

CANADA / JUDGMENT

Thibodeau v. Air Canada

2005 FC 1156

COURT

Federal Court

DECIDED

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Thibodeau v. Air Canada

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Notes

Reported Decision

Decision Content

Date: 20050824

Docket: T-346-02

Citation: 2005 FC 1156

Ottawa, Ontario, August 24, 2005

PRESENT: THE HONOURABLE MR. JUSTICE BEAUDRY

BETWEEN:

MICHEL THIBODEAU

Applicant

and

AIR CANADA AND

AIR CANADA REGIONAL INC.

Respondent

and

COMMISSIONER OF OFFICIAL LANGUAGES

OF CANADA

Intervener

REASONS FOR ORDER AND ORDER

[1] The applicant, who is representing himself, has filed an application for a remedy under subsection 77(1) of the Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.) (OLA).

THE APPLICATION

[2] The applicant is essentially seeking the following relief from the Court:

[translation]

I. THE APPLICATION seeks, first of all, a DECLARATION that:

- (a) Air Canada and its subsidiary company Air Canada Regional Inc. are subject to the OLA, and more particularly Part IV, the Air Canada Public Participation Act (the ACPPA), and more particularly subsection 10(1) and paragraph 10(2)(a), and the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48 (the Regulations);
- (b) Air Canada and its subsidiary company Air Canada Regional Inc. are not complying with the language obligations under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;
- (c) the violation of the language rights under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations is also a violation of the rights under sections 16 and 20 of the Canadian Charter of Rights and Freedoms (the Charter);
- (d) Air Canada and its subsidiary company Air Canada Regional Inc. failed to comply with their language obligations under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations on August 14, 2000 on flight AC 1347 between Montréal and Ottawa, and thereby breached the language rights of Michel Thibodeau guaranteed by the Charter;

- (e) the provisions of the OLA, the ACPPA and the Regulations prevail over the provisions of trade agreements or collective agreements and their enforcement and these agreements cannot effectively absolve Air Canada and Air Canada Regional Inc. of their language obligations under Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;

II. THE APPLICATION further seeks a mandatory ORDER against the respondents Air Canada and Air Canada Regional Inc. requiring them, within six months of the delivery of judgment in this proceeding, or within any other period determined by the Court:

- (a) to take all the necessary steps to ensure that the public can communicate with and receive available services from the respondents in French, in accordance with Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;
- (b) without limiting the generality of the foregoing statements in the preceding paragraph, to take the following steps:
 - (i) to ensure that the respondents have an adequate bilingual capability and take all the other necessary steps to provide services to the public in French for in-flight services on routes with a significant demand;
 - (ii) to ensure, in the previously stated circumstances, that steps be taken by the respondents to actively offer service to the public, for example by making an active offer of service in French, entering into communication with it or by signage, notices or documentation in accordance with Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;
 - (iii) to establish adequate procedures and a system of supervision designed to quickly identify, document and quantify potential violations of language rights, which rights are set out in Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations;
 - (iv) to ensure that language rights, as described in Part IV of the OLA, subsection 10(1) and paragraph 10(2)(a) of the ACPPA and the Regulations, prevail over any agreement executed by the respondents and any collective agreements that involve them;

III. THE APPLICATION further seeks a REMEDY under subsection 24(1) of the Charter, subsection 77(4) of the OLA and rule 53 of the Federal Court Rules, 1998, having regard for the circumstances and in order to ensure compliance by the respondents with the Charter, the OLA, the ACPPA and the Regulations. THE APPLICATION is seeking the following RELIEF:

- (a) the payment by the respondents to the applicant as damages of \$25,000.00 or any other amount considered appropriate by the Court;
- (b) the payment by the respondents to the applicant as punitive and exemplary damages of \$500,000.00 or any other amount considered appropriate by the Court;
- (c) any further RELIEF that the Court considers appropriate and just to order;

IV. THE APPLICATION further seeks a mandatory ORDER against the respondents, Air Canada and Air Canada Regional Inc., requiring them to give the applicant, Michel Thibodeau, a letter of apology, which shall be posted by the respondents in all the Air Canada and Air Canada Regional Inc. customer service counters. This letter should be visible to the public, easily readable, posted for a duration of two or more weeks and include, inter alia, the following:

- (a) An acknowledgement that Air Canada and Air Canada Regional Inc. are legally required to provide services in French in accordance with the provisions of Part IV of the OLA, the ACPPA and the Regulations;
- (b) An acknowledgement that Air Canada and Air Canada Regional Inc. have breached their duty to provide services in French to Francophone passengers;
- (c) Apologies to Michel Thibodeau for the lack of service in French and for the lack of respect on the part of Air Canada and Air Canada Regional Inc. associated with the incident of August 14, 2000; [emphasis in original]

ISSUES

[3] The issues are the following:

1. Does section 10 of the Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.) (ACPPA), as amended in July 2000, impose an obligation of result on Air Canada in respect of its subsidiaries instead of an obligation of means?
2. (a) What is the admissible evidence in this case?
(b) In light of the evidence, is there a breach of the applicant's language rights?
3. More particularly, but without limitation:
 - (a) Does the Canadian Charter of Rights and Freedoms apply to Air Canada and Air Canada Regional Inc.?
 - (b) Having regard to section 10 of the ACPPA, as amended, does the applicant have an independent remedy against Air Canada Regional Inc.?
 - (c) Having regard to the circumstances, does the applicant have standing to raise legal issues and remedies that are not specific to his personal legal situation?
 - (d) Does section 79 of the OLA prevail over the other federal statutes?
 - (e) Is section 25 of the OLA applicable in the circumstances?
4. In view of the legal situation of the applicant and the respondents, particularly in the wake of the orders issued under the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36 (CCAA), is the applicant entitled to relief other than that already provided under the CCAA?

5. Do the provisions of the OLA, the ACPPA and the Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48 prevail over the provisions of trade agreements or collective agreements?

FACTUAL CONTEXT

- [4] On August 14, 2000, the applicant and his wife were passengers on board flight AC 1347 of Air Ontario departing from Montréal for Ottawa.
- [5] Air Ontario is a subsidiary of Air Canada and, since January 1, 2001, has been legally part of the merged unit known as Air Canada Regional Inc.
- [6] The only flight attendant on duty (Marne Guenther) on flight AC 1347 was a unilingual Anglophone. She asked the applicant and his wife in English if they would be kind enough to give up their seats to accommodate a couple with a baby. They agreed to do so.
- [7] During the snack service, the applicant spoke to Ms. Guenther in French. The flight attendant replied: "I apologize that I do not speak French. Would you like anything to drink?" (flight attendant's version). The applicant's version: "Excuse me, I do not speak French."
- [8] The versions differ regarding the events that followed. The applicant submits that he did not use a threatening tone but admits that he was upset that he could not obtain service in French.
- [9] The flight attendant and other witnesses who were present, on the other hand, allege that the applicant, through the tone of his voice, intimidated some passengers, including Ms. Guenther.
- [10] Another flight attendant (Ms. Lawn), who was in uniform but not on duty aboard flight AC 1347, then intervened to help Ms. Guenther and serve as her interpreter with the applicant.
- [11] Dissatisfied, the applicant asked to speak to the captain. The flight was a short one and the plane had already begun its descent. Ms. Lawn explained to the applicant that it would be impossible to speak to the captain since he did not speak French.
- [12] Upon his arrival at the Ottawa airport, two officers of the Ottawa-Carleton police force boarded the plane to meet with the applicant in response to a call from Air Ontario. Since the police intervention amounted to nothing more than an on-site intervention and necessitated no action on their part, there was no written report.
- [13] In their oral submissions, the respondents state that they did not want to label the applicant as having been under the influence of "air rage".
- [14] On August 16, 2000, the applicant filed a written complaint with the Commissioner of Official Languages, Air Canada and Air Ontario concerning the lack of services in French on board flight AC 1347.

- [15] The applicant received an acknowledgement of receipt from the office of the Commissioner of Official Languages and Air Ontario. However, he was informed by Air Canada, in a telephone conversation, that it would not respond to his complaint as the matter concerned only Air Ontario, an independent company of Air Canada.
- [16] A report of the Office of the Commissioner of Official Languages was delivered to the applicant in January 2002 and the findings may be summarized as follows:
- The flight attendant on duty was unable to provide service in French to the passengers, despite the fact that this flight services a route with a significant demand for services in both official languages, pursuant to paragraph 7(4)(c) of the Regulations.
 - Air Canada and Air Ontario did not fulfill their obligations under subsection 10(2) of the ACPPA and Part IV of the OLA.
 - Since the ACPPA did not give the Air Canada regional carriers who operate in Eastern Canada some time in which to comply with their obligations, as was provided for the Western subsidiaries (subsection 10(5) of the ACPPA), Air Canada's obligations took effect immediately upon the coming into force of the ACPPA amendments, on July 5, 2000.
 - The Commissioner's analysis indicates that over the last ten years Air Canada's efforts to fulfill its obligations under the OLA have had essentially no effect since there has been no appreciable improvement in service in French.
 - The OLA is quasi-constitutional legislation and as such the public's rights are not negotiable. The respondents should not be required to negotiate the public's language rights with the union. They must persuade the union representatives that the seniority provisions cannot contravene the duty to provide services in both official languages on designated flights. They must clearly state that the assignment of bilingual flight attendants to designated bilingual flights is not negotiable.
- [17] The applicant subsequently filed this application. On April 1, 2003, Air Canada was placed under the protection of the CCAA. Mr. Justice Farley of the Superior Court of Ontario granted Air Canada and some of its subsidiaries protection against their creditors so they could proceed in an orderly way with a restructuring of their activities.
- [18] On April 9, 2003, the Commissioner of Official Languages (the Commissioner) was given leave to intervene in this proceeding with respect to the issue of interpretation of section 10 of the ACPPA.
- [19] On October 5, 2003, Mr. Justice Noël of this Court made an order staying these proceedings until Mr. Justice Farley's order to stay was definitively lifted.
- [20] On September 18, 2003, Farley J. made a "Claims Procedure Order" (CPO) establishing the procedure to be taken in making a claim under the ACPPA on behalf of unsecured creditors.

- [221] Observing the problem that exists concerning the appropriate forum for determining a claim under the OLA, Noël J. issued a direction in which he requested that the parties ask Farley J. which forum (the CPO or the Federal Court) would be the most appropriate for making determinations arising out of this case. Farley J. determined that the CPO is the appropriate forum for dealing with the monetary portion of the claim, but that the non-monetary aspects should be heard by the Federal Court.
- [222] On June 2, 2004, Noël J., taking into consideration the determination by Farley J., made a second order dismissing the request to lift the order to stay, pending the issuance of the final order of Farley J. or upon application by one of the parties should the circumstances so warrant.
- [231] Mr. Thibodeau's claim was rejected by the Air Canada monitor and he appealed that decision. That appeal was heard by Mr. Boudreault (a retired former judge) on the basis of the documentation on file under the CPO. He concluded that Air Canada had failed to comply with the applicant's language rights under the OLA and assessed the damages at \$1,175 including interest, leaving the Federal Court the discretion to determine the costs.
- [241] Mr. Thibodeau appealed this decision to the Superior Court of Ontario alleging that the value of the award was unreasonable and ought to be increased. Mr. Justice Rouleau dismissed the applicant's appeal and upheld Mr. Boudreault's decision.
- [251] On February 15, 2005, Noël J. made two orders - the first, ordering that the stay of proceedings be lifted to allow the applicant to proceed to the hearing of his case, and the second listing the issues to be decided by this Court.

ANALYSIS

1. Does section 10 of the ACPPA, as amended in July 2000, impose an obligation of result on Air Canada in respect of its subsidiaries instead of an obligation of means?
- [261] Air Canada was legally constituted by Parliament in 1937 under the name "Trans-Canada Airlines". The name "Air Canada" replaced "Trans-Canada Airlines" pursuant to legislation enacted in 1964.
- [271] The Canadian government decided to privatize the airline. This project materialized through the enactment of the ACPPA. The airline, previously a Crown corporation, now became an ordinary company whose activities were subject to the Canada Business Corporations Act, R.S.C. 1985, c. C-44.
- [281] Under section 10 of the ACPPA, the OLA applies to Air Canada. It is clear that this company is under a statutory duty to comply with the OLA and the Regulations thereunder.

- [29] Because of differences of opinion concerning the extent of Air Canada's linguistic obligations in respect of its subsidiaries, Parliament decided to amend the ACPA. Section 10 of the ACPA now expressly provides, effective July 5, 2000, that Air Canada must ensure that its subsidiaries comply with Part IV of the OLA. In other words, the ACPA provides that Air Canada customers may communicate with and be served in the official language of their choice when they use the services of Air Canada subsidiaries (subsection 10(2)).
- [30] On July 6, 2000, Air Canada sent a message to all staff members of the regional carriers informing them of their official languages obligations under the amendments to the ACPA. This message clearly stated that, effective July 2000, Air Ontario was required by law to provide its in-flight services in both official languages [translation] "on all flights departing Montréal, Ottawa or Moncton, flights to those cities or flights that include a transit in those cities and on all flights within Ontario, Quebec and New Brunswick . . .".
- [31] On November 2, 2000, in a letter from Air Ontario, Manon Stuart, OLA Implementation Coordinator for Air Canada regional airlines, confirmed that Air Ontario had been subject to the OLA since July 5, 2000.
- [32] It is undeniable, therefore, that the OLA applies to Air Canada and to all of its subsidiaries in respect of communications with travellers. But what is the extent of this obligation? Is it an obligation of result as the applicant and the intervener contend, or is it an obligation of means as the respondents submit?
- [33] It is important to assess the intensity of the obligation under subsection 10(2) of the ACPA. The classification of duties according to their intensity is a doctrinal classification. Parliament does not define this intensity; instead, it describes the extent of the obligation. Classification is an important means in practical terms for determining the evidence that the applicant must adduce and the grounds of exoneration available to the respondents.
- [34] Jean-Louis Baudouin and Pierre-Gabriel Jobin define the obligation of means and of result as follows:

[translation]

Obligation of means - The obligation of means is the obligation for the satisfaction of which the debtor is required to act with prudence and diligence with a view to obtaining the agreed result, using all reasonable means, but without guaranteeing the creditor that the result will be achieved (p. 32)

Obligation of result - The obligation of result is the obligation for the satisfaction of which the debtor is required to provide the creditor with a specific and defined result (p. 34)

Baudouin, Jean Louis and Pierre-Gabriel Jobin, *Les Obligations*, 5th ed., Les éditions Yvon Blais Inc., Cowansville, Quebec, 1998, 1217 pages.

- [35] In the case of an obligation of means, the respondent will be liable only if it has not exercised due diligence and care in respect of its obligation. The obligation of result, on the contrary, suffices to impose a presumption of fault on the respondent. Accordingly, in order to prove it is not liable, the respondent must establish that the non-performance or harm results from a force majeure. Absence of fault is not sufficient to exonerate it (Baudouin, *supra*, pages 36-37).
- [36] A number of factors must be considered in analyzing the intensity of the duties under section 10 of the ACPPA: the text of section 10 of the ACPPA, the context of the Act and the intention of Parliament when it enacted the OLA and the ACPPA (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, page 41, paragraph 21).

Current meaning of the words

- [37] The current meaning of the words focuses on the wording of the section in question. This method of interpretation presumes that Parliament chose certain words the use and meaning of which is that of the general population. The text of section 10 of the ACPPA reads as follows (since July 5, 2000, through the coming into force of section 18 of the Act to amend the Canada Transportation Act, the Competition Act, the Competition Tribunal Act and the Air Canada Public Participation Act and to amend another Act in consequence, S.C. 2000, c. 15 (AAACPPA)):

Official Languages Act

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

Duty re subsidiaries

- (2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the Official Languages Act to be provided in either official language.

Loi sur les langues officielles

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

Communication avec les voyageurs

- (2) Sous réserve du paragraphe (5), la Société est tenue de veiller à ce que les services aériens, y compris les services connexes, offerts par ses filiales à leurs clients le soient, et à ce que ces clients puissent communiquer avec celles-ci relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, offrant elle-même les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles, à une telle obligation. Subsidiary body corporate
- (3) For the purposes of this section, a body corporate is a subsidiary of the Corporation if
- (a) it is controlled by
 - (i) the Corporation,
 - (ii) the Corporation and one or more bodies corporate each of which is controlled by the Corporation, or
 - (iii) two or more bodies corporate each of which is controlled by the Corporation; or
 - (b) it is a subsidiary of a body corporate that is a subsidiary of the Corporation.

Filiales

- (3) Pour l'application du présent article, une personne morale est la filiale de la Société si, selon le cas :
- a) elle est contrôlée :
 - (i) soit par la Société,
 - (ii) soit par la Société et une ou plusieurs personnes morales elles-mêmes contrôlées par celle-ci,
 - (iii) soit par des personnes morales elles-mêmes contrôlées par la Société;
 - b) elle est la filiale d'une filiale de la Société.

Control

- (4) For the purposes of subsection (3), a body corporate is controlled by another body corporate if
- (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of the other body corporate; and
 - (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

Contrôle

- (4) Pour l'application du paragraphe (3), une personne morale est contrôlée par une autre personne morale si :
- a) des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, autrement qu'à titre de garantie uniquement, par cette autre personne morale ou pour son bénéfice;
 - b) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale.

Application of subsection (2)

*(5) Subsection (2) applies

- (a) in respect of air services, including incidental services, provided or made available by a subsidiary of the Corporation at a facility or office in Manitoba, British Columbia, Saskatchewan, Alberta, the Yukon Territory, the Northwest Territories or Nunavut or on a route wholly within those provinces, one year after that subsection comes into force if it had been a subsidiary of the Corporation on that coming into force; and (b) in respect of a person that becomes a subsidiary of the Corporation only after that subsection comes into force, or in respect of Canadian Airlines International Ltd. or Canadian Regional Airlines Ltd. if that airline becomes a subsidiary of the Corporation before that subsection comes into force, three years after the person or airline becomes a subsidiary.

*[Note: Subsection 10(2) in force July 5, 2000, see SI/2000-59.]

Application

*(5) Le paragraphe (2) s'applique :

- a) un an après son entrée en vigueur, à l'égard des services aériens, y compris les services connexes, offerts soit à un bureau au Manitoba, en Colombie-Britannique, en Saskatchewan, en Alberta, au Yukon, dans les Territoires du Nord-Ouest ou au Nunavut, soit relativement à un trajet dans ces provinces, par une filiale de la Société qui avait ce statut lors de cette entrée en vigueur;
- b) à l'égard des Lignes aériennes Canadien International ltée et des Lignes aériennes Canadien Régional ltée, dans le cas où celles-ci deviennent des filiales de la Société avant cette entrée en vigueur et à l'égard de la personne qui ne devient une filiale de la Société qu'après cette entrée en vigueur, trois ans après l'acquisition par elles du statut de filiale.

*[Note : Paragraphe 10(2) en vigueur le 5 juillet 2000, voir TR/2000-59.]

Extension

- (6) The Governor in Council may, by order made on the recommendation of the Minister of Transport, increase the three years referred to in paragraph (5)(b) to a maximum of four years in respect of a route served, or an office or facility from which service is provided, by a subsidiary.

Prorogation

- (6) Le gouverneur en conseil peut, par décret pris sur recommandation du ministre des Transports, proroger le délai de trois ans visé à l'alinéa (5)b) d'au plus un an à l'égard soit d'un trajet emprunté par une filiale, soit d'un bureau où elle offre des services.

Duties of replacements

- (7) If Canadian Airlines International Ltd., Canadian Regional Airlines Ltd. or a subsidiary of the Corporation replaces the Corporation or one of its subsidiaries in providing an air service, including incidental services, that the Corporation or the subsidiary provided on or after December 21, 1999, the Corporation has the duty to ensure that any of the customers of the person who replaces the Corporation or the subsidiary can communicate with that person in respect of those services, and obtain those services from that person, in either official language in any case where those services, if provided by the Corporation or the subsidiary, would be required under Part IV of the Official Languages Act or under subsection (2) to be provided in either official language.

Obligation en cas de substitution

- (7) Si les Lignes aériennes Canadien International ltée, les Lignes aériennes Canadien Régional ltée ou une filiale de la Société offrent à la place de la Société ou de l'une de ses filiales un service aérien, y compris les services connexes, que celles-ci offraient le 21 décembre 1999 ou par la suite, la Société est tenue de veiller à ce que les services offerts par la personne à ses clients à sa place ou à la place de l'une de ses filiales le soient, et à ce qu'ils puissent communiquer avec la personne relativement à ces services, dans l'une ou l'autre des langues officielles dans le cas où, elle-même ou l'une de ses filiales offrant les services, elle serait tenue, au titre de la partie IV de la Loi sur les langues officielles ou du paragraphe (2), à une telle obligation.

For greater certainty

- (8) For greater certainty, subsections (2) and (7) do not affect any duty that the Corporation may have under section 25 of the Official Languages Act.

Article 25 de la Loi sur les langues officielles

- (8) Il demeure entendu que les paragraphes (2) et (7) ne portent pas atteinte à l'obligation qui incombe à la Société au titre de l'article 25 de la Loi sur les langues officielles.

Deemed duty

- (9) For the purposes of Parts VIII, IX and X of the Official Languages Act, the duties referred to in subsections (2) and (7) are deemed to be duties under Part IV of that Act.

Assimilation

- (9) Pour l'application des parties VIII, IX et X de la Loi sur les langues officielles, les obligations prévues aux paragraphes (2) et (7) sont réputées être des obligations prévues à la partie IV de cette loi.

- [38] Subsection 10(2) provides that Air Canada has a duty to ensure that the customers of its subsidiaries can communicate and obtain services in either of the official languages. The English wording is in my opinion stronger than the language in the French version. It states that Air Canada "has the duty to ensure that any subsidiary's customers can communicate . . . and obtain those services from the subsidiary in either official language . . .".
- [39] To establish that it has only an obligation of means, Air Canada compares the wording of subsection 10(2) of the ACPPA with the wording of subsections 705.43(1) and (2) of the Canadian Aviation Regulations, SOR/96-443, enacted pursuant to the Aeronautics Act, R.S.C. 1985, c. A-2. It states that the resulting obligation under these regulations is clearly an obligation of result because of the words "shall ensure" (doit s'assurer). It adds that the obligation under the ACPPA cannot be one of result since subsection 10(2) uses radically different language, "duty to ensure" (tenue de veiller).
- [40] In my opinion, the respondents ought instead to conduct a comparative study of the words used in the OLA if they wish to find out how to interpret their duties under the ACPPA. The Canadian Aviation Regulations are not regulations based on a quasi-constitutional enactment. Subsection 10(2) of the ACPPA refers to a quasi-constitutional enactment, the OLA. Consequently, the words in subsection 10(2) of the ACPPA must be construed in light of the language used in the OLA.
- [41] In terms of communication with and services provided to the public, the OLA provides, in sections 23 and 25, that "every federal institution . . . has the duty" (in French, "qu'il incombe aux institutions fédérales" - "incombe" meaning that federal institutions "ont la responsabilité ou la charge de" [translation] "are responsible for", Le Nouveau Petit Robert, 1993). I would liken this obligation to the one in subsection 10(2) of the ACPPA: "has the duty to ensure" (est tenue de veiller à . . .). The Federal Court has previously interpreted section 25 of the OLA as imposing an obligation of result on these institutions. In *Quigley v. Canada*

(House of Commons), [2003] 1 F.C. 132, it was held that the House of Commons had breached its duties under the OLA in failing to ensure that the debates are made available in both official languages.

Context of the OLA

- [42] Section 82 provides that in the event of any inconsistency between Parts I to V of the OLA and any other Act of Parliament or regulation thereunder, other than the Canadian Human Rights Act and the regulations thereunder, these Parts prevail to the extent of the inconsistency.
- [43] Subsection 10(9) of the ACPPA, as amended, specifies that Air Canada's duties under subsections (2) and (7) are deemed to be the same as the duties of federal institutions under Part IV of the OLA (Communications with and services to the public). By explicitly subjecting Air Canada to the OLA through section 10 of the ACPPA, Parliament has compared Air Canada, for the purpose of this part of this Act, to a federal institution. That being said, Air Canada has the same duties as those incumbent on federal institutions, namely, to ensure that the services it provides itself or through its subsidiaries are consistent with the OLA.

Parliament's intention

- [44] In *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paragraph 15, the Supreme Court of Canada states:

In 1975, when this Court confirmed that language guarantees in s. 133 of the Constitution Act, 1867 were minimal provisions and did not preclude the extension of language rights by either the federal or the provincial legislatures (*Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, at pp. 192-93), a purposive and liberal approach to the interpretation of language rights was adopted. . . .

It was in this context that the OLA was enacted by Parliament. In fact, Part IV of the OLA is primarily intended to guarantee that federal institutions will implement measures that will enable Canadians to exercise fully the rights conferred on them by the Constitution, namely, to communicate with or receive services from the institutions of Parliament and the government of Canada in either of the official languages.

- [45] Section 2 of the OLA, which serves as an interpretive tool, provides that the purpose of the Act is to advance the equality of status and use of the English and French languages. In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, at paragraph 23, the Supreme Court confirmed what the Federal Court, in *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373, had correctly held, that the OLA is not an ordinary statute:

It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and

Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it." [Emphasis added.]

[46] In light of the foregoing, the quasi-constitutional nature is clear. That is why the Act must be interpreted having regard to the constitutional guarantees and must be given such broad and liberal interpretation as will best ensure that these guarantees are attained (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd edition (Scarborough, Carswell, 2000), p. 500).

[47] Section 16 of the Charter confirms that the substantive equality of language rights and section 2 of the OLA has the same effect. In *Beaulac*, supra, the Supreme Court of Canada ruled in paragraph 24 that "the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation." This principle of substantive equality between the two official languages means, for example, that language rights require government action for their implementation and accordingly create positive obligations for the State (*Beaulac*, supra, at paragraph 20).

[48] Since the rights arising under the OLA are comparable to a constitutional guarantee, and since subsection 10(9) of the ACPPA provides that Air Canada's duty in subsection 10(2) is deemed to be a duty under Part IV of the OLA for the purposes of applying Parts VIII, IX and X of the OLA, I consider that this obligation is one of result.

[49] The parameters of this obligation of result are found in section 22 of the OLA, which stipulates that this obligation exists within the National Capital Region or wherever, in Canada or elsewhere, there is a significant demand. Subsection 23(1) provides:

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.

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.

[50] "Significant demand" has been defined in subsection 7(1) and paragraph 7(4)(c) of the Regulations:

7. (1) For the purposes of subsection 23(1) of the Act, there is significant demand for services to the travelling public, other than air traffic control services and related advisory services, from an office or facility of a federal institution in an official language where the facility is an airport, railway station or ferry terminal or the office is located at an airport, railway station or ferry terminal and at that airport, railway station or ferry terminal over a year at least 5 per cent of the demand from the public for services is in that language.

7. (1) Pour l'application du paragraphe 23(1) de la Loi, l'emploi d'une langue officielle fait l'objet d'une demande importante à un bureau d'une institution fédérale en ce qui a trait aux services offerts aux voyageurs, à l'exclusion des services de contrôle de la circulation aérienne et des services consultatifs connexes, lorsque le bureau est un aéroport, une gare ferroviaire ou de traversiers ou un bureau situé dans l'un de ces lieux et qu'au moins cinq pour cent de la demande de services faite par le public à cet aéroport ou à cette gare, au cours d'une année, est dans cette langue.

...

[...]7. (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

7. (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 immediate 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 the 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;

2. (a) What is the admissible evidence in this case?

[51] The respondents challenge the admissibility of the following exhibits:

1. Exhibit TM-15: Report of the Standing Joint Committee on Official Languages, "Air Canada: Good Intentions are Not Enough" (February 2002)
2. Exhibit TM-16: Summary and analysis of the proceedings of the Standing Joint Committee on Official Languages on the implementation of the Official Languages Act in Air Canada, "Air Canada and the implementation of the Official Languages Act" (September 2001)
3. Exhibit TM-17: Affidavit of Michel Robichaud
4. Exhibit TM-14: Report of the Commissioner of Official Languages, "Rapport d'enquête concernant l'absence de service en français sur le vol AC 1347 d'Air Ontario Montréal - Ottawa"

Exhibits TM-15, TM-16

[52] The respondents allege that exhibits TM-15 and TM-16 are inadmissible because the respondents are legally unable to question the proceedings of the Standing Joint Committee on Official Languages or to challenge the findings in these reports. Consequently, they contend, it would be contrary to the traditional rules of evidence to admit them. In support of their contentions, they submit the decision of the Ontario Court of Appeal in *Robb v. St. Joseph's Health Care Centre*; *Rintoul v. St. Joseph's Health Centre*; *Farrow v. Canadian Red Cross Society*, [2001] O.J. 4605 (Ont. C.A.), upholding the decision at trial of Mr. Justice Macdonald, referring to paragraphs 23 to 26:

To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended. (emphasis added)

There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

...

This reasoning also applies to prevent the Grace Report from being admitted into evidence as proof of its contents. The Grace Report is dated January 21, 1997. It is the report of the Information Commissioner of Canada John W. Grace. It contains the results of his investigation of a complaint made on September 8, 1995 against Health Canada following reports which alleged the destruction of audio tapes and verbatim transcripts in the possession of the Canadian Blood Committee Secretariat (the "Secretariat") of meetings of the Canadian Blood Committee (the "CBC") held between 1982 and 1989. Underlying the allegation of destruction of the audio tapes and verbatim transcripts is the allegation that the destruction of records occurred to thwart their release under the Access to Information Act, R.S.C. 1985, c. A-1. Commissioner Grace focused in his report on a decision taken at a meeting on May 16-18, 1989 of the CBC which directed the Secretariat to destroy the records of all previous meetings of the CBC in the possession of the Secretariat since its inception in 1982. The Report of Commissioner Grace is, according to the plaintiffs, relevant to the issues in this action. The investigation was not a public process. Commissioner Grace was not required to apply a standard of proof analogous to civil proceedings.

The reasoning which prohibits the admission of the Krever Report is applicable to the question of whether the Grace Report can be admitted.

[1998] O.J. 5394 (O.C. Gen. Div.)

[53] Section 79 of the OLA allows the admission as evidence of information relating to any similar complaint in respect of the same federal institution. In 1997, the Federal Court, in Canada (Commissioner of Official Languages) v. Air Canada, [1997] F.C.J. No. 1834 (T.D.) (QL), analyzed this section. Here is what Mr. Justice Dubé said, at paragraphs 17 to 20:

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. . . .

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.

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. . . .

The admissibility in evidence of this additional information of similar complaints nevertheless does not transform the hearing into a public commission of inquiry. . . .

- [54] Documents M-15 and M-16 do not provide an exhaustive overview of Air Canada's linguistic performance but they do provide an outline of the problems that had not been satisfactorily resolved at the time the reports were written. A number of witnesses were called to discuss problems Air Canada was having in connection with OLA compliance.
- [55] Concerning exhibit TM-15, three union representatives of the Air Canada employees drew attention to certain labour relations problems and gave their point of view on the services offered. In response to these allegations, the President and Chief Executive Officer, Robert Milton, accompanied by some of his managers, had their own opportunity to comment on and discuss with the Committee the difficulties confronting Air Canada in complying with the OLA.
- [56] Document TM-16 is an analysis of the existing situation at Air Canada. The Committee met 13 times between 1980 and 2000. The Commissioner's office appeared several times while the Air Canada representatives appeared five times. The latter, therefore, had an opportunity to make submissions.
- [57] Exhibits TM-15 and TM-16 are not admissible as evidence of non-compliance with the OLA on Air Ontario's flight AC 1347 on August 14, 2000, but they may be useful in determining the appropriate relief under subsection 77(4) of that Act.

Exhibit TM-17

- [58] Exhibit TM-17 should not be admissible, according to the respondents, for it is an affidavit of Michel Robichaud filed in docket T-2536-96. This document was not filed by Mr. Robichaud but it was appended to the applicant's affidavit. The respondents argue that they are unable to cross-examine the author of this affidavit, which refers to 70 exhibits that were not filed in the record of this case.
- [59] The allegations contained in document TM-17 would not be admissible either, the respondents submit, because they involve a factual situation prior to the coming into force, on July 5, 2000, of the amendments to the ACPPA. According to this argument the affidavit cannot, therefore, serve as evidence of information concerning "similar" or "comparable" complaints in respect of the same federal institution. In short, the respondents allege that prior to July 5, 2000, Air Canada was under no obligation to its subsidiaries and the complaints prior to that date are therefore not "similar" for the purposes of section 79 of the OLA.

[60] I note that in document TM-17, Michel Robichaud, then an employee of the Office of the Commissioner of Official Languages, lists a number of complaints against Air Canada from November 1987 to 1996. In particular, there were 158 complaints concerning in-flight services. The exhibits appended to his affidavit are not filed, the most recent complaints dating more than four years before the coming into force of the amendments to section 10 of the ACPA. Moreover, an abandonment was filed by counsel for the Commissioner of Official Languages in docket T-2536-96.

[61] I agree with the respondents that this exhibit is inadmissible as evidence.

Exhibit TM-14 (Report of the Commissioner of Official Languages)

[62] The reply to the question of the admissibility of the Commissioner's report may be found in the recent decision of the Federal Court of Appeal, *Forum des maires de la Péninsule acadienne v. Canada* (Food Inspection Agency), [2004] F.C.J. No. 1235 (F.C.A.) (QL), at paragraph 21. In that decision, the Court ruled on the purpose of section 77 of the OLA. It stated that the Commissioner's reports are admissible in evidence but they are not binding on the court and may be challenged like any other evidence.

[15] The Judge more than once characterized the proceeding filed by the Forum as an "application for judicial review under section 18.1 of the Federal Court Act". That is an error. Subsection 77(2) provides for "[a]n application" (referred to as a "recours" in the French text), and it is [translation] "an application [demande] under section 77 of the Official Languages Act" that the Forum had filed. This proceeding is not an application for judicial review, although it is governed procedurally by the rules applicable to applications (see paragraph 300(b) of the Federal Court Rules, 1998 [SOR/98-106]). This application is instead similar to an action.

[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), (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)). The

Commissioner's report is nevertheless the source or the pretext for the remedy or, to repeat the words of Madam Justice Desjardins in relation to the comparable report filed by the Information Commissioner, a [translation] "precondition to the exercise of the remedy" (Canada (Information Commissioner) v. Canada (Minister of National Defence) (1999), 240 N.R. 244 (F.C.A.), at page 255): the capacity as an "applicant" to the Court is derived from the capacity as a "complainant" to the Commissioner (subsection 77(1)) and it is the date of communication of the report that serves as the point of departure for the calculation of the time periods (subsection 77(2)). The "complainant", according to subsection 58(2), may be a "person" or a "group".

- [18] Thus we see that the remedy differs from an application for judicial review within the meaning of section 18.1 [as enacted by S.C. 1990, c. 8, s. 5; 2002, c. 8, s. 27] of the Federal Courts Act [R.S.C., 1985, c. F-7, s. 1 (as am. idem, s. 14)]. It does not attack the "decision" of the federal institution as such. It may be undertaken by a person or a group, which may not be "directly affected by the matter in respect of which relief is sought" (see subsection 18.1(1) of the Federal Courts Act). The relief the applicant may be seeking is not limited to the remedies prescribed in subsection 18.1(3) of the Federal Courts Act, as the Court, by way of exception, has the discretion that it "considers appropriate and just in the circumstances" (subsection 77(4)). New evidence is admissible (section 79). The matter is heard and determined in a summary manner (section 80).
- [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.
- [21] Moreover, the Commissioner's reports are admissible in evidence, but they are not binding on the judge and may be contradicted like any other evidence. The explanation is obvious. The Commissioner conducts her inquiry in secret and her conclusions may be based on facts that the parties concerned by the complaint will not necessarily have been able to verify. Furthermore, for reasons that I will soon give, the purpose of the Court remedy is more limited than the purpose of the Commissioner's inquiry and it may be that the Commissioner takes into account some considerations that the judge may not consider. Also, I agree with the decision of Mr. Justice Nadon, then in the Trial Division, in *Rogers v. Canada (Department of National Defence)* (2001), 201 F.T.R. 41 (F.C.T.D.), who held, after accepting in evidence the report of the Commissioner, that (at paragraph 40):

The conclusion that a breach of the Act has occurred, in any given case, must be reached after the judge has heard and weighed the evidence advanced by both parties.

[Emphasis added.]

It is my view, therefore, that exhibit TM-14 is admissible but I do not consider myself bound by the conclusions set down in this document.

(b) In light of the evidence, is there a breach of the applicant's language rights?

[63] The respondents submit that prior to July 5, 2000, Air Canada legally was under no obligation with respect to Air Ontario and Part IV of the OLA. They argue that common sense dictates that all flight attendants cannot become bilingual overnight. Following the adoption of the amendments to the ACPPA, between August 2000 and August 2001, Air Canada conducted surveys to determine which routes were characterized by "significant demand" within the meaning of subsection 7(2) of the Regulations. In January 2000, Air Canada began to take the necessary steps to fulfill the obligations of means that the amendments to the ACPPA were going to impose on it on July 5.

[64] Since I have reached the conclusion that the amended provisions of the ACPPA lead to an obligation of result, I need not ask myself at this point the following question: "Did Air Canada adopt reasonable means to fulfill its obligations?"

[65] In *Les Obligations*, supra, at page 35, it is stated that in terms of evidence, the lack of result creates a presumption of fault and places on the defendant's shoulders the burden of demonstrating that the failure to perform derives from a cause that is not attributable to the defendant. The mere fact of identifying absence of fault is not sufficient to exonerate the defendant from liability. The defendant must identify, by a preponderance of evidence, the existence of force majeure, or that the victim prevented the obligation from being performed, failing which the defendant will be liable for the non-performance.

[66] The particulars related in the applicant's affidavit and the letter dated November 2, 2000, by Manon Stuart, Official Languages Act implementation coordinator, Air Canada Regional Airlines, persuades me that Air Canada did not provide services in French to Mr. Thibodeau on August 14, 2000, on the flight from Montréal to Ottawa. Similar findings are found in the decision of the retired judge Mr. Boudreault (applicant's volume 7, tab 6, paragraph 26), a decision upheld by Mr. Justice Rouleau of the Superior Court of Ontario (applicant's volume 7, tab 7, filed at the hearing).

3. (a) Does the Canadian Charter of Rights and Freedoms apply to Air Canada and Air Canada Regional Inc.?

[67] The respondents submit that the Charter expressly provides that the official languages provisions apply to federal institutions and the government of Canada. They contend that the Charter does not apply to Air Canada and its subsidiaries because they are private companies.

- [68] It is trite law that the Charter does not apply to purely private activities. Henri Brun, in the 16th edition of *Charte des droits de la personne: Législation, Jurisprudence, Doctrine* (Montréal: Wilson & Lafleur, 2003), page 599, defines the word "government" in section 32 of the Charter as meaning [translation] "the federal and provincial executive power, and not the government in its most generic sense. According to section 32, the actors to which the Charter applies are the legislative, executive and administrative branches."
- [69] Baudouin and Mendes, in *Charte Canadienne des Droits & Libertés*, 3rd edition (Montréal: Wilson & Lafleur, 1996), pages 47 to 49, state that in order to find out whether the Charter applies, it is necessary to analyze the nature of the undertaking's activities. The company must exercise a governmental function, and the fact that it supplies public services does not necessarily meet the test of governmental function. Although a business corporation derives its existence from the governmental authority, this is not sufficient to subject it to compliance with the Charter.
- [70] In the case at bar, Air Canada's incorporating legislation, even before its privatization, stipulated that the company was not an agent of the Crown (section 24). Given the fact that Air Canada is now a private company, that it does not exercise a governmental function and does not implement any policy or program determined by the government, I conclude that Air Canada and its subsidiaries are not subject to the Charter (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, paragraph 42).
- (b) Having regard to section 10 of the ACPA, as amended, does the applicant have an independent remedy against Air Canada Regional Inc.?
- [71] Subsection 10(2) of the ACPA provides that the "Corporation" (Air Canada) has the duty to ensure that its subsidiaries provide services in both languages. It is therefore Air Canada that is accountable and not the subsidiaries, since the OLA does not directly apply to them. Subsection 10(2) is modelled on section 25 of the OLA, which provides that every federal institution has the duty to ensure that services provided or made available to the public by another person or organization on its behalf are provided in either official language as if the institution itself were providing the services.
- [72] The applicant has no independent remedy against Air Canada Regional Inc. The duty to ensure compliance with the OLA rests on Air Canada's shoulders. If there is no compliance with the Act, this is the responsibility of Air Canada and not of its subsidiary.
- (c) Having regard to the circumstances, does the applicant have standing to raise legal issues and remedies that are not specific to his personal legal situation?
- [73] Part X of the OLA covers the proceedings that may be brought when the Act is not complied with. The applicant meets the tests in subsection 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 or V, or in respect of section 91, may apply to the Court for a remedy under this Part." Section 76 gives jurisdiction to the Federal Court.

- [74] But in what circumstances may an applicant act in the public interest? Three factors were laid down by the Supreme Court of Canada in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. This judgment followed three previous decisions of that Court involving statutory challenges: *Thorson v. Canada (Attorney General of Canada)*, [1975] 1 S.C.R. 138; *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 and *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662.
- [75] The three tests are as follows:
1. The applicant must raise a serious and justiciable issue;
 2. He must have a genuine interest; and
 3. There must be no other reasonable and effective manner in which the issue may be brought before the Court.
- [76] The respondents allege that the applicant only has standing in respect of his personal situation and that he cannot call for relief of a general and structural nature on behalf of the public interest. The respondents argue that the applicant, to attain standing, must demonstrate that there are no other reasonable and effective ways to submit the questions of public interest to the Court. In this regard, they cite *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.
- [77] They submit that in the case at bar, the Commissioner of Official Languages, and not the applicant, would be the person in the best position to raise questions of public interest.
- [78] The applicant explains that he fulfills the three criteria applied in *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)*, 2001 FCTD 239 to uphold his standing on behalf of the public interest. But, in the alternative, he asks that the Court award him this status because the Supreme Court, in *Finlay*, *supra*, allowed for judicial discretion to grant standing even if the three criteria were not fulfilled.
- [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.
- [80] I will allow the parties and the intervener to make submissions to the Court on the non-monetary remedies claimed by the applicant.
- (d) Does section 79 of the OLA prevail over the other federal statutes?

- [81] Section 82 of the OLA provides that in the event of any inconsistency between Parts I to V and any other Act of Parliament or regulation thereunder, those Parts prevail to the extent of the inconsistency. Section 79 is in Part X of the OLA, a part that is not mentioned in section 82 of the OLA. But the OLA is a quasi-constitutional statute and by its very nature prevails over other legislation.
- [82] Here, I adopt the position of Mr. Justice Dubé in *Canada (Commissioner of Official Languages) v. Air Canada*, supra, that section 79 is one of a kind and does not appear in other similar legislation. I believe that Parliament introduced this section because it thought it was important that the Court be able to obtain a more accurate portrait of the context so as best to determine the appropriate relief.
- [83] Consequently, I think that when a question must be decided under the OLA, section 79 prevails over the other rules of evidence. In my opinion, this section should be considered an exception to the general rules in evidentiary matters. To limit the scope of this section would, I think, conflict with Parliament's intention to allow the Court to obtain an overall appreciation of the situation.
- (e) Is section 25 of the OLA applicable in the circumstances?
- [84] Subsection 10(1) of the ACPPA stipulates that the OLA applies to Air Canada. Under Part IV of the OLA, Air Canada has the duty to provide its customers with the opportunity to communicate in either of the official languages.
- [85] Section 25 of that Act provides that a federal institution that provides services through another person or organization on its behalf has a duty to ensure that this third party makes those services available in either official language as if the federal institution was itself providing the services. The interpretation of this section has not been unanimous in the past. Air Canada did not consider its subsidiaries to be third parties, and did not think section 25 applied to its subsidiaries. But with the amendment to subsection 10(2) of the ACPPA, Parliament decided to impose the section 25 OLA obligation on Air Canada on its subsidiaries, using the parameters set out in section 7 of the Regulations.
- [86] I do not think it is necessary to answer the question as posed, since in my opinion subsection 10(2) of the ACPPA is very clear and unambiguous. Nor do I need to question whether, in the past, Air Canada was under the same duty in regard to its subsidiaries as the one prescribed for third parties in section 25 of the OLA.
4. In view of the legal situation of the applicant and the respondents, particularly in the wake of the orders issued under the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36 (CCAA), is the applicant entitled to relief other than that already provided under the CCAA?
- [87] The CCAA and the OLA are two federal statutes addressing two totally different concerns. The challenge, therefore, is to reconcile these two statutes when they are to apply simultaneously.

- [88] The purpose of the CCAA is to allow a company facing bankruptcy to propose a recovery plan to its creditors that would be more advantageous than the consequences of a bankruptcy and at the same time guarantee the survival of the business. Once the recovery plan is accepted and ratified by the court, it binds all of the creditors affected by the arrangement.
- [89] In the case at bar, Air Canada asked for and obtained protection under the CCAA. A number of orders were issued by Farley J. of the Ontario Superior Court, some ratifying a recovery plan with all of the consequences that this entails, *inter alia*.
- [90] The applicant was required to present the monetary portion of his claim (\$525,000) to a [translation] "claims officer concerning Air Canada and some of its subsidiaries", namely, the retired former judge, Mr. Boudreault. The latter determined the value of the applicant's claim at \$1,175. In paragraph 40, Mr. Boudreault stated:
- [translation] Concerning the claimant's request for an order as to costs and disbursements, although Mr. Thibodeau, who is not a lawyer, is not entitled to counsel fees, *Lavigne v. Minister of Human Resources Development, FCA, Docket A-104-97 (T-1977-94)*, subsection 400(4) of the Federal Court Rules, 1998, might "to a certain extent . . . satisfy, what fairness could dictate in that respect", as the Honourable Mr. Justice Marceau says in paragraph [2]. Absent any evidence, and since it appears that the case will continue in the Federal Court in regard to the other conclusions, I defer to that Court in this regard.
- [91] The applicant, dissatisfied with this decision and the dividend of about \$80 he would receive, decided to appeal to the Ontario Superior Court.
- [92] His appeal was dismissed by Mr. Justice Rouleau who wrote, at paragraph 27 of his decision:
- [translation] Mr. Thibodeau also referred to the high costs of the lawsuit. If the costs incurred by Mr. Thibodeau are high, a court will take this into account when the time comes to determine costs. The question of costs was not decided by Mr. Boudreault and was deferred to the Federal Court to be decided following the hearing on the non-monetary aspects of Mr. Thibodeau's suit.
- No appeal was filed in the Ontario Court of Appeal.
- [93] Having examined Mr. Justice Farley's orders, and in particular the order dated August 24, 2004, at paragraphs 9, 29, 32 and 34 (correspondence and documents resulting from the reorganization of Air Canada under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, documents filed by the respondents), I am satisfied that the entire monetary portion of Mr. Thibodeau's claim is now settled, other than the question of costs and disbursements.
- [94] I will also have to determine the non-monetary relief requested that is just and appropriate in the circumstances.
5. Do the provisions of the OLA, the ACPPA and the Regulations prevail over the provisions of trade agreements or collective agreements?

- [95] The collective agreements with Air Canada are under the jurisdiction of the Canada Labour Code, R.S.C. 1985, c. L-2 (CLC) pursuant to section 91 of the Constitution Act, 1867, and section 4 of the CLC.
- [96] The CLC is a federal statute covered by section 82 of the OLA. Consequently, as that section provides, Parts I to V of the OLA prevail over inconsistent provisions of this statute and the regulations thereunder. Based on this principle, it can be concluded that the CLC must comply with the requirements arising out of the OLA insofar as the latter applies.
- [97] We know that the OLA applies to Air Canada. The collective agreements under the aegis of the CLC must not be incompatible with the implementation of the OLA's purpose. If some incompatibility develops, the OLA will prevail over the provisions of the collective agreement.
- [98] Pages 17-21 of the book by W.B. Rayner, *The Law of Collective Bargaining* (Carswell, 1995), are relevant:

17.5 The Collective Agreement and Other Statutes

The existence of statutes that may touch on the matter in dispute under the collective agreement is reflective in two ways. First, the statute may purport to limit rights given under the collective agreement. Secondly, the statute, while not directly applicable to the claim under the agreement, may assist in interpreting the meaning of the agreement. The first category is essentially a question of precedence, i.e., does the statute or the agreement govern, while the second raises the issue of whether the arbitrator can apply and interpret the statute.

The most fundamental issue of precedence occurs when the statute restricts or changes the operation of the collective bargaining process and restricts the effect of negotiated agreements . . .

- [99] The author goes on to say that if the statute and the collective agreement come into conflict, the statute prevails.

There is not one law for the arbitrator and another law for the rest of the society, and so if the collective agreement is in conflict with the statute, the statute prevails. . . .

Our first question then can be readily answered. A provision in a collective agreement which conflicts with a statute is void even in cases where the conflict results from a proper interpretation of the statute rather than a direct provision purporting to void some parts of collective agreements.

- [100] These principles were laid down by the Supreme Court of Canada in *McLeod v. Egan*, [1975] 1 S.C.R. 517. They were restated in the recent decision of the Ontario Labour Relations Board in *King-Con Construction Ont. Ltd.*, [2004] O.L.R.D. No. 773, by vice-chair Jack J. Slaughter, at paragraph 28:

... In MCLEOD, the Employer had disciplined an employee who refused to work more than 48 hours per week. The collective agreement contained broad management rights clause, and did not prohibit the Employer from scheduling an employee for more than 48 hours per week. Nevertheless, the Court concluded "that an arbitrator must look beyond the four corners of the collective agreement to determine the limits of an Employer's right to manage operations" (see para. 26) and made the Employer's management rights subject to the overtime limits specified in the EMPLOYMENT STANDARDS ACT, 1968, S.O. 1968 c. 35. Accordingly, the Court found the statutory limitation on overtime in the EMPLOYMENT STANDARDS ACT operated to modify the scope of the Employer's management rights under the collective agreement.

[101] In this case, Air Canada had a duty to ensure that its subsidiaries were providing services in both official languages on routes with a significant demand. The principle that statutes prevail over collective agreements applies in this case. Air Canada must make the necessary arrangements with its unions to ensure compliance with the OLA, bearing in mind that this statute is quasi-constitutional in nature.

ORDER

THE COURT ORDERS that:

1. The applicant's proceeding against Air Canada Regional Inc. be dismissed without costs;
2. The applicant's proceeding against Air Canada be allowed;
3. The applicant shall serve and file his written submissions regarding costs and disbursements in a book not exceeding 10 pages, excluding appendices and authorities, no later than September 8, 2005. Air Canada shall do likewise no later than September 23, 2005. The applicant may file a reply no later than September 28, 2005.
4. The applicant shall serve and file his written submissions concerning the non-monetary claims in a book not exceeding 15 pages, excluding appendices and authorities, no later than September 8, 2005. Similarly, the intervener is urged to submit its own written submissions within the same period. Air Canada shall do likewise no later than September 23, 2005. The applicant and the intervener will have until September 28, 2005 for their reply.
5. After September 28, 2005, the parties will make oral arguments. In this regard, the court administrator will set a date for hearing at Ottawa and so notify them. This hearing will be held in French for a period not exceeding four hours for the entire case.
6. An order shall follow.

"Michel Beaudry"

Judge

Certified true translation

Kelley Harvey

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-346-02

STYLE: MICHEL THIBODEAU

- and -

AIR CANADA AND AIR CANADA REGIONAL INC.

- and -

COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: May 16 and 17, 2005

REASONS FOR ORDER: Beaudry J.

DATE OF REASONS: August 24, 2005

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Languages FOR THE INTERVENER

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