Federal Court  Cour fédérale

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Docket: T-1509-17
T-1514-17

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[ENGLISH TRANSLATION]

Montréal, Quebec, August 27, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

MICHEL THIBODEAU
LYNDA THIBODEAU

Applicants

and

AIR CANADA

Respondent

and

THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

Intervener

JUDGMENT AND REASONS

I. Introduction

[1] The applicants, Michel Thibodeau and Lynda Thibodeau, are applying to the Court for remedy under subsection 77(1) of the *Official Languages Act*, RSC, 1985, c. 31 (4th Supp.) [the Act].

[2] The remedy sought by the applicants, who are representing themselves before the Court, is related to 22 complaints they filed in 2016 with the Commissioner of Official Languages (the Commissioner) under section 55 of the Act, alleging violations of their language rights. Mr. and Ms. Thibodeau each filed nine identical complaints, and Mr. Thibodeau filed four additional complaints. Before the Court, the applicants are arguing that the respondent, Air Canada, violated their language rights multiple times, and they are seeking a declaration that Air Canada failed to meet its language obligations on multiple occasions, a formal apology letter and compensation for damages.

[3] The applicants are also arguing that Air Canada's official languages violations are systemic in nature. They are therefore seeking to have the Court issue mandatory orders requiring Air Canada to use: (1) signage for emergency exits on airplanes that complies with the language obligations set out in the Act; and (2) a notice on airplane seatbelts that complies with the language obligations set out in the Act.

[4] Air Canada has initially responded by acknowledging that eight of the 22 complaints the applicants filed are associated with violations of its obligations under the Act. Air Canada

confirms that it sent apology letters to both Mr. and Ms. Thibodeau and paid a total of $12,000 in damages, that is, $1,500 per complaint. Air Canada confirms that it is understood, on its part, that this payment was made with no admission or acknowledgement whatsoever by Air Canada of the merit of the damages of a fixed value of $1,500 per complaint. At the hearing, the applicants confirmed that they did each receive an apology letter and cheques for the total amount stated above, which they did cash. However, the applicants are disputing Air Canada's statement that the eight complaints have been settled, and they are still seeking a declaration from the Court regarding those complaints.

[5] I am convinced that those eight complaints have been settled and that they are not to be examined by the Court as part of this dispute, and I will therefore issue no declaration with regard to those complaints.

[6] The complaints that are still in dispute can be grouped into four issues as follows:

- Displaying only the word "exit" or the combination of the words "exit" and "sortie" where the word "sortie" is written in smaller characters to designate emergency exits in facilities or on airplanes;
- Displaying the words "warning" and "avis" beside the exit door of an airplane, where the word "avis" is written in smaller characters;
- Engraving only the word "lift" on the buckles of airplane seatbelts;
- Having a less detailed boarding announcement in French than in English for passengers at Fredericton airport.

[7] The applicants have filed an affidavit from Ms. Thibodeau, sworn on November 15, 2017, an affidavit from Mr. Thibodeau, sworn on November 16, 2017, and several supplementary affidavits from Mr. Thibodeau.

[8] The applicants are essentially arguing that Air Canada systematically violates the language rights of Francophones, since the unilingual English or predominantly English signage, being of unequal quality in both official languages, violates the Act and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the Charter]. With regard to the remedies, the applicants submit that the case law and history of violation of their language rights justify an amount of damages of $1,500 per violation. Furthermore, the applicants argue that the Court should issue a mandatory order against Air Canada, since there is unequivocal evidence of a systemic problem.

[9] Air Canada filed the affidavits, sworn on January 16, 2018, of Giuseppe (Joseph) Basile, Director, Technical Services & Engineering at Jazz Aviation; Chantal Dugas, General Manager, Linguistic Affairs and Diversity at Air Canada; Gregory Furholter, Engineering Technician - Cabin Engineering for Air Canada; Suzanne James, Booking Clerk for Air Canada; and Manon Stuart, Manager, Corporate Communications and Linguistic Services at Jazz Aviation. Air Canada also filed a supplementary affidavit from Denise Pope, paralegal, sworn on December 12, 2018, and the transcript of the preliminary examinations of Mr. and Ms. Thibodeau, held on March 26, 2018.

[10] Air Canada's response is essentially that the complaints arise from an overly narrow interpretation of the Act, which requires "substantive equality" rather than "formal equality", and does not require identical treatment of the two languages, but rather a treatment that is substantively the same. Air Canada states that requiring identical communications in both languages is contrary to the spirit of the Supreme Court of Canada's decision in *DesRochers v Canada (Industry)*, 2009 SCC 8 [*DesRochers*] and that, to achieve substantive equality, it is necessary instead to assess whether the communications are substantively equal.

[11] With regard to remedies, if the Court decides that Air Canada violated its obligations, then Air Canada: (1) is not opposed to presenting an apology letter nor to a declaratory judgment being issued; (2) argues that the circumstances do not justify awarding punitive or exemplary damages; (3) argue that this is a matter of moral prejudice and that the amount of damages must be adjudicated by the Court; and (4) argues that a lower amount should be awarded since it does not regard a lack of services.

[12] With regard to the request to issue mandatory orders, Air Canada essentially responds that such an order, in addition to a declaration, is superfluous and inappropriate because: (1) this case does not present exceptional circumstances; (2) the Act in itself constitutes an injunction; (3) there is no reason to believe that Air Canada would deliberately violate the Act; (4) such an order would pose a constant threat of contempt of Court proceedings; (5) it would likely lead to ongoing litigation, along with the associated consequences; and (6) the evidence does not reveal the existence of a systemic problem.

[13] The Commissioner is an intervener in this case, without taking a position with regard to the facts, in order to present a legal position on two questions of law raised in this case.

[14] Firstly, the Commissioner states that substantive equality is the applicable standard in Canadian law and details the nature and scope of the principle of substantive equality (*R. v Beaulac*, [1999] 1 SCR 768 at paragraph 22 [*Beaulac*]; *DesRochers* at paragraph 31). The Commissioner explains that this principle is intended to address existing inequalities in order to achieve true equality. To do this, it must first be determined whether the service or communication is intended for a specific clientele with particular needs or whether it is a standardized communication or occasional service intended for a general clientele. In the first case, it could be relevant to assess whether different treatment is necessary to achieve substantive equality, whereas in the second case, identical treatment will achieve substantive equality.

[15] Secondly, the Commissioner submits that the principle of equality underlying the Act consists of at least four elements: equality of status, equality of use, equality of access and equality of quality. The first two elements, equality of status between French and English and the equality of the rights and privileges in terms of their use are derived from the wording of section 2 of the Act and subsection 16(1) of the Charter. The other two elements are taken from *Beaulac*, in which the Supreme Court stated that substantive equality consists of equality of access to communications and services in both official languages and equality in the quality of those communications and services.

[16] The Commissioner goes on to express his opinion on the Court's authority to grant the remedy it considers to be appropriate and just under the circumstances, pursuant to subsection 77(4) of the Act. In particular, the Commissioner points out that the Court has a great deal of latitude in determining the remedy it considers to be appropriate and just with regard to the circumstances and reiterates the factors that must guide this choice, as identified by the Supreme Court in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 [*Doucet-Boudreau*] at paragraphs 55–59. The Commissioner explains that, although mandatory orders are rare and exceptional measures, they may be the appropriate and just remedy if there is a systemic problem or if an institution violates the Act.

[17] For the reasons set out below, the Court will partially grant the remedy the applicants are seeking. In short, the Court does not agree with Air Canada's interpretation of the Act and is of the opinion that the unilingual or predominantly English signage, as well as the more detailed boarding announcement in English, violate the Act.

[18] With respect to remedies, the Court will declare that the applicants' language rights were violated and order Air Canada to send a formal apology letter and pay damages. However, the Court will not issue a mandatory order and will not award punitive damages.

II. Issues

[19] The Court must determine: (1) if the evidence concerning the disputed complaints reveals a breach of Air Canada's language obligations under the Act; and (2) the remedy that is appropriate to grant, if applicable.

III. Background

[20] The facts of this case are not challenged, and the dispute between the parties concerns rather how the Act should be interpreted in order to determine whether those facts reveal that Air Canada has breached its language obligations. Mr. and Ms. Thibodeau's complaints can be grouped into four issues, as described above.

[21] The Commissioner filed three final investigation reports and a preliminary report in which he concludes that Mr. and Ms. Thibodeau's complaints have merit and that Air Canada breached its obligations as set out in Part IV of the Act.

[22] The first of the final reports concerns the unilingual display of the word "exit" in the cargo area, and the Commissioner issues no recommendations given that Air Canada has already taken measures. The second final report is related to the different boarding announcements in French and English at Fredericton airport, and the Commissioner again does not issue recommendations in light of the measures Air Canada has already taken. The third final report concerns the complaints related to the unilingual display of the word "exit" in airplanes, and the Commissioner recommends that Air Canada submit, within six months of the date of the report, a work plan to ensure that both "exit" and "sortie" are displayed on its airplane exit signs. The preliminary report is related to the complaints regarding the unilingual engraving of the word "lift" on the seatbelts, and the Commissioner recommends that Air Canada submit, within six months of the date of the final investigation report, a work plan to ensure that both official languages are displayed.

[23] On March 2, 2018, Mr. Thibodeau filed six new complaints with the Commissioner for violation of his language rights by Air Canada. The parties agree that those complaints do not give rise to remedy in this case.

IV. Breaches of language obligations

A. *Interpretation of the Act*

[24] The applicants argue that Air Canada violated their language rights conferred on them in the Act and guaranteed by sections 16 to 20 of the Charter. They submit that the Act applies to Air Canada under subsection 10(1) of the *Air Canada Public Participation Act*, RSC, 1985, c. 35 (4th Supp.) [Air Canada Act], as well as to the services of Jazz Aviation, a third party acting on behalf of Air Canada, under section 25 of the Act.

[25] The applicants add that Air Canada must comply with the obligations set out in sections 23 to 25 of the Act, which constitute obligations of result (*Thibodeau v Air Canada*, 2005 FC 1156 at paragraphs 35, 48 [*Thibodeau 2005*]), in section 8 of the *Official Languages (Communications with and Services to the Public) Regulations*, SOR/92-48 [Regulations] and in section 6.4.1 of the *Directive on Official Languages for Communications and Services*. They argue that these sections provide that the wording on emergency exits and seatbelts on airplanes used for Air Canada flights must be displayed in both official languages and in equal quality. They state that the signage is not of equal quality in both official languages when the word “exit” is used alone or when the words “exit” and “sortie” are both displayed, but the latter is written in smaller characters.

[26] Air Canada responds that it takes the promotion and respect of Canada's official languages seriously and explains the policies and directives it has adopted in this regard. Air Canada recognizes that the Act applies to it and imposes language obligations on it, including the obligation to provide services of equal quality in both official languages (Air Canada Act; sections 23 and 24 of the Act; the Regulations; *DesRochers* at paragraphs 3, 31, 51, 54). Air Canada acknowledges that, according to the Supreme Court in *DesRochers*, the expression "equal quality" refers to substantive equality between the two official languages and not to formal equality, and that the language obligations must be defined based on the nature and purpose of the service. Air Canada notes that the French phrase "égalité réelle" is rendered as "substantive equality" in English and that it is therefore an equality that is assessed substantively rather than formally, by examining the substance of things rather than their appearance.

[27] Subsequently, Air Canada argues that the Commissioner's analysis grid and the alignment of the components of the principle of equality as proposed by the Commissioner (equality of status, use, access and quality) are not rooted in the case law. Air Canada acknowledges that the components of the principle of equality can be useful as a reference for interpreting the Act when ambiguity exists. However, it argues that these components constitute legislative objectives, which cannot serve to alter the Act, either by ignoring conditions provided therein, or by adding requirements it does not contain. Thus, Air Canada differentiates between the objectives of a statute and the concrete measures implemented by the legislature to achieve those objectives and argues that it is the measures that impose obligations and not the objectives. Air Canada points out that the Act qualifies the right to receive services in both official languages in various ways, including the significant demand criterion, and that the notions of

equality of status, use and access cannot be cited to override the statutory requirement of significant demand.

[28] Moreover, Air Canada argues that: (1) the principle of substantive equality is satisfied by a unilingual employee referring an individual to another employee who is able to speak French since, in so doing, Air Canada is fulfilling its obligation to ensure that passengers are served in the language of their choice; (2) the Act does not require the use of characters of identical size; (3) the Act does not require identical treatment of standardized communications and the principle of substantive equality can be satisfied by a treatment that is not identical in both languages; and (4) in all circumstances, the issue the Court must analyze and address is whether or not the passenger received service of equal quality in his or her preferred language.

B. *Arguments of the parties on each issue*

(1) Displaying only the word “EXIT” or the combination of the words “EXIT” and “SORTIE” where the latter is written in smaller characters to designate emergency exits in facilities or on airplanes.

[29] The applicants cite the Commissioner’s reports to argue that the unilingual English “exit” signage violates the Act and the language rights of Francophones. They also argue that displaying the word “sortie” in smaller characters also violates the Act because the signage is not of equal quality in both languages.

[30] Air Canada argues that the word “exit” is an accepted term in French to designate an exit or way out. It argues that the word, of Latin origin, is accepted in French dictionaries as meaning

[TRANSLATION] “it goes out” and adds that paragraph 521.31(1)(d) of the *Canadian Aviation Regulations*, SOR/96-433 and paragraphs 525.811(d) and (g) of the *Airworthiness Manual* provide for, even in their French versions, the use of the word “exit” on an airplane’s emergency exits. It therefore refutes the conclusion of the Commissioner’s investigation report that the word “exit” is not commonly used in French, arguing instead that the common usage of a word is a criterion extraneous to the Act. Air Canada notes that using only the word “exit” makes it possible to use larger characters and is an internationally recognized visual indicator of an emergency exit, as Chantal Dugas, General Manager, Linguistic Affairs and Diversity at Air Canada, testifies based on some twenty years of experience in the industry (respondent’s record, tab 2, affidavit of Ms. Dugas at paragraph 58).

[31] Air Canada adds that the concurrent use of the words “sortie” and “exit” on certain airplanes does not negate the sufficiency of the word “exit”. In the alternative, if the use of the word “sortie” is deemed to be imperative, Air Canada argues that the difference in the size of the characters does not represent a difference in the quality of service because if Parliament wants to define the size of signage then it does so expressly, as is the case for signage in the offices of a federal institution (section 29 of the Act).

> (2) Displaying the words “WARNING” and “AVIS” beside the exit door of an airplane, where the word “AVIS” is written in smaller characters

[32] The applicants argue that signage with different-sized characters in the two languages violates the Act, because preference is given to the English, and the two versions are not of equal quality.

[33] Air Canada responds that the sign displays the words “open/warning/exit door handle” and “ouvert/avis/manette de porte” in the same size in English and French, with the exception of the word “avis” being slightly smaller than its English equivalent, “warning”, and that the service is therefore of equal quality in both official languages.

(3) Engraving only the word “LIFT” on the buckles of airplane seatbelts

[34] The applicants argue that the writing on seatbelts must be of equal quality in both official languages, and that displaying only the unilingual word “lift” violates the equality principles of the Act and Charter.

[35] Air Canada argues that the engraving of only the word “lift” is not a communication or service rendered within the meaning of the Act, and that it is rather an initiative of the seatbelt manufacturer, and that neither the *Canadian Aviation Regulations*, nor the *Airworthiness Manual* require engraving on seatbelts and that Air Canada provides a bilingual audio-visual service on the use of seatbelts.

(4) The boarding announcement to passengers at Fredericton airport

[36] The applicants argue that on July 31, 2016, at Fredericton International Airport, the boarding announcement was much less detailed in French than in English. The English version, which is 15 seconds long, is read as follows:

> Good afternoon ladies and gentlemen, we’d like to start boarding Air Canada Xpress 8507 service to Montreal. At this time we are going to take passengers that are seated in zones 1 and 2 or require

> additional assistance aboard the aircraft with user ID number 3.
> Please have your photo ID and boarding cards ready.

[37] The French version, which is five seconds long, is read as follows: “Mesdames et messieurs, le vol Air Canada Xpress 8507 à destination de Montréal est maintenant prêt pour l’embarquement général.” [Ladies and gentlemen, the Air Canada Xpress 8507 flight to Montreal is now ready for general boarding.]

[38] At the hearing, the applicants argued that this violates the provisions of the Act because the English version of the announcement contains more information than the French version, and the two versions are therefore not of equal quality.

[39] Air Canada notes that the English version of the message announced boarding for passengers in zones 1 and 2 and that the French version announced general boarding, but that the boarding involved only two zones. In addition, the affidavit of Ms. Dugas reports that this announcement was preceded by a pre-recorded radio announcement of which the content is strictly identical in French and English. Air Canada argues that the Act does not require formal equality and that the Court must decide whether the service rendered, overall, is of equal quality. Moreover, Air Canada refers to a passage in the Commissioner’s memorandum in which he states that, according to the Supreme Court in *Association des parents de l’école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21 [*École Rose-des-vents*], it is appropriate to consider the perspective of the general public in analyzing substantive equality. Air Canada states that the interpretation underlying the applicants’ complaint deviates significantly from the

objective point of view of a member of the general public and argues that the [TRANSLATION] "average Francophone person" would not be offended by the announcement.

C. *Discussion*

(1) The notion of equality

[40] As the Commissioner notes, the equality of the official languages has four components. Section 16 of the Charter and section 2 of the Act provide for the equality of status between French and English, as well as the equality of the rights and privileges with regard to their use. Equality of access and of quality arise from the decision in *Beaulac*, which describes the nature of language obligations by stating that "substantive equality is the correct norm to apply in Canadian law" and that there must be "equal access to services of equal quality for members of both official language communities in Canada" (*Beaulac* at paragraph 22).

[41] The decision in *DesRochers* reinforces the language obligations of institutions. It defines the nature and scope of the principle of language equality in communications and the provision of services under section 20 of the Charter and Part IV of the Act. More specifically, the Supreme Court defines the scope of the notion of "services of equal quality" and states from the outset that "[s]ubstantive equality, as opposed to formal equality, is to be the norm" (*DesRochers* at paragraph 31).

[42] In that case, Industry Canada offered its community economic development services to communities in Huronie, Ontario, in an identical manner in both official languages. The

appellants argued that “depending on the nature of the service in question, it will sometimes be necessary to go further and take account of the special needs of the language community receiving the service” (*DesRochers* at paragraph 46). The Supreme Court therefore had to determine whether Industry Canada was required to consider the particular needs of the Francophone community and provide services adapted to its needs that would not necessarily be identical to those provided in English.

[43] The Supreme Court concluded that “it is possible that substantive equality will not result from the development and implementation of identical services for each language community” and that the principle of language equality “must be defined in light of the nature and purpose of the service in question” (*DesRochers* at paragraph 51). In other words, it is acceptable to provide services that are not completely identical in both languages in order to achieve substantive equality. In that case, the services in question were intended to help communities “take charge of their own economic futures” and varied “greatly from one community to another depending on priorities established” (*DesRochers* at paragraph 52). Consequently, the Supreme Court found that the communities “could ultimately expect to have distinct content that varied ’greatly from one community to another, depending on priorities established’ by the communities themselves” (*DesRochers* at paragraph 53). In concrete terms, the Supreme Court found that, since Industry Canada “made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community” (*DesRochers* at paragraph 54).

[44] Following the decision in *DesRochers*, the Supreme Court once again addressed language equality in *École Rose-des-vents*, which concerns the right to education in the minority language, which is enshrined in section 23 of the Charter. The Supreme Court had to determine the circumstances in which the quality of education in the minority language is equivalent to that of education in the majority language.

[45] Once again confirming that substantive equality takes precedence over formal equality, the Supreme Court stated that the analysis of compliance with the Act does not consist of examining the costs and other indicators of formal equality, but rather of comparing the quality of "the educational experience of the children" (*École Rose-des-vents* at paragraphs 32–33). In that perspective, "substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority" (*École Rose-des-vents* at paragraph 33). The crux of that case lies in the reality that "no school is likely to be considered by all parents to be equal or better than its neighbours in every respect" (*École Rose-des-vents* at paragraph 38). The Supreme Court was therefore required to decide on the factors to be considered in assessing equivalence and, in that context, described the concept of the "reasonable parent", possibly adapted by Air Canada at the hearing to describe the expectations of the [TRANSLATION] "average reasonable Francophone" (*École Rose-des-vents* at paragraph 40). In concrete terms, the Supreme Court considered whether all of the circumstances would dissuade "reasonable parents" from enrolling their children in a minority language school. In that case, it confirmed the position of the trial judge that the disparity in quality between the

minority and majority language schools was such as to limit enrolment (*École Rose-des-vents* at paragraph 57).

[46] However, the facts in this case differ from those in *École Rose-des-vents* because the quality of education is assessed on the basis of a certain number of factors, whereas the quality of signage on an emergency exit or of a boarding announcement seem to be rather one-dimensional and standardized. Moreover, the decisions in *DesRochers* and *École Rose-des-vents* rely on "substantive equality" to address the injustices created by the reference to formal equality. Substantive equality was indeed required in *DesRochers* to address the inequalities that persisted, even though identical services were provided in both languages. In *École Rose-des-vents*, the Francophone school board received more funding than its English counterpart, but the education provided was nevertheless of inferior quality. These decisions reveal that official language minorities may be treated differently "if necessary" in order to ensure service of equal quality (*École Rose-des-vents* at paragraph 33).

[47] Therefore, I agree with the position expressed by the Commissioner that different treatment of the two languages may be acceptable if it is necessary in order to achieve substantive equality or meet particular needs, which is not the case here.

(2) The application of the principles at issue

a) *Displaying only the word "EXIT" or the combination of the words "EXIT" and "SORTIE" where the word "SORTIE" is written in smaller characters to designate emergency exits in facilities or on airplanes*

[48] Therefore, with regard to using only the word “exit”, I cannot agree with Air Canada’s argument that this is an acceptable word in French to designate an exit or way out. It seems clear that this word is used in a theatrical context to designate someone who is exiting the stage. Air Canada refers to the *Grand Robert de la langue française*, the *Dictionnaire de français Larousse* and the *Multidictionnaire de la langue française*, but none of those dictionaries refer to the word “exit” as meaning a physical exit, in the sense of a way out. The testimony of Ms. Dugas did not convince me that the word “exit” is universally recognized in French to designate an exit or way out. Moreover, paragraph 525.811(g) of the *Airworthiness Manual*, which Air Canada cites in its memorandum, describes the English terms in French. Therefore, it is not clear that this paragraph supports Air Canada’s position because: (1) it permits the use of the word “exit” in the legend and not on the signage itself; (2) Parliament deemed it relevant to specify, in the French version, that the word “exit” is equivalent to “issue” in French, which does not support the position that the word “exit” is universally recognized in French; and (3) the *Airworthiness Manual* sets out airworthiness standards, whereas the Act imposes language obligations.

[49] With respect to the words “exit” and “sortie”, I am of the opinion that the difference in the size of the characters suggests an inequality in the status of the two official languages. While Air Canada relies on the decision in *DesRochers* to argue that the service was rendered in both languages and that that is sufficient, the problem is not related to the quality of the service, but rather to the equality in status, which is recognized by section 16 of the Charter and section 2 of the Act.

[50] The difference in the size of the characters is not necessary to ensure substantive equality, and it seems rather obvious that a difference in the size of characters tends to affirm the predominance of one language over another.

b) *Displaying the words "WARNING" and "AVIS" beside the exit door of an airplane, where the word "AVIS" is written in smaller characters*

[51] Similarly, the difference in the size of characters in the words "warning" and "avis" suggests an inequality in the status of French and English, which violates section 16 of the Charter and section 2 of the Act. Displaying the word "warning" in larger characters than the word "avis" tends to affirm the predominance of the English language.

c) *Engraving only the word "LIFT" on the buckles of airplane seatbelts*

[52] I cannot agree with Air Canada's argument that the engraving of only the word "lift" would not be subject to the requirements of the Act because it is the initiative of the manufacturer. Air Canada has no authority as to whether such a communication is subject to the Act.

[53] The engraving of the word "lift" is a communication from Air Canada to its passengers and, being unilingual, it violates the requirements of the Act. If Air Canada displays this word, it must also display the French equivalent.

d) *The boarding announcement to passengers at Fredericton airport*

[54] It is not disputed that the English announcement contains more information than the French announcement. The service provided is clearly not identical, and this distinction between the two languages cannot be justified by the noble objective of ensuring substantive equality (*École Rose-des-vents* at paragraph 33; *DesRochers* at paragraph 51).

(3) Conclusion

[55] Consequently, I conclude that Air Canada violated its language obligations with respect to the four issues raised.

V. Appropriate and just remedy

A. *Declaration and formal apology letter*

[56] Mr. and Ms. Thibodeau are seeking a declaration that Air Canada violated their language rights on multiple occasions and breached its language obligations in recent years, as well as a formal apology letter.

[57] Air Canada is not opposed to this, and the Court will grant these remedies.

B. *Damages*

[58] Mr. and Ms. Thibodeau argue that damages may be granted under subsection 24(1) of the Charter and subsection 77(4) of the Act (*Lavigne v Canada (Human Resources Development)*, [1997] 1 FC 305 (FCTD); *Thibodeau v Air Canada*, 2011 FC 876 at paragraph 36 [*Thibodeau 2011*]). They submit that the first three steps of the analysis established by the Supreme Court in *Vancouver (City) v Ward*, 2010 SCC 27 [*Ward*] are satisfied: their language rights have been breached; the damages will be able to compensate them, defend language rights and deter future breaches; and the other remedies could not fully compensate them (*Ward* at paragraphs 4, 33, 38). With regard to the third step, consisting of determining the amount of damages, Mr. and Ms. Thibodeau refer to the decisions in *Ward*, *Thibodeau 2005*, *Thibodeau 2011*, *Air Canada v Thibodeau*, 2012 FCA 246 [*Thibodeau FCA*] and *Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau SCC*] and highlight the history of Air Canada violating their language rights over the past 18 years. They suggest the amount of $1,500 per violation as damages.

[59] Air Canada submits that the damages are intended to compensate the loss incurred and that, to compensate for moral prejudice, they must be adjudicated by the Court (*Air Canada (Re)*, [2004] OJ No. 4932 (ONSC) at paragraph 25; *de Montigny v Brossard (Succession)*, 2010 SCC 51 at paragraph 34). Air Canada notes that, since the amount of damages awarded for an absence of services in one of the official languages vary between $500 and $1,500, the amount should be less for a difference in quality of the service. It reiterates that the amount must

be determined on a case-by-case basis (section 77(4) of the Act; *Fédération Franco-Ténoise v Canada (Attorney General)*, 2006 NWTSC 20 at paragraphs 734, 912–923; *Thibodeau 2011*).

[60] Subsection 24(1) of the Charter and subsection 77(4) of the Act enable the Court, in the case of a violation of the Charter or Act, to grant the remedy it considers appropriate and just in the circumstances.

[61] In *Ward*, the Supreme Court recognized that "s. 24(1) is broad enough to include the remedy of damages for *Charter* breach" (*Ward* at paragraph 21). The award of damages may meet the conditions established in *Doucet-Boudreau* for recognizing an appropriate and just remedy (*Ward* at paragraph 20).

[62] Moreover, the Supreme Court provides the analytical framework to be applied for awarding damages (*Ward* at paragraph 4):

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

[63] The second step of this analysis requires that damages be awarded only if they further the general objects of the *Charter*: (1) "[t]he function of compensation, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied"; (2) "[t]he function of vindication recognizes that Charter rights must be maintained, and cannot be allowed to be whittled away by attrition"; and (3) "the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors" (*Ward* at paragraph 25).

[64] The Federal Court recognized that these principles for interpreting subsection 24(1) of the Charter may be applied to subsection 77(4) of the Act (*Thibodeau 2011* at paragraph 36).

[65] In light of the circumstances of this case, I consider an amount of $1,500 per complaint to represent an appropriate and just amount.

C. *Punitive damages*

[66] In their notice of application, Mr. and Ms. Thibodeau did not seek punitive damages, but they did suggest, in their memorandum and at the hearing, that punitive damages could be necessary to compensate the prejudice suffered, recognize the importance of language rights and deter Air Canada from continuing to violate the language rights of Francophones.

[67] Air Canada argues that punitive damages may be awarded only if there is malicious, capricious or reprehensible conduct.

[68] The Supreme Court reaffirmed several guiding principles in the award of punitive damages in *Whiten v Pilot Insurance Co.,* 2002 SCC 18 (at paragraph 94):

> (1) Punitive damages are very much the exception rather than the rule[.]
>
> (2) [They are] imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.
>
> . . .
>
> (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.
>
> . . .
>
> (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives[.] [paragraphs created for readability]

[69] The Court was not convinced that the evidence on record and the current circumstances warrant ordering Air Canada to pay punitive damages.

D. *Mandatory order*

[70] Mr. and Ms. Thibodeau are seeking a mandatory order to require Air Canada to comply with its language obligations, because the signage that violates the Act is apparently widespread in the airplanes used by Air Canada, and Air Canada apparently has no intention of rectifying the situation. They refer to the structural order this Court issued in *Thibodeau 2011*, although it was overturned by the Federal Court of Appeal in *Thibodeau FCA* for lack of evidence on the systemic nature of the problem. They submit that the evidence of the systemic problem is

unequivocal in this case because: (1) each Francophone passenger is confronted with unilingual or predominantly English signage; (2) the photos submitted into evidence by the applicants and Air Canada show that the signage problem is widespread since, unless otherwise stated, it must be assumed that all devices of the same type as those photographed are manufactured with the same signage; and (3) based on its argument, Air Canada refuses to acknowledge that there is a problem related to signage of unequal quality.

[71] Air Canada argues that a mandatory order is superfluous and inappropriate because it would have the effect of requiring Air Canada to comply with the Act as interpreted by the Court. Moreover, the case at bar does not present exceptional circumstances (*Métromédia CMR Inc. v Tétreault*, [1994] RJQ 777 (CSQ) at pages 23–24 [*Métromédia*]; *Thibodeau FCA* at paragraph 55; *Steinberg v Bitton*, 2005 CanLII 26290 (QCCS) at paragraphs 45–46). It argues that there is no reason to believe that Air Canada would deliberately breach the Act and that such an order would pose a constant threat to Air Canada of contempt of Court proceedings and of ongoing litigation (*Thibodeau SCC* at paragraph 128; *Pro Swing Inc. v Elta Golf Inc.*, 2006 SCC 52 at paragraphs 24–25 [*Pro Swing*]).

[72] Issuing a general order to comply with the law requires exceptional circumstances, "for example, in the event that a party announces that it intends to deliberately break the law or breaks it with impunity without regard for its duties and the rights of others" (*Thibodeau SCC* at paragraph 124; *Thibodeau FCA* at paragraph 55). In other words, [TRANSLATION] "there are exceptional cases where certain persons make it clear that they are firmly resolved to disobey the

law and systematically commit the same offences over and over again, preferring to pay the fine" (*Métromédia* at paragraph 36).

[73] In this case, there is no reason to believe that Air Canada would deliberately breach the Act, and such an order would pose a constant threat to Air Canada of contempt of Court proceedings and of ongoing litigation (*Thibodeau SCC* at paragraph 128; *Pro Swing* at paragraph 24).

[74] The Federal Court of Appeal notes in *Thibodeau FCA* that there must be "very substantial evidence, consisting of several internal and external reports" to find that there is systemic discrimination (see *Canada (Attorney General) v Jodhan*, 2012 FCA 161). In this context, the number of complainants is a factor to be taken into account, and section 79 of the Act can enable complainants "to present the tribunal with the complete context of the linguistic situation in the federal institution against which they are complaining, and to establish the existence of a systemic problem that has already persisted for some time" (*Thibodeau v Halifax International Airport Authority*, 2018 FC 223 at paragraph 18).

[75] However, the applicants submitted into evidence only their own complaints, that is, the 22 complaints underlying this remedy and the eight additional complaints dated March 2, 2018, and the Commissioner's report regarding those complaints. The burden of proving the systemic nature of the breaches is on the applicants, and they did not discharge that burden.

[76] Therefore, the Court will not issue a mandatory order.

[77] Lastly, Air Canada informed the Court that, if it found that the signage violates the Act, Air Canada is willing to file with the Commissioner, within six months of the final judgment, a work plan for replacing the signage in orderly fashion, as recommended by the Commissioner in his final report. The Court notes this willingness.

JUDGMENT in T-1509-17 and T-1514-17

THE COURT:

1. Declares that the applicants' language rights were violated.
2. Orders Air Canada to send each applicant a formal apology letter.
3. Orders Air Canada to pay to Ms. Thibodeau damages of $1,500 per complaint, for a total sum of $9,000.
4. Orders Air Canada to pay to Mr. Thibodeau damages of $1,500 per complaint, for a total sum of $12,000.
5. Awards costs in favour of the applicants.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1509-17 and T-1514-17
STYLE OF CAUSE:	MICHEL THIBODEAU and LYNDA THIBODEAU v AIR CANADA AND THE COMMISSIONER OF OFFICIAL LANGUAGES
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 2, 2019
REASONS FOR JUDGMENT BY:	ST-LOUIS J.
DATED:	AUGUST 27, 2019

APPEARANCES:

Michel Thibodeau Lynda Thibodeau	REPRESENTING THEMSELVES
Pierre Bienvenu Vincent Rochette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Norton Rose Fulbright	FOR THE RESPONDENT