicants and submits that, to the contrary, they attempted to help the applicants.

[163] First, I exclude the incident that occurred at the Ottawa airport since the evidence makes it impossible to conclude that Air Canada breached its duties. Regarding the incident on board the Charlotte–Toronto flight, it is my view that the evidence does not indicate that the flight attendant was arrogant or condescending.

[164] Regarding the third incident, I note that the Air Canada employee made no effort to ensure that the applicants received the service in French to which they were entitled. On the contrary, he displayed a nonchalant attitude trivializing the applicants' rights. In view of the evidence, it seems that that was an isolated incident. Hence, the attitude of Air Canada's employees and Air Canada itself in no way calls for an award of exemplary damages. The evidence does not reveal a malicious, oppressive and high-handed attitude on the part of Air Canada that would call for such a remedy. As I have concluded previously, Air Canada does not do enough to comply with its duties under the OLA; that being said, her breaches are not such that the imposition of a "penalty" is warranted.

IV. Costs

[165] Under the *Federal Courts Rules*, SOR/98-106 (the Rules), the Court has power over the amount of costs (subsection 400(1) of the Rules). The factors that the Court may consider when exercising this discretion are set out at subsection 400(3) of the Rules.

[166] The applicants are seeking disbursements in the amount of $1,982.19 and fees in the amount of $3,500 each for a total of $7,000. Mr. Thibodeau explained that he had spent approximately 250 to 300 hours to prepare the case and that Ms. Thibodeau had spent about 75 hours to do so.

[167] Air Canada admitted at the hearing that this case raised important issues and agreed to pay $4,000 to Mr. Thibodeau and $1,000 to Ms. Thibodeau for costs. Air Canada did not challenge the amount of the disbursements claimed by the applicants.

[168] Air Canada’s proposal seems reasonable to me and, in the exercise of my discretion, I award the applicants the total amount of $6,982.19 in costs, including the disbursements.

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.

"Marie-Josée Bédard"
Judge

SCHEDULE "A"

[TRANSLATION]

AIR CANADA
Linguistic Affairs
P.O. Box 14000, Station Airport
Z1P 1230
Dorval, Quebec H4Y 1H4

March 28, 2011
Lynda Thibodeau
Michel Thibodeau
Ottawa, Ontario

Dear Mr. and Ms. Thibodeau:

In my capacity as general manager of Air Canada's Linguistic Affairs Division and on behalf of Air Canada, I would like to apologize that you were unable to receive service in the official language of your choice, a service to which you were entitled, on the following flights:

AC8627, January 23, 2009
AC8622, February 1, 2009 (only with regard to the pilot's announcement about arrival time and the temperature at destination)
AC7923, May 12, 2009

This apology also applies to the baggage collection announcement and your visit to the baggage counter at Toronto Pearson Airport on May 12, 2009.

Air Canada has followed up with the employees involved in the incidents and reminded them of the language policy. Moreover, an awareness workshop was given to all agents assigned to the baggage counter in Toronto.

Both Air Canada and Jazz, which operated the abovementioned flights on behalf of Air Canada, are aware of their language duties and responsibilities and understand the importance of offering service in both official languages to Air Canada's customers.

I understand your dissatisfaction and your disappointment, and I would like to assure you that Air Canada and Jazz take their language responsibilities very seriously and are constantly working to offer their clients service in the official language of their choice.

Yours sincerely,

Chantal Dugas
General Manager, Linguistic Affairs

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-450-10 and T-451-10
STYLE OF CAUSE:	MICHEL THIBODEAU ET LYNDA THIBODEAU v. AIR CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 28 and 29, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Justice Marie-Josée Bédard
DATED:	July 13, 2011

APPEARANCES:

Michel Thibodeau Lynda Thibodeau	FOR THE APPLICANTS
David Rheault Louise-Hélène Sénécal	FOR THE RESPONDENT
Pascale Giguère Ghady Thomas	FOR THE INTERVENER

SOLICITORS OF RECORD:

	FOR THE APPLICANTS
David Rheault Louise-Hélène Sénécal Dorval, Québec	FOR THE RESPONDENT
Kevin Shaar Pascale Giguère Ghady Thomas Ottawa, Ontario	FOR THE INTERVENER