

Air Canada (appellant) v. Michel Thibodeau and Lynda Thibodeau (respondents) and The
Commissioner of Official Languages (intervener)
(A-358-11; 2012 FCA 246; 2012 CAF 246)

Indexed As: Thibodeau v. Air Canada

Federal Court of Appeal
Pelletier, Gauthier and Trudel, J.J.A.
September 25, 2012.

Summary:

Two Air Canada passengers, the Thibodeaus, filed eight complaints with the Commissioner of Official Languages respecting the lack of services in French for two round trip flights (Ottawa-Toronto-Atlanta/Atlanta-Toronto-Ottawa and Toronto-Philadelphia-St. Maartens/St. Maartens-Charlotte-Toronto). The two passengers complained that there were no services in French on the Toronto-Atlanta and Atlanta-Toronto flights, no services in French at the check-in counter or gate in Atlanta and that a baggage announcement in Ottawa was in English only. Respecting the second round trip, the passengers complained that there were no French services on the Charlotte-Toronto flight and that a baggage announcement in Toronto was in English only. The Commissioner rejected the complaint respecting the check-in counter and gate in Atlanta, because it was not an airport where there was a significant demand requiring the provision of services in French. The Ottawa baggage claim complaint was rejected for want of proof. The Commissioner found that the remaining claims had merit. The passengers applied under s. 77 of the Official Languages Act (OLA) for a remedy for Air Canada's breach of its linguistic obligations. The passengers sought a declaratory order respecting the breaches, an apology and \$25,000 damages. Further, the passengers argued that the breaches were systemic, warranting institutional orders against Air Canada and exemplary and punitive damages. Air Canada did not object to a declaratory order and an apology, but argued that damages were restricted by the Montreal Convention and that the breaches were not systemic.

The Federal Court, in a decision reported 394 F.T.R. 160, granted a declaration, based on Air Canada's admissions, that Air Canada breached its linguistic duties under the OLA by failing to have a bilingual flight attendant on the Toronto-Atlanta flight, by the pilot's English- only announcement re arrival time and weather in Toronto on the Atlanta-Toronto flight (untranslated by the bilingual flight attendant on board), by failing to have a bilingual flight attendant on the Charlotte-Toronto flight, and by an English-only announcement concerning baggage collection at the Toronto airport. The entitlement to a remedy under the OLA took precedence over the Montreal Convention where the two conflicted. The court awarded each passenger \$6,000 damages, ordered Air Canada to apologize to each of them in writing, ordered Air Canada to make reasonable efforts to comply with its obligations under the OLA (general order) and ordered Air Canada to introduce, within six months, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language obligations, particularly to identify Jazz flights where bilingual flight attendants were not assigned notwithstanding a significant demand for service in French (structural order). Air Canada filed an appeal and brought a motion to stay the Federal Court's order pending appeal under rule 398(1) (b) of the Federal Courts Rules.

The Federal Court of Appeal, per Blais, C.J., in a decision reported 425 N.R. 297, granted the motion and stayed the order pending appeal. Also, the Commissioner of Official Languages was recognized as an intervener - [2012] N.R. TBEEd. JA.024. The appeal proceeded on the following issues:

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

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

"C) Was the Judge entitled to a structural order against Air Canada?"

The Federal Court of Appeal allowed the appeal, answering "Yes" to question "A" and "No" to the other two questions. The appeal court held that pursuant to the Montreal Convention, the Federal Court could not award damages under the OLA for the incidents that occurred during international carriage. The applications judge was not entitled to issue the general or structural order against Air Canada. In the result, the appeal court ordered Air Canada (as it agreed to do) to provide a letter of apology and to pay \$1,500 to each of the two passengers with respect to an announcement to passengers made in English only concerning baggage claim and procedures for connecting flights at the Toronto airport. Air Canada was also ordered to pay the passengers \$6,982.19 in costs.

Aeronautics - Topic 5145

Airlines - Carriage of passengers - Liability - Damages - [See both **Aeronautics - Topic 5146**].

Aeronautics - Topic 5146

Airlines - Carriage of passengers - Liability - Statutory limitations - On three occasions Air Canada failed to observe its linguistic obligations to two passengers under the Official Languages Act (OLA) by failing to offer services in French on international flights - A question arose as to whether art. 29 of the Montreal Convention excluded an action by the passengers for damages under Part IV of the OLA for the incidents on international flights - The Federal Court of Appeal answered the question in the affirmative - The Montreal Convention constituted the sole remedy for a passenger against a carrier for any loss, bodily injury or property damage incurred during or arising out of international carriage - There was no implicit conflict of laws between the Convention and OLA - Thus the court could not award damages under the OLA for the three incidents that occurred during international carriage - See paragraphs 16 to 53.

Aeronautics - Topic 5146

Airlines - Carriage of passengers - Liability - Statutory limitations - Article 29 of the

Montreal Convention provided that "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable" - The Federal Court of Appeal interpreted this article and reviewed the relevant case law - See paragraphs 16 to 53.

Civil Rights - Topic 2866.1

Language - Right to use French or English in dealings with or within the public service or institutions, etc. - Breach - Remedies - On three occasions Air Canada failed to observe its linguistic obligations to two passengers under the Official Languages Act (OLA) - As a remedy, the applications judge issued a general order against Air Canada to comply with Part IV of the OLA respecting communications with the public and provision of services as a federal institution (i.e., "to make every reasonable effort to comply with all of its duties under Part IV of the [OLA]") - An issue arose as to whether the judge was entitled to make a general order of this nature - The Federal Court of Appeal held that the applications judge's judgment was vitiated by an error of law - A general order to comply with the law, in whole or in part, should be granted only in exceptional circumstances - In any event, the order was not precise enough - It was vague and lacking in specificity - See paragraphs 54 to 60.

Civil Rights - Topic 2866.1

Language - Right to use French or English in dealings with or within the public service or institutions, etc. - Breach - Remedies - On three occasions Air Canada failed to observe its linguistic obligations to two passengers under the Official Languages Act (OLA) - As a remedy, the applications judge issued a structural order to address systemic problems, giving Air Canada six months to implement a monitoring system and other procedures - The Federal Court of Appeal held that such a structural order was not justified in light of the evidence on the record - Alternatively, the court opined that the structural order was imprecise and disproportionate in relation to the prejudice suffered by the passengers - The order exceeded the normal role of the courts, which was to resolve disputes - See paragraphs 61 to 78.

Civil Rights - Topic 2866.1

Language - Right to use French or English in dealings with or within the public service or institutions, etc. - Breach - Remedies - [See first **Aeronautics - Topic 5146**].

Civil Rights - Topic 2874

Language - Right to use French or English in dealings with or within the public service or institutions, etc. - Air Canada - [See first **Aeronautics - Topic 5146** and first and second **Civil Rights - Topic 2866.1**].

Civil Rights - Topic 2969

Language - Complaints - Remedies - [See first **Aeronautics - Topic 5146** and first and

second **Civil Rights - Topic 2866.1**].

Damages - Topic 1332.3

Exemplary or punitive damages - Language rights violations - [See first **Aeronautics - Topic 5146**].

Cases Noticed:

Forum des maires de la Péninsule acadienne v. Agence canadienne d'inspection des aliments, [2004] 4 F.C.R. 276; 324 N.R. 314; 2004 FCA 263, refd to. [para. 2].

Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, refd to. [para. 16].

Canada (Attorney General) v. Viola et al., [1991] 1 F.C. 373; 123 N.R. 83 (F.C.A.), refd to. [para. 23].

R. v. Beaulac (J.V.), [1999] 1 S.C.R. 768; 238 N.R. 131; 121 B.C.A.C. 227; 198 W.A.C. 227, refd to. [para. 23].

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Sidhu v. British Airways plc - see Abnett v. British Airways plc.

Abnett v. British Airways plc, [1997] 1 All E.R. 193; 206 N.R. 211 (H.L.), refd to. [para. 26].

El Al Israel Airlines Ltd. v. Tseng (1999), 525 U.S. 155; 119 S. Ct. 662 (Sup. Ct.), refd to. [para. 27].

Morris v. KLM Royal Dutch Airlines, [2001] EWCA Civ. 790; [2001] 3 All E.R. 126, refd to. [para. 28].

King v. Bristow Helicopters Ltd., [2002] 2 A.C. 628; 286 N.R. 201; [2002] UKHL 7, refd to. [para. 28].

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Croteau et al. v. Air Transat A.T. Inc., 2007 QCCA 737, leave to appeal dismissed (2007), 383 N.R. 391 (S.C.C.), refd to. [para. 29].

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Lukacs v. United Airlines Inc. et al. (2009), 237 Man.R.(2d) 75; 2009 MBQB 29, refd to. [para. 29].

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International Air Transport Association, Re, [2006] ECR1-00403; [2006] 2 C.M.L.R. 20, refd to. [para. 31].

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Tandon v. United Airlines Inc. (1996), 926 F. Supp. 366 (S.D.N.Y.), refd to. [para. 31].

Abramson v. Japan Airlines Co. (1984), 739 F.2d 130 (3rd Cir.), refd to. [para. 31].

Walker v. Eastern Air Lines Inc. (1991), 775 F. Supp. 111 (S.D.N.Y.), refd to. [para. 31].

Naval-Torres v. Northwest Airlines Inc. (1998), 60 O.T.C. 193 (Gen. Div.), refd to. [para. 31].

King v. American Airlines Inc. (2002), 284 F.3d 352 (2nd Cir.), refd to. [para. 33].
Connaught Laboratories Ltd. v. British Airways, [2002] O.T.C. 639; 61 O.R.(3d) 204 (Sup. Ct.) affd. (2005), 197 O.A.C. 283; 77 O.R.(3d) 34 (C.A.), refd to. [para. 45].
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Johnson & Higgins Willis Faber Ltée et autres v. Picard et autres, [1988] R.J.Q. 235; 21 Q.A.C. 245 (C.A.), refd to. [para. 60].
Northwest Territories (Attorney General) et al. v. Fédération Franco-Ténoise et al. (2008), 440 A.R. 56; 438 W.A.C. 56; 2008 NWTCA 6, refd to. [para. 68].
Jodhan v. Canada (Attorney General) et al. (2012), 431 N.R. 144; 2012 FCA 161, refd to. [para. 69].
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Statutes Noticed:

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Convention for the Unification of Certain Rules Relating to International Carriage By Air - see Carriage by Air Act, R.S.C. 1985, c. C-26, Schedule VI.
Carriage by Air Act, R.S.C. 1985, c. C-26, Schedule VI (Montreal Convention), Preamble, art. 1, art. 17, art. 18, art. 19, art. 21, art. 29 [para. 13].
Montreal Convention - see Carriage by Air Act, R.S.C. 1985, c. C-26, Schedule VI.
Official Languages Act, R.S.C. 1985 (4th Supp.), c. 31, sect. 21, sect. 22, sect. 23, sect. 25 [para. 12]; sect. 79 [para. 61]; sect. 81(2) [para. 80].
Official Languages Act Regulations (Can.), Official Languages Regulations, SOR/92-48, sect. 7(2), sect. 7(4) [para. 12].
Official Languages Regulations - see Official Languages Act Regulations (Can.).

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Côté, Pierre-André, Beaulac, Stéphane, and Devinat, Mathieu, *Interprétation des lois* (4th Ed. 2009), paras. 1150, 1152 [para. 37]; 1301 [para. 40]; 1312 [para. 44].
Emanuelli, Claude, *Droit international privé québécois* (3rd Ed. 2011), para. 378 [para. 36].
Sharpe, Robert J., *Injunctions and Specific Performance* (2nd Ed. 1992) (Looseleaf), para. 1.410 [para. 60].

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Michel Thibodeau and Lynda Thibodeau appeared on their own behalf;
Pascale Giguère and Kevin Shaar, for the intervener.

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Office of the Commissioner of Official Languages, Legal Affairs Branch, Ottawa,
Ontario, for the intervener.

This appeal was heard at Ottawa, Ontario, on April 25, 2012, by Pelletier, Gauthier and Trudel, J.J.A., of the Federal Court of Appeal. The following judgment of the Court of Appeal was delivered by Trudel, J.A., on September 25, 2012.

Order accordingly.

Editor: Elizabeth M.A. Turgeon

Civil Rights - Topic 2866.1

Language - Right to use French or English in dealings with or within the public service or institutions, etc. - Breach - Remedies - On three occasions Air Canada failed to observe its linguistic obligations to two passengers under the Official Languages Act (OLA) by failing to offer services in French on international flights - A question arose as to whether art. 29 of the Montreal Convention excluded an action by the passengers for damages under Part IV of the OLA for the incidents on international flights - The Federal Court of Appeal answered the question in the affirmative - The Montreal Convention constituted the sole remedy for a passenger against a carrier for any loss, bodily injury or property damage incurred during or arising out of international carriage - There was no implicit conflict of laws between the Convention and OLA - Thus the court could not award damages under the OLA for the three incidents that occurred during international carriage - See paragraphs 16 to 53.

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Damages - Topic 1332.3

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