

**SUPREME COURT OF CANADA**

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| **Citation:** Thibodeau *v.* Air Canada, 2014 SCC 67, [2014] 3 S.C.R. 340 | **Date:** 20141028  **Docket:** 35100 |

Between:

Michel Thibodeau and Lynda Thibodeau

Appellants

and

Air Canada

Respondent

**And Between:**

Commissioner of Official Languages of Canada

Appellant

and

Air Canada

Respondent

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 133)  **Dissenting Reasons:**  (paras. 134 to 178) | Cromwell J. (McLachlin C.J. and LeBel, Rothstein and Karakatsanis JJ. concurring)  Abella J. (Wagner J. concurring) |

thibodeau *v.* air canada, 2014 SCC 67, [2014] 3 S.C.R. 340

Michel Thibodeau and

Lynda Thibodeau Appellants

v.

Air Canada Respondent

‑ and ‑

Commissioner of Official Languages of Canada Appellant

v.

Air Canada Respondent

**Indexed as: Thibodeau *v.* Air Canada**

2014 SCC 67

File No.: 35100.

2014:  March 26; 2014:  October 28.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

on appeal from the federal court of appeal

*Official languages — Breach of language rights during international carriage by air — Airline failing to provide services in French on international flights — Passengers applying to Federal Court for damages and a structural order under Official Languages Act — Whether award of damages barred by limitation of damages liability set out in the Convention for the Unification of Certain Rules for International Carriage by Air (“Montreal Convention”) — Whether structural order appropriate — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 77(4) — Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, Article 29.*

*Legislation — Interpretation — Conflicting legislation — Airline breaching passengers’ right to services in French under Official Languages Act by failing to provide services in French on international flights — Passengers applying to Federal Court for damages under Official Languages Act — Whether award of damages barred by limitation of damages liability set out in Convention for the Unification of Certain Rules for International Carriage by Air (“Montreal Convention”) — Whether Official Languages Act and Montreal Convention conflict or overlap — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 77(4) — Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309, Article 29.*

In 2009, on three international flights operated by the airline and in an airport, the passengers did not receive services in the French language. They filed several complaints with the Office of the Commissioner of Official Languages against the airline, four of which were upheld. There is no dispute that the airline breached its obligations to supply services in French under s.  22 of the *Official Languages Act* (the “*OLA*”) on the occasions giving rise to those four complaints. The passengers applied to the Federal Court under s. 77 of the *OLA* for damages and for structural orders in relation to the airline’s breaches of their right to services in French. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* (the “*Montreal Convention*”), which restricts the types and the amount of claims for damages that may be made against international air carriers. The Federal Court found that the passengers were entitled to both damages and a structural order, holding that although there was a conflict between the limitation on damages in the *Montreal Convention* and the power under the *OLA* to award damages, the latter prevailed. The Federal Court of Appeal set aside the award of damages for the three complaints about events that took place on board the flights as well as the structural order. It held that the *Montreal Convention* precluded the damages remedy and that a structural order was not appropriate.

*Held* (Abella and Wagner JJ. dissenting): The appeals should be dismissed.

*Per* McLachlin C.J. and LeBel, Rothstein, Cromwell and Karakatsanis JJ.: The *Montreal Convention*’s uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the *Montreal Convention*, depart from Canada’s international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the *OLA* to award appropriate and just remedies cannot — and should not — be read as authorizing Canadian courts to depart from Canada’s international obligations under the *Montreal Convention*.

The claims before this Court fall squarely within the exclusion established by the *Montreal Convention*. The key provision at the core of the *Montreal Convention*’s exclusive set of rules for liability is Article 29. This provision makes clear that the *Montreal Convention* provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, “any action for damages, however founded” may only be brought “subject to the conditions and such limits of liability as are set out in this Convention”. Articles 17 to 19 of the *Montreal Convention* establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19).

Two of the main purposes of the *Montreal Convention* are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal Convention* does not deal with all aspects of international carriage by air, but within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas. The *Montreal Convention*’s text and purpose as well as a strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.

The passengers’ argument that the *Montreal Convention* does not limit claims for damages sought in relation to public law claims or breaches of quasi-constitutional statutes has no support in the text or purpose of the *Montreal Convention* or in the international jurisprudence. The limitation in Article 29 of the *Montreal Convention* applies to “any action” in the carriage of passengers, baggage or cargo, “for damages, however founded, whether under this Convention or in contract or in tort or otherwise”. There is no hint in this language that there is any intention to exempt any “action for damages” in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. The passengers’ claims are an “action for damages” within the meaning of Article 29, as they claim damages for injuries, namely moral prejudice, pain and suffering and loss of enjoyment of their vacation, suffered in the course of an international flight. Permitting an action in damages to compensate for moral prejudice, pain and suffering and loss of enjoyment of a passenger’s vacation that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. The application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it.

The passengers’ argument that the substantive scope of the *Montreal Convention* does not extend to barring claims for “standardized damages” and that their claims are of that nature must also be rejected. Even if this Court were to adopt the distinction between “individual damages” and “standardized damages” relied on in jurisprudence from the European Court of Justice, the damages sought by the passengers in this case were for damages on an individual basis, as they were geared to and depended upon the impact on the passengers of the particular breaches.

The passengers’ submission that, even if their claims fall within the substantive scope of the *Montreal Convention*, they fall outside its temporal scope for cases involving personal injuries since the assignments of non-bilingual flight attendants on the relevant flights were decisions made long before the embarkation process is not well founded. The passengers were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights. Courts must focus their application of the exclusivity principle on the location or activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault.

When the *OLA* and the *Montreal Convention* are properly interpreted, there is no conflict between the general remedial powers under the *OLA* and the exclusion of damages under the *Montreal Convention* and, therefore, there is no need to consider which would prevail if there were. Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even when provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible. The provisions in issue here overlap but do not conflict. They have markedly different purposes and touch on distinct subject matters. The remedial provisions of the *OLA* are part of a larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada’s official languages in our federal institutions. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing the damages claims in the field of international carriage by air. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant “appropriate and just” remedies. The power to grant an “appropriate and just” remedy may easily be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not “appropriate and just” if awarding it would constitute a breach of Canada’s international obligations under the *Montreal Convention*. Accordingly, in fashioning an appropriate and just remedy under the *OLA* in a case of international carriage by air, the Federal Court must apply the limitation on damages set out in Article 29 of the *Montreal Convention*.

The passengers’ submission that the quasi-constitutional status of the *OLA* prevents a harmonious interpretation of s. 77(4) of the *OLA* and of Article 29 of the *Montreal Convention* must be rejected. Section 77(4) of the *OLA*, which confers a wide remedial authority, is certainly part of a quasi‑constitutional statutory scheme designed to both reflect and actualize the equality of status of English and French as the official languages of Canada and the equal rights and privileges as to their use in the institutions of Parliament and government of Canada as declared in s. 16(1) of the *Canadian Charter of Rights and Freedoms*, and it should be interpreted generously to achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament. The *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada’s international obligations given effect by another federal statute. The proposition that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada’s international undertakings as incorporated into federal statute law runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada’s international law obligations. Section 77(4) should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles — including Canada’s international undertakings incorporated into Canadian statute law — which guide the court in deciding what remedy is “appropriate and just”.

The Federal Court of Appeal was correct to set aside the structural order. Structural orders are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision. Orders must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply and to prevent a potentially endless round of further applications to determine whether the parties have complied. Ongoing judicial supervision will be appropriate in some cases, but absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the order is being complied with. In this case, the order is too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner’s statutory powers and expertise in relation to monitoring compliance with the *OLA*.

*Per* Abella and Wagner JJ. (dissenting): The *Montreal Convention* does not bar a damage award for breach of language rights during international carriage by air.

The T’s seek damages for violations of a statute that reifies constitutionally protected rights. The *Montreal Convention* should be interpreted in a way that is respectful of the protections given to fundamental rights, including language rights, in domestic legislation. There is no evidence in the Parliamentary record or the legislative history of the *Convention* to suggest that Canada, as a state party, intended to extinguish domestic language rights protection by ratifying or implementing the *Montreal* *Convention*. Given the significance of the rights protected by the *Official Languages Act* and their constitutional and historic antecedents, the *Montreal Convention* ought to be interpreted in a way that respects Canada’s express commitment to these fundamental rights, rather than as reflecting an intention to subvert them. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.

The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In this case, this exercise leads to the conclusion that Article 29 of the *Montreal Convention* does not exclusively govern the universe of damages for which carriers are liable during international carriage by air. The first words of Article 29 are words that restrict its scope by declaring that any action for damages “[i]n the carriage of passengers, baggage and cargo” must be brought subject to the conditions set out in the *Montreal Convention*. The phrase that immediately follows — “however founded, whether under this Convention or in contract or in tort or otherwise” — is a clause dependant for its meaning on the preceding opening words; thus, “action” refers only to an action for damages “[i]n the carriage of passengers, baggage and cargo”. It is, therefore, only an action for damages incurred “[i]n the carriage of passengers, baggage and cargo” that must be brought “subject to the conditions and such limits of liability as are set out” in the *Montreal Convention*.

Other provisions of the *Montreal Convention*, and, in particular, of Chapter III in which Article 29 is found, provide interpretive assistance to assess the meaning of an action for damages “[i]n the carriage of passengers, baggage and cargo”. Chapter III sets out the limited liability of carriers in the carriage of passengers, baggage and cargo. Articles 17, 18 and 19 refer to death or bodily injury of a passenger, destruction or loss of, or damage to, baggage, destruction or loss of, or damage to, cargo, and delay in the carriage of persons, baggage or cargo. Together with Article 29, these provisions confirm that the *Montreal Convention* exclusively governs only actions for damages in respect of these subjects.

The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. The relative frequency of accidents exposed carriers to unpredictable and significant losses. This made it difficult to secure investment capital or insurance protection. Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses. As safety in the industry improved, governments turned their attention from protecting the financial viability of airlines to introducing a more passenger-friendly legal regime. The focus tilted towards increasing the exceptionally low limits on carrier liability established in the *Warsaw Convention* and statessubsequently signed on to different international efforts to expand carrier liability.

Notwithstanding the increasing recognition that compensation for passengers was too low, a single international instrument increasing ceilings on carrier liability proved elusive. Out of concern that this fractured response could lead to the demise of a unified system of international air law, the industry took action. The *Montreal Agreement* of 1966, a private arrangement between airlines, increased carrier liability under the *Warsaw Convention* for personal injury.

Having been “upstaged” by industry initiatives to address the low ceilings on carrier liability, states began to work towards updating the *Warsaw Convention*. The *Montreal Convention* came into being in 1999, adopting a two-tier liability scheme for passenger injury or death. The *Montreal Convention* sought to replace the patchwork system that had attempted to expand the limits on liability set by the *Warsaw Convention* in 1929. The drafters of the *Montreal Convention* continued to maintain a uniform liability scheme, as had the *Warsaw Convention*, but while the primary goal of the *Warsaw Convention* had been to limit the liability of carriers in order to foster the growth of the nascent commercial aviation industry, the state parties to the *Montreal Convention* were more focused on the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.

Interpreting Article 29 of the *Montreal Convention* in a way that narrows protection for consumers and expands it for carriers, is therefore both counter-intuitive and historically anomalous. At no time was there ever any suggestion that the new *Convention* was designed to *reduce* the ability of passengers to sue carriers.

The absence of any reference in the Parliamentary record to the changes in language between the *Warsaw Convention* and the *Montreal Convention* is also revealing. Dramatic changes in law tend to attract dramatic reactions. This purported change attracted none. The most logical explanation for the silence, therefore, is that there was no change in law. In fact, it is hard to imagine such a drastic domestic intrusion without either express language or Parliamentary disclosure. The silence about such consequences suggests that no such consequence was either contemplated or intended.

The meaning of Article 29, consideredin context and in light of the object and purpose of the *Montreal Convention*, therefore, points to a limited scope of exclusivity, and should be interpreted as directing that the *Montreal Convention* governs only those actions brought for damages incurred “[i]n the carriage of passengers, baggage and cargo”, namely, actions covered by Articles 17, 18 and 19.

The T’s action for damages does not fall within the actions covered by Articles 17, 18 and 19 of the *Montreal Convention*. The language of Article 17(1) makes it clear that the provision does not apply to all events that take place on board an aircraft or in the course of the operations of embarking or disembarking. Rather, Article 17(1) imposes the requirements that: (1) there must have been an accident, (2) which caused, (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking. In this case, there is no complaint of an accident. That is dispositive since Article 17(1) talks of “death or bodily injury” caused by an accident. The T’s have not suffered any bodily injury. The fact that the breaches of their language rights occurred on board the aircraft is irrelevant since those circumstances are only pertinent if there was an accident.

The appeals should be allowed with respect to the claims for damages and the damages awarded by the application judge should be restored.

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By Cromwell J.

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By Abella J. (dissenting)

*El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999); *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2004); *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373; *Walker v. Eastern Air Lines, Inc.*, 785 F.Supp. 1168 (1992); *Beaudet v. British Airways, PLC*, 853 F.Supp. 1062 (1994); *Sidhu v. British Airways Plc.*, [1997] A.C. 430; *King v. American Airlines, Inc.*, 284 F.3d 352 (2002); *In re Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 A.C. 495; *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 W.L.R. 521; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

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*Canadian Charter of Rights and Freedoms*, ss. 16, 24(1).

*Carriage by Air Act*, R.S.C. 1985, c. C‑26, s. 2, Schs. I, III, IV, V, VI.

*Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), ss. 2, 22, 49 to 75, 76, 77, 78.

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*Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 [*Montreal Convention*], preamble, arts. 3(4), 17, 18, 19, 21, 22, 26, 29, 49.

*Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 [*Warsaw Convention*], arts. 17, 18, 19, 20, 22, 23, 24, 25.

*Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 500 U.N.T.S. 31 [*Guadalajara Convention*].

*Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955*, 2145 U.N.T.S. 31.

*Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 478 U.N.T.S. 371 [*Hague Protocol*].

*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City on 8 March 1971 (not in force).

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APPEALS from a judgment of the Federal Court of Appeal (Pelletier, Gauthier and Trudel JJ.A.), 2012 FCA 246, [2013] 2 F.C.R. 155, 435 N.R. 131, 355 D.L.R. (4th) 62, [2012] F.C.J. No. 1201 (QL), 2012 CarswellNat 3578, setting aside in part a decision of Bédard J., 2011 FC 876, [2013] 2 F.C.R. 83, 394 F.T.R. 160, 239 C.R.R. (2d) 301, [2011] F.C.J. No. 1030 (QL), 2011 CarswellNat 6095. Appeals dismissed, Abella and Wagner JJ. dissenting.

*Érik Labelle Eastaugh*, *Ronald F. Caza* and *Alyssa Tomkins*, for the appellants Michel and Lynda Thibodeau.

*Pascale Giguère*, *Kevin Shaar* and *Mathew Croitoru*, for the appellant the Commissioner of Official Languages of Canada.

*Louise‑Hélène Sénécal*, *Pierre Bienvenu* and *Andres Garin*, for the respondent.

The judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

Cromwell J. —

1. Introduction
2. Air Canada failed to provide services in French on some international flights as it was obliged to do under the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (the “*OLA*”). Two passengers, the appellants Michel and Lynda Thibodeau, applied to the Federal Court for damages and for orders, referred to as “structural” or “institutional” orders, requiring Air Canada to take steps in order to ensure future compliance with the *OLA*. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 309 (the “*Montreal Convention*”), which is part of Canadian federal law by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26,a federal statute.
3. The Federal Court rejected Air Canada’s defence, awarded damages and granted a structural order (2011 FC 876, [2013] 2 F.C.R. 83). However, the Federal Court of Appeal set that ruling aside in part, holding that the *Montreal* *Convention* precluded the damages remedy for the events that took place on board Air Canada flights and that a structural order was not appropriate (2012 FCA 246, [2013] 2 F.C.R. 155). The main issue on the further appeal to this Court is whether the Federal Court of Appeal erred in these conclusions.
4. The issue of damages sits at the intersection of Canada’s domestic commitment to official languages and its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.
5. On one hand, we have Canada’s duty to comply with its international undertaking, by its ratification of the *Montreal Convention* and its adoption of the *Montreal Convention* into domestic law, to establish and give effect to limitations on liability for international air carriers. Air Canada maintains that upholding a damages remedy against the airline would be inconsistent with this important international undertaking. On the other hand, we have Canada’s foundational commitment to the equality of the French and English languages, a commitment reflected, among other places, in s. 16 of the *Canadian Charter of Rights and Freedoms* and in the *OLA*. These language rights are “basic to the continued viability of [this] nation”: *R. v. Mercure*, [1988] 1 S.C.R. 234, at p. 269, *per* La Forest J. The appellants say that a damages remedy must be available for breach of language rights in order to fulfill the purposes of the *OLA*.
6. This appeal requires us to resolve this tension by interpreting the *OLA* and the *Montreal Convention* in accordance with their text and purpose. As I see it, when they are properly interpreted, there is no conflict between the general remedial powers under the *OLA* and the exclusion of damages under the *Montreal Convention* and there is no need to consider which would prevail if there were.
7. The *Montreal Convention*’s uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the *Montreal Convention*,depart from Canada’s international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the *OLA* to award appropriate and just remedies cannot — and should not — be read as authorizing Canadian courts to depart from Canada’s international obligations under the *Montreal Convention*.
8. I also conclude that the Federal Court of Appeal was correct to set aside the structural order as it was impermissibly vague and unclear.
9. I would therefore dismiss the appeals.
10. Facts and Proceedings
    1. The Official Languages Act
11. The *OLA* is a federal statute whose purposes include ensuring respect for English and French as the official languages of Canada and the equality of status and equal rights and privileges as to their use in all federal institutions: s. 2(*a*). The *OLA* also seeks to support the development of English and French linguistic minority communities and, as well, sets out the powers, duties and functions of federal institutions with respect to official languages: s. 2(*b*) and (*c*).
12. Parts I to VI of the *OLA* set out various language rights in a number of settings: the proceedings of Parliament, legislative and other instruments, the administration of justice, communications with the public and the workplace. Parts VII and VIII of the *OLA* set out duties and responsibilities with respect to enhancing the vitality of English and French linguistic minorities and fostering the full recognition and use of both English and French in Canadian society. Part IX establishes the Office of the Commissioner of Official Languages and sets out the Commissioner’s duties and powers. These include the duty to undertake investigations, to make recommendations and to report.
13. Part X provides for court remedies and includes provision for a person who has made a complaint to the Commissioner in relation to certain parts of the *OLA* to apply to the Federal Court for a remedy: s. 77(1). The court is empowered, if it finds that a federal institution has failed to comply with the *OLA*, to award “such remedy as it considers appropriate and just in the circumstances”: s. 77(4).
14. As the Court has observed on a number of occasions, the *OLA* has a special status: “. . . 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’” (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23, quoting *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at p. 386).
15. Air Canada and its affiliate Jazz are subject to the *OLA*: see *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.), s. 10. (For convenience, I will refer to either or both of them as “Air Canada” in these reasons.) The *OLA* requires Air Canada to supply services in French or English where there is “significant demand” for them: see s. 22(*b*).
    1. The Montreal Convention
16. The *Montreal Convention*,which is part of Canadian federal law by virtue of the *Carriage by Air Act*, restricts the types and the amount of claims for damages that may be made against international air carriers. It permits claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay: Articles 17 to 19. It bars all other actions for damages, however founded, in the carriage of passengers, baggage and cargo: Article 29. The Thibodeaus’ claims for damages under the *OLA* are clearly not within the types of permitted claims for death or bodily injury, destruction, damage or loss of baggage and cargo or for delay. The Thibodeaus submit, however, that their claims are not barred by the *Montreal Convention*.
    1. The Complaints
17. On three international flights on Air Canada and in an airport, over the course of roughly four months in 2009, Mr. and Ms. Thibodeau did not receive services in the French language. On some flights, there was no flight attendant able to provide services in French and in some cases passenger announcements on board and in the terminal were made only in English.
18. On January 23, 2009, while on board a flight from Toronto to Atlanta, Georgia, Mr. and Ms. Thibodeau did not receive services in French because there was no bilingual flight attendant on the aircraft. A few days later, coming back from Atlanta, there was no French announcement made by the pilot or translation of it. On May 12, 2009, the Thibodeaus again did not receive services in French, this time on a flight from Charlotte, North Carolina, to Toronto. Upon arrival in Toronto, an announcement concerning baggage collection was made only in English.
19. There is no longer any dispute that Air Canada breached its obligations under s. 22 of the *OLA* on these occasions.
20. Mr. and Ms. Thibodeau filed eight complaints with the Office of the Commissioner of Official Languages: four complaints related to the breaches described above and four related to other incidents during those two trips. These latter complaints were however rejected by the Commissioner (and later by the application judge) and only the four complaints that were upheld by the Commissioner were subsequently upheld by the application judge: application judge’s reasons, at para. 30.
21. In response to the Commissioner’s investigation of the Thibodeaus’ complaints, Air Canada put in place remedial measures to improve its capacity to offer bilingual services. These measures led the Commissioner to close its files pertaining to the four complaints that he had found to be established.
22. The Commissioner also undertook an audit of the bilingual services offered by Air Canada to its passengers and released its report in September 2011, after the Federal Court rendered its decision in the present case (*Audit of Service Delivery in English and French to Air Canada Passengers: Final Report* (2011)). The Commissioner made 12 recommendations to Air Canada in this audit, recommendations to which the latter responded by suggesting measures and deadlines to implement said measures. The Commissioner declared himself satisfied with Air Canada’s proposed solutions for 11 of the recommendations, and partly satisfied with the answer provided for the remaining recommendation, which I should say is not relevant for the outcome of this appeal. (I note that the reliance of the Federal Court of Appeal on this subsequently acquired report was objected to by the Commissioner. I refer to this audit here simply to complete the factual background of this case and not in relation to the specific issues I will later decide in these reasons.)
    1. Proceedings in the Federal Courts
23. As outlined earlier, under s. 77 of the *OLA*, a person who has complained to the Commissioner under various provisions, including in relation to failure to provide services to the public in both official languages, may apply to the Federal Court of Canada for a remedy. If the court concludes that a federal institution has failed to comply with the *OLA*,the court may grant such remedy as it considers appropriate and just in the circumstances.
24. The Thibodeaus applied to the Federal Court for remedies in relation to Air Canada’s breaches of their right to services in French. They requested that the court make “institutional orders against Air Canada and . . . order it to pay punitive and exemplary damages”, as well as damages for the violation of their language rights: application judge’s reasons, at para. 43.
25. Air Canada’s position was that damages for breach of the *OLA* are not permitted under the *Montreal Convention* and that the Thibodeaus’ claims for damages were therefore precluded because they arose out of injury suffered in the course of international flights governed by the *Montreal Convention*.
    * 1. Federal Court, Bédard J.
26. The Federal Court found that the Thibodeaus were entitled to both damages and a structural order. The judge concluded that there was a conflict between the limitation on damages in the *Montreal* *Convention* and the power under the *OLA* to award damages. As she put it, “in interpreting the Montréal Convention as allowing compensation on the basis of a cause of action which is not contemplated by the Convention, I would depart from the Canadian and international case law”: para. 77. She concluded, however, that the power to award damages under the *OLA* prevailed over the *Montreal* *Convention* in the face of this conflict: paras. 81-83. She therefore ordered Air Canada to pay $6,000 in damages to each of the Thibodeaus ($1,500 per incident) in order to compensate them for the harm they suffered (moral prejudice, pain and suffering and loss of enjoyment of their vacation), to recognize the importance of the rights at issue and to deter future breaches: paras. 88-90.
27. Bédard J. then analyzed the evidence supporting the Thibodeaus’ claim for a structural order and concluded that there was a “systemic problem at Air Canada”, in the sense that violations of its linguistic obligations were not “isolated problems that [were] out of [its] control”: para. 153. She therefore ordered the airline to put in place within the next six months a monitoring process that would “quickly identify, document and quantify potential violations of its language duties”: application judge’s reasons, at p. 153.
    * 1. Federal Court of Appeal, Trudel J.A. (Pelletier and Gauthier JJ.A. Concurring)
28. Air Canada appealed these conclusions and, on September 25, 2012, the Federal Court of Appeal allowed the appeal and set aside the award of damages for the three complaints about events that took place on board Air Canada flights (the claim for damages related to the announcement concerning baggage collection at the Toronto Airport was not appealed: Air Canada factum, para. 29) and the structural order. The court agreed with the judge at first instance that the *Montreal* *Convention* would bar the Thibodeaus’ claims for damages unless the broad remedial power under the *OLA* prevails over that bar: paras. 20-22. The court, however, found that there was no conflict between the two regimes: in deciding whether a remedy is “appropriate and just” under the *OLA*, the court must take into account the fact that damages are not permitted in the circumstances to which the *Montreal* *Convention* applies: para. 43.
29. With respect to the structural order, the Federal Court of Appeal concluded it was not appropriate in the circumstances of this case because the evidence was insufficient and because the order was too vague to be properly enforced: paras. 74-76.
30. This Court granted Mr. and Ms. Thibodeau leave to appeal and, by the same judgment, gave appellant status to the Commissioner of Official Languages of Canada. I will refer to them collectively as the appellants.
31. Analysis
    1. Does the Montreal Convention Purport to Exclude Monetary Damages Under the Official Languages Act?
       1. The Appellants’ Submissions
32. The appellants make three principal submissions in support of their position that the *Montreal* *Convention* does not purport to exclude a damages remedy under the *OLA*:

The *Montreal* *Convention* applies only to private law claims, not statutory claims in relation to fundamental rights such as language rights.

The *Montreal* *Convention* only limits “individual” damage awards, not remedies for “standardized” damages.

The appellants’ claims do not fall within the temporal scope of the *Montreal* *Convention*’s limitation of claims.

1. Both the Federal Court and the Federal Court of Appeal were of the view that the *Montreal* *Convention* purports to exclude a claim for damages under the *OLA* and I agree with them. In my view, the appellants’ submissions to the contrary are based on a misconception of the purpose and structure of the *Montreal* *Convention* and a misreading of its text. Before turning in more detail to each of the appellants’ main submissions, I will set out briefly some important interpretative considerations in relation to the *Montreal* *Convention*.
   * 1. Interpreting the *Montreal* *Convention*
        1. Overview
2. The *Montreal Convention* was adopted in 1999 in Montréal and applies to all international carriage by aircraft of persons, baggage or cargo. It was the successor to the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S. 11 (the “*Warsaw Convention*”)and its purpose was “to modernize and consolidate the Warsaw Convention and related instruments”: preamble of the *Montreal* *Convention*. To understand the purposes of the *Montreal Convention*, we therefore must go back to its predecessor, the *Warsaw Convention*,signed at Warsaw on October 12, 1929, as set out at Sch. I of the *Carriage by Air Act* (as amended at The Hague in 1955, as set out at Sch. III). The purposes of the *Warsaw Convention* and of the *Montreal Convention* were the same and decisions and commentary respecting the *Warsaw Convention* are therefore helpful in understanding those purposes: *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 W.L.R. 521, at paras. 24-25; P. S. Dempsey, *Aviation Liability Law* (2nd ed. 2013), at p. 304; P. S. Dempsey and M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), at p. 7.
3. There were a number of attempts to revise the *Warsaw Convention*, leading ultimately to the *Montreal Convention* with which we are directly concerned here: see, e.g., *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955*, 2145 U.N.T.S. 31, as set out at Sch. IV of the *Carriage by Air Act*. For a comprehensive overview of these modifications which led to the *Montreal Convention*, see J. D. McClean et al., eds., *Shawcross and Beaumont: Air Law* (loose-leaf), at pp. VII-103 to VII-165. The *Montreal Convention* resulted from the work of delegates of approximately 120 states meeting in Montréal in 1999: L. Weber and A. Jakob, “The Modernization of the Warsaw System: The Montreal Convention of 1999” (1999), 24 *Ann. Air & Sp. L.* 333, at pp. 334-35; Dempsey, at p. 336; Dempsey and Milde, at pp. 36-41.
4. The *Montreal Convention* was ratified by Canada in 2002 and it came into force in 2003. It is part of Canadian federal law by virtue of s. 2 of the *Carriage by Air Act*, and its text is set out at Sch. VI of that statute. The same basic structure and language used in the various versions of the *Warsaw Convention* can be found in the *Montreal* *Convention* and the same *quid pro quo* between limiting air carrier’s liability and facilitating consumers’ claims was maintained: Dempsey, at pp. 310 and 338-40; *Shawcross and Beaumont*, at p. VII-251.
5. The question raised in this appeal is whether Article 29 of the *Montreal Convention*, which limits the actions in damages that can be brought for injuries in the course of international air carriage, excludes the Thibodeaus’ claims for damages. I turn therefore to the interpretation of this article.
6. I begin this exercise with a fundamental principle of interpretation, set out in Article 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” I will therefore first turn to the text of Article 29 of the *Montreal Convention* and then analyze its place within the *Montreal Convention* in light of the latter’s purpose and object: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 56.
   * + 1. Text
7. The key provision at the core of the *Montreal* *Convention*’s purpose of establishing a uniform and exclusive set of rules for liability is Article 29, which is the successor of Article 24 of the *Warsaw Convention*. Article 29 reads:

*Article 29 — Basis of Claims*

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

1. The *Montreal* *Convention* makes clear that it provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. It provides that *all* “action[s] for damages” in the carriage of passengers, baggage and cargo are subject to the conditions and limitations of liability set out in its provisions. The provision could hardly be expressed more broadly; it applies to “any action for damages, however founded”. This breadth is equally reflected in the French text: “. . . *toute action en dommages-intérêts, à quelque titre que ce soit . . .*.”
2. This exclusivity principle is expressed even more clearly in the *Montreal Convention* than it was in the *Warsaw Convention*.Article 24 of the *Warsaw Convention* introduces its exclusion of other claims by referring to “the cases covered by” Articles 17 to 19. Article 29 of the *Montreal Convention*, in contrast, introduces its exclusion of other claims by using the terms “[i]n the carriage of passengers, baggage and cargo”. By using this broader language, it articulates even more clearly the state signatories’ intention to exclude any actions not specifically addressed in Articles 17 to 19. The comments made by the chairman of the International Conference on Air Law, held in Montréal in May 1999, on this point are enlightening:

The provisions contained in Article [29] (*Basis of Claims*) made it clear that an action which was brought for damages, however founded, whether under the new Convention or in contract or tort or otherwise, could only be brought subject to the conditions and such limits of liability as were set out in the Convention. There was indeed jurisprudence which suggested that it was exclusive. It was not possible to get around the provisions of the Conventionregarding the burden of proof, etc., by bringing an action in tort or by attempting to bring an action outside the Convention . . . . [Emphasis added.]

(International Civil Aviation Organization, *International Conference on* *Air Law*, vol. I, *Minutes*, Doc. 9775-DC/2 (2001), at p. 137)

1. The *Montreal* *Convention* sets out in Chapter III the types of liability of carriers *that are permitted* and the applicable limits on compensation. It also clarifies the set of events that Article 29 purports to cover. Articles 17 to 19 establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19). The full text of the relevant provisions of the *Montreal Convention* is set out in the Appendix.
2. The monetary limits of the carrier’s liability (which are not directly relevant to this appeal) are set out in Articles 21 and 22. These limits of liability are linked specifically and exclusively to the claims addressed in Articles 17 to 19 and, by virtue of Article 26, any contractual provision tending to relieve a carrier of liability or fix a lower limit of liability than that established in the *Montreal* *Convention* is null and void. Chapter VI of the *Montreal* *Convention* underlines its exclusive force by providing that any provision in a contract of carriage or special contract that purports to infringe the rules laid down by the *Montreal Convention* is null and void: Article 49. As discussed earlier, Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, “any action for damages, however founded” may only be brought “subject to the conditions and such limits of liability as are set out in this Convention”.
   * + 1. Purpose and Object of the Montreal Convention
3. The *Warsaw Convention* (and therefore its successor the *Montreal Convention*) had three main purposes: to create uniform rules governing claims arising from international air transportation; to protect the international air carriage industry by limiting carrier liability; and to balance that protective goal with the interests of passengers and others seeking recovery. These purposes responded to concerns that many legal regimes might apply to international carriage by air with the result that there could be no uniformity or predictability with respect to either carrier liability or the rights of passengers and others using the service. Both passengers and carriers were potentially harmed by this lack of uniformity. There were also concerns that the fledging international airline business needed protection against potentially ruinous multi-state litigation and virtually unlimited liability.
4. As succinctly summed up by one text, the *Warsaw Convention* aimed “to eliminate many of the conflicts problems which might arise in international air travel, to create a system of internationally recognized documentation, to prescribe a limitation period for claims, to resolve questions of jurisdiction and, perhaps most importantly, to impose very strict limits on carriers’ liability”: Fountain Court Chambers, *Carriage by Air* (2001), at p. 3. From the point of view of passengers and shippers, this limitation was balanced against a reversal of the burden of proof in their favour such that, on proof of damage, fault on the part of the carrier would be presumed: *ibid*. See also Dempsey, at pp. 309-10; *Shawcross and Beaumont*,at pp. VII-105 to VII‑105A; A. Field, “International Air Carriage, The Montreal Convention and the Injuries for Which There is No Compensation” (2006), 12 *Canta. L.R.* 237, at p. 239; L. Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité* (2012), at pp. 45-46.
5. It will be helpful to explain in a bit more detail how the *Warsaw Convention* addressed each of its three main purposes.
6. To further the goal of uniformity, the *Warsaw Convention* provided for three areas of air carrier liability: personal injuries in Article 17; loss, destruction and damage to baggage or cargo in Article 18; and damage occasioned by delay in Article 19. It also set out the conditions exempting air carriers from liability (Article 20), the monetary limits of liability (Article 22) and, to keep the scheme in balance, the circumstances in which air carriers may *not* limit liability (Articles 23 and 25). The intention was to exempt carriers from the differing liability regimes under the law of the various states: see, e.g., *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at pp. 169-71, *per* Ginsburg J.
7. As for the second purpose — limiting liability — the *Warsaw Convention* restricted both the nature of admissible claims and the amount of recovery. In Articles 22 and 24, passengers were limited in the amount of damages they could recover and restricted in the claims they could pursue. The *Warsaw Convention*’s regime rests on an exclusivity principle, found at Article 24, which provides that “[i]n the cases covered” by Articles 17 to 19, “any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention”. It is useful to reproduce here Article 24 in its entirety, since several cases I will discuss later turn on this provision:

*Article 24*

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

1. The third purpose of the *Warsaw Convention* was to balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability: *Tseng*, at p. 170. While there was concern that damage suits could put the nascent international airline industry at risk, there was also concern that the airlines would take undue advantage of their ability to limit their liability by contractual means: *ibid*. The *Warsaw Convention* was thus seen as “a compromise between the interests of air carriers and their customers worldwide”: *Tseng*,at p. 170. Article 17 of the *Warsaw Convention* denies carriers the contractual prerogative to exclude or limit their liability for personal injury, whereas Articles 22 and 24 limit the amount of damages that passengers can recover and restrict their claims. As previously mentioned, the *Warsaw Convention* also gave passengers and shippers the benefit of a reversed burden of proof.
2. As we have seen, two of the main purposes of the *Warsaw Convention*, and hence of the *Montreal* *Convention*,are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal* *Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal* *Convention* of course does not deal with all aspects of international carriage by air: it is not comprehensive. But within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas: M. Clarke, *Contracts of Carriage by Air* (2nd ed. 2010), at pp. 8 and 160-62; G. N. Tompkins, Jr., “The Continuing Development of Montreal Convention 1999 Jurisprudence” (2010), 35 *Air & Space L.* 433, at pp. 433-36.
3. The scope of the exclusivity principle in the *Montreal* *Convention* lies at the heart of this appeal. While we do not have to resolve all of the issues that may arise with respect to how this exclusivity principle operates, the *Montreal Convention*’s text and purpose as well as a strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.
4. I dwell on this point because the appellants’ submissions, while not doing so directly, in effect take issue with this exclusivity principle. Instead of asking whether their claims fall within those permitted by the *Montreal Convention*,the appellants seek to circumvent the exclusivity of the *Montreal Convention* by arguing that their claims are not specifically excluded. The appellants have never suggested that the Thibodeaus’ claims under the *OLA* could also be maintained under Articles 17 to 19 of the *Montreal Convention*. This, respectfully, is the fatal flaw in their argument. As we shall see in further detail below, the appellants try to escape the application of the *Montreal Convention* by claiming that the Thibodeaus’ proceedings in the Federal Court do not constitute an “action for damages” covered by the substantive scope of the *Montreal Convention* and that therefore its bar on claims does not apply to their action. The appellants also argue that the Thibodeaus’ claims do not fall within the temporal scope of the *Montreal* *Convention*. These submissions fail because they are inconsistent with the exclusivity principle that underlies the *Montreal Convention* and because they are not consistent with its clear text. A review of the international jurisprudence supports this view.
   * + 1. The International Jurisprudence
5. The highest courts of state parties to the *Montreal* *Convention* have affirmed the exclusivity principle: S. Radošević, “CJEU’s Decision in *Nelson* *and Others* in Light of the Exclusivity of the Montreal Convention” (2013), 38 *Air & Space L.* 95, at p. 99. In light of the *Montreal Convention*’sobjective of achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation: see *Tseng*,at p. 175; *Morris v. KLM Royal Dutch Airlines*, [2002] UKHL 7, [2002] 2 A.C. 628, at paras. 5 and 7; see also *Plourde v. Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739 (CanLII), at paras. 53-55, leave to appeal refused, [2007] 3 S.C.R. xiii; *Sakka (Litigation Guardian of) v. Air France*, 2011 ONSC 1995, 18 C.P.C. (7th) 150, at para. 28; and Chassot, at p. 34.
6. I begin my review with cases decided under the *Warsaw Convention*,which, as I noted earlier, is similar in purpose, structure and text to its successor the *Montreal Convention* which is in issue on this appeal.In cases under the *Warsaw Convention*, the highest courts of the United Kingdom, the United States, and France have endorsed the exclusivity principle. The exclusivity principle, affirmed under this *Warsaw Convention* jurisprudence, is, if anything, more strongly apparent in the text of the *Montreal Convention*.
7. In *Sidhu v. British Airways Plc.*,[1997] A.C. 430 (H.L.), the plaintiffs were taken hostage during a layover in Kuwait by the Iraqi forces, at the commencement of what became known as the Gulf War. Ms. Sidhu sued British Airways for personal injury at common law and Ms. Abnett, for delay and for breach of contract at common law. While the House of Lords did not express an opinion on this issue, it was common ground that Article 17 of the *Warsaw Convention*, as fully implemented by the *Carriage by Air Act, 1961*, 9 & 10 Eliz. 2, c. 27, in the United Kingdom, did not apply to the plaintiffs’ claim. Indeed, the parties agreed that Article 17 could not apply, given that no “accident” occurred while on board the aircraft or while disembarking and that psychological damage could not fall under the notion of “bodily injury”: pp. 440-41. The stark issue was therefore “whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under article 17 of the [Warsaw] Convention, is left without a remedy”: p. 441. In deciding this question, the House of Lords analyzed the purpose of the *Warsaw Convention*, as well as its text and context, and concluded, at pp. 453-54:

I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals — and the liability of the carrier is one of them — the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.

. . .

. . . It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.

. . . The conclusion must be therefore that any remedy is excluded by the Convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme.

1. This understanding of the exclusivity principle was reiterated by the House of Lords in *In re* *Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 A.C. 495, at para. 3:

It is to the passengerʼs disadvantage, however, that even clear causative negligence on the part of the carrier will not entitle the passenger to a remedy if the article 17 conditions cannot be satisfied. It has been authoritatively established that if a remedy for the injury is not available under the Convention, it is not available at all: see *Sidhu v British Airways plc* [1997] AC 430 and *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155. [Emphasis added.]

1. In *Tseng*, the Supreme Court of the United States agreed with the House of Lords’ affirmation of the exclusivity principlein *Sidhu* and adopted the interpretation of the *Warsaw Convention* which was supported by the United States government. The plaintiff was subjected to an intrusive security search at John F. Kennedy International Airport in New York before she boarded an El Al Israel Airlines flight to Tel Aviv. She sought damages for psychic or psychosomatic injuries, but agreed that she did not suffer any “bodily injury”. The airline and the U.S. government submitted that the words “[i]n the cases covered by Article 17”, found at Article 24 of the *Warsaw Convention*, “refer[red] generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking”: p. 168. The United States Supreme Court further agreed with the proposition that “[s]o read, Article 24 [of the *Warsaw Convention*] would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17’s liability conditions”: *ibid.*
2. The French Cour de cassation adopted a similar approach in Civ. 1re, June 14, 2007, *Bull. civ.* 6, No. 230. Ms. Gillet suffered a pulmonary embolism more than two weeks after an international flight with Air Canada and sued the latter for damages, arguing that it failed to inform her of the risks of aerial transportation, as was its contractual duty under the French *Code de la consommation*. She was however denied monetary relief by virtue of the application of the *Warsaw* *Convention*, which was integrated in French domestic law by art. L. 322-3 of the *Code de l’aviation civile*. She appealed to the Cour de cassation, première chambre civile, submitting among other arguments that the Cour d’appel de Paris erred in not applying the provisions of the *Code de la consommation*, which are of public order at domestic law. The Cour de cassation rejected this contention, holding that a personal injury claim that does not respect the conditions set out at Article 17 of the *Warsaw Convention* was precluded by Article 24 of this Convention.
3. This understanding of the exclusivity principle in the *Warsaw Convention* was also affirmed by the Court of Appeal of Hong Kong in *Ong v. Malaysian Airline System Bhd*, [2008] 3 H.K.L.R.D. 153, the High Court of Ireland in *Hennessey v. Aer Lingus Ltd.*, [2012] IEHC 124 (BAILII), the Court of Appeal of New Zealand in *Emery Air Freight Corp. v. Nerine Nurseries Ltd.*, [1997] 3 N.Z.L.R. 723, the Singapore Court of Appeal in *Seagate Technology International v. Changi International Airport Services Pte. Ltd.*, [1997] SGCA 22, [1997] 2 S.L.R.(R.) 57, and the High Court of South Africa in *Potgieter v. British Airways Plc*, [2005] ZAWCHC 5 (SAFLII). In Canada, courts have adopted the same view: see *Gal v. Northern Mountain Helicopters Inc.*, 1999 BCCA 486, 128 B.C.A.C. 290, and *Sakka*,at para. 30. A similar understanding of the exclusivity principle under the *Montreal Convention* was affirmed by the supreme court of Germany in Az. X ZR 99/10, March 15, 2011 (online), the Supreme Court of the United Kingdom in *Stott*, at para. 31, and the High Court of Ireland in *McAuley v. Aer Lingus Ltd.*, [2011] IEHC 89 (online), at paras. 6.3-6.6; in Canada, see *O’Mara v. Air Canada*, 2013 ONSC 2931, 115 O.R. (3d) 673, and *Walton v. MyTravel Canada Holdings Inc.*, 2006 SKQB 231, 280 Sask. R. 1.
4. To sum up, the text and purpose of the *Montreal Convention* and a strong current of international jurisprudence show that actions for damages in relation to matters falling within the scope of the *Montreal* *Convention* may only be pursued if they are the types of actions specifically permitted under its provisions. As the Supreme Court of the United Kingdom put it very recently, “[t]he Convention is intended to deal comprehensively with the carrier’s liability for whatever may physically happen to passengers between embarkation and disembarkation”: *Stott*,at para. 61.
5. I turn now to address the specific submissions advanced on behalf of the appellants.
   * 1. Analysis of Appellants’ Submissions
        1. The Montreal Convention Does Not Limit Claims for Compensation for Public Law Claims for Breach of Statute or Fundamental Rights Arising Under Quasi-Constitutional Statutes Such as the Official Languages Act
6. The appellants contend that the *Montreal* *Convention* does not limit claims for damages sought in relation to public law claims or breaches of quasi-constitutional statutes. To place this submission in its statutory context, the appellants assert that their claims for damages under the *OLA* do not fall within the substantive scope of the *Montreal* *Convention*, that is to say the areas of air carriers’ liability that the latterpurports to cover. Since language rights claims would escape this substantive scope, their claims for damages would not be within the type of “action for damages” contemplated by Article 29 of the *Montreal Convention* and the exclusivity principle contained therein would therefore not apply. In support of this submission, the appellants principally argue that the violation of language rights is not an inherent risk to air carriage covered by Article 17 and that the *Montreal Convention* intends to govern neither statutory claims based on fundamental rights nor the “public law damages” they would give rise to. In my view, this position has no support in the text or purpose of the *Montreal* *Convention* or in the international jurisprudence.
   * + - 1. The Appellants’ Argument Is Inconsistent With the Text and Purpose of the *Montreal Convention*
7. I have already discussed the breadth of the language that is used in Article 29 to describe the basis of the claims that are subject to the *Montreal* *Convention*’s limitations. The limitation applies to “any action” in the carriage of passengers, baggage or cargo, “for damages, however founded, whether under this Convention or in contract or in tort or otherwise”. There is no hint in this language that there is any intention to exempt any “action for damages” in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. As Dr. Chassot has said, both the terms “action” and “damages” must be understood in a broad sense; to do otherwise would unduly limit the ambit of the *Montreal* *Convention* in a way that was not intended: see pp. 176-77.
8. The Thibodeaus’ claims are an “action for damages” within the meaning of Article 29, as they claim damages for injuries suffered in the course of an international flight. This is clear from the way in which the claims were asserted and from the application judge’s reasons.
9. The Thibodeaus referred in their pleading to what they were claiming as damages. Their claims for damages, as set out in Part III (a) and (b) of their notice of application, filed with the Federal Court, included $25,000 in damages and $250,000 in punitive and exemplary damages for each of them. In response to these claims, the Federal Court awarded damages to compensate the Thibodeaus for the injury flowing from the breaches of their language rights. As the judge at first instance put it, “the applicantsʼ language rights are clearly very important to them and the violation of their rights caused them a moral prejudice, pain and suffering and loss of enjoyment of their vacation”: para. 88 (emphasis added). (Although the judge decided against awarding punitive or exemplary damages in this case, I note in passing that such damages are excluded by the concluding words of Article 29, even in actions that are otherwise permitted under the *Montreal* *Convention*.)
10. In short, damages for moral prejudice, pain and suffering and loss of enjoyment of their vacation are what the Thibodeaus sought in their court proceeding and such damages are what the judge awarded.
11. Permitting an action in damages to compensate for “moral prejudice, pain and suffering and loss of enjoyment of [a passenger’s] vacation” that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal* *Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. As the international jurisprudence makes clear, the application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it. To decide otherwise would be to permit artful pleading to define the scope of the *Montreal Convention*.
    * + - 1. The Appellants’ Argument Is Inconsistent With International Jurisprudence
12. The abundant international jurisprudence provides no support for the appellants’ position that their claims escape the substantive scope of the *Montreal Convention*. It supports the opposite conclusion.
13. American courts have been faced with a similar issue as they had to decide whether claims based on fundamental rights were precluded by the *Warsaw* *Convention*. District and appellate courts, following *Tseng*, have concluded that, despite the substantive difference between tort claims and discrimination claims, the *Warsaw Convention* had to be applied to damages in relation to both of these types of claims. The principle underlying these holdings is that the application of the *Warsaw Convention* depends on the factual circumstances giving rise to the claim, not on its legal foundation. As discussed earlier, the exclusion under the *Montreal* *Convention* is, if anything, even clearer than it is under the *Warsaw Convention*.
14. In *King v. American Airlines, Inc*., 284 F.3d 352 (2d Cir. 2002), Mr. and Ms. King claimed damages before the United States District Court for the Northern District of New York, alleging that they had been racially discriminated against in violation of their equal rights under the law, as protected by 42 U.S.C. § 1981. The Kings also relied on the *Federal Aviation Act*, 49 U.S.C. § 41310(a), and various other state and federal laws. They contended that American Airlines “bumped them from an overbooked flight because of their race”: p. 355. The U.S. Federal Court of Appeals, Second Circuit, had to decide whether the *Warsaw Convention* applied to the Kings’ damages claim. If it did, then this claim would be excluded, as it had been filed outside the two-year limitation period provided at Article 29 of the *Warsaw Convention*.
15. Circuit Judge Sotomayor (as she then was) for the court concluded that the claim fell within the substantive scope of Article 17 of the *Warsaw Convention*, which exhaustively covers claims for injuries suffered while “in the course of [one of] the operations of embarking”: pp. 359-60. The Kings, however, submitted that civil rights claims based on federal statutes would fall outside the intended exclusivity regime of the *Warsaw Convention*: p. 360. Sotomayor J. rejected this argument:

As *Tseng* makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. See *Tseng*,525 U.S. at 171, 119 S.Ct. 662 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would “encourage artful pleading by plaintiffs seeking to opt out of the Convention’s liability scheme when local law promised recovery in excess of that prescribed by the treatyˮ) . . . .

Notably, every court that has addressed the issue of whether discrimination claims are preempted by the Warsaw Convention post-*Tseng* has reached a similar conclusion. . . .

. . . It is not for the courts to rewrite the terms of a treaty between sovereign nations. *Cf. Turturro*,128 F.Supp.2d at 181 (“[T]he Convention massively curtails damage awards for victims of horrible acts [of] terrorism; the fact that the Convention also abridges recovery for . . . discrimination should not surprise anyone.ˮ). [Emphasis added; pp. 361-62.]

1. This decision is highly relevant because the Kings’ argument that damages for civil rights claims were not excluded by the *Warsaw* *Convention* is similar to the appellants’ arguments in this case that damages for breach of language rights are not excluded. The logic of *King*, holding that the exclusion does apply, supports the same conclusion here.
2. Similarly, in *Gibbs v. American Airlines, Inc.*, 191 F.Supp.2d 144 (D.D.C. 2002), Dr. Gibbs brought a claim against American Airlines under 42 U.S.C. § 1981, alleging that the air carrier “refused to perform its contract to transport him . . . on the basis of his race”: pp. 146-47. Dr. Gibbs argued that “Congressdid not intend the [Warsaw] Convention to impede civil rights claims rooted in the [American] Constitution, such as Section 1981 claims”: p. 148. Kennedy J. of the United States District Court, District of Columbia, however rejected this argument and held that the “negative consequences that the *Tseng* Court found would flow from ‘[c]onstruing the [Warsaw] Convention . . . to allow passengers to pursue claims under local law when the [Warsaw] Convention does not permit recovery’ are no less likely with statutory discrimination claims than with common law claims”: *ibid.*, citing *Tseng*, at p. 171. As Kennedy J. explained, “the primary purpose of the [Warsaw] Convention is to prevent variations in liability according to local law” and, as such, this purpose“does not distinguish between types of local law, only between local and international law”: p. 149. To that extent, “[f]ederal discrimination statutes clearly fall into the former category”: *ibid.* On the application of the *Warsaw Convention* to civil rights claims, see also *Turturro v. Continental Airlines*, 128 F.Supp.2d 170 (S.D.N.Y. 2001), and *Brandt v. American Airlines*, 2000 WL 288393 (N.D. Cal.).
3. Jurisprudence from other jurisdictions, including a very recent decision of the Supreme Court of the United Kingdom, also supports the view that exclusion under the *Montreal* *Convention* turns on whether the claim is one for damages related to the circumstances contemplated by the *Montreal* *Convention*, not on the alleged source of the obligation to pay them.
4. In *Stott*, the plaintiff, a disabled passenger in a wheelchair, claimed damages resulting from a series of breaches by Thomas Cook Tour Operators of the *Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007*, SI 2007/1895, which implemented in the United Kingdom Regulation (EC) No. 1107/2006 of the European Parliament and the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air. The Supreme Court of the United Kingdom however found that, because the claim did not fall within the sorts of injury claims permitted under Article 17 of the *Montreal Convention*, no monetary relief could be awarded:

Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no for the reasons given by Sotomayor CJ in *King v American Airlines*. I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrierʼs liability for whatever may physically happen to passengers between embarkation and disembarkation. The answer to that general question also covers the more specific question. [para. 61]

1. I agree with this analysis and I reject the appellants’ argument that statutory claims for quasi-constitutional rights fall outside the type of actions covered by the *Montreal Convention*.
2. The Commissioner however submits that the *Montreal* *Convention* only applies to claims finding their source in private law and to claims for private law damages. With regards to the source of the liability at law, the Commissioner argues that claims such as the ones made by Mr. and Ms. Thibodeau, based on a statutory right, would not be excluded by Article 29, as they would be more akin to administrative complaints mechanisms than private law proceedings.
3. The flaw in this argument is that, as I have discussed, the relevant question concerns the nature of the claim (i.e. is it an action for damages related to the circumstances contemplated by the *Montreal Convention*, however founded), not the underlying source of the claim: see also Chassot, at p. 179; J. J. Wegter, “The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention” (2006), 31 *Air & Space L.* 133, at p. 144.
4. The argument relating to the distinction between “public law” and “private law” damages rests on the same logic and can be answered in a similar fashion. Mr. and Ms. Thibodeau submit that they claimed public law damages, as they are pursuing redress for breach of quasi-constitutional rights. In support of this argument, they rely heavily on the remarks of this Court in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, where the Chief Justice differentiated actions for public law damages from actions for private law damages, emphasizing that they are distinct remedies: para. 22.
5. There are two flaws in this submission. The first is that, subject to constitutional considerations, the scope of the exclusivity principle in the *Montreal* *Convention* cannot be modeled on national definitions of damages. As Dr. Chassot explains, at p. 177:

[translation] The concept of damages, as an element of the definition of the scope of the exclusivity provided for in Article 29 [of the *Montreal Convention*], is a matter of uniform law: it must be interpreted independently. . . . To assess the scope of the exclusivity, one cannot refer to the domestic law concept of damages, however, since the rules of domestic law would then be defining the scope of the Convention, which would clearly be inconsistent with the objective of Article 29 [of the *Montreal Convention*]. Thus, the concept of damages within the meaning of Article 29 [of the *Montreal Convention*], the purpose of which is to define the scope of the exclusivity of the Convention’s rules respecting liability, must be distinguished from that of the damage for which compensation might be obtained under Articles 17 *et seq.* [of the *Montreal Convention*]. [Emphasis added.]

1. The second flaw in the appellants’ submission is that, even if domestic law were relevant at this stage, the damages discussed in *Ward* were damages against the state; but of course Air Canada is not the state, or its agent.
2. I conclude that the appellants’ arguments that the *Montreal* *Convention* does not apply to the damages they claimed in these proceedings are inconsistent not only with the text and purpose of the *Montreal Convention*, but with a strong current of international jurisprudence interpreting it.
   * + 1. The Montreal Convention Excludes Only “Individual Damages” and Not Claims for “Standardized Damages”
3. The Thibodeaus further submit that the substantive scope of the *Montreal* *Convention* does not extend to barring claims for “standardized damages” and that their claims are of that nature. This argument relies on jurisprudence from the European Court of Justice, in particular *International Air Transport Association v. Department for Transport*,C-344/04, [2006] E.C.R. I-403 (Grand Chamber) (“*IATA*”), which was followed by the Fourth Chamber of the European Court of Justice in *Wallentin-Hermann v. Alitalia*,C-549/07,[2008] E.C.R. I-11061, at para. 32, and *Sturgeon v. Condor Flugdienst GmbH*, Joined Cases C-402/07 and C‑432/07, [2009] E.C.R. I-10923, at para. 65, and reaffirmed by the Grand Chamber in *Nelson v. Deutsche Lufthansa AG*, Joined Cases C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191), at paras. 46-60. In the *IATA* case, for example, the question was whether a European Community regulation dealing with air passengers’ rights in the event of delay was inconsistent with the *Montreal Convention*. The regulation required airlines to provide assistance to delayed passengers ranging from free meals and refreshments to free hotel accommodation. The court concluded that passenger delay gives rise to two distinct types of damage, only one of which is governed by the *Montreal* *Convention*. The first, which in the court’s view is *not* addressed by the *Montreal* *Convention*, is “damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned”: para. 43. This, in the court’s view, was the sort of measure contained in the regulation. The second, which *is* subject to the *Montreal* *Convention*, is “individual damage . . . redress for which requires a case-by-case assessment of the extent of the damage caused”: *ibid.*
4. In my respectful view, this line of jurisprudence is not relevant to the issue that confronts us here. Even if we were to adopt the distinction between “individual damages” and “standardized damages” relied on by the European Court of Justice, it would not assist the Thibodeaus. The damages which they seek in this case cannot be described as “damage . . . redress for which may take the form of standardised and immediate assistance or care for everybody concerned” as were the measures required by the regulation considered in *IATA*.The damages as claimed by the Thibodeaus and as awarded by the application judge were, at least in part, geared to and depended upon the impact on the Thibodeaus of the particular breaches. Their claims were for damages on an individual basis.
5. I note that the Supreme Court of the United Kingdom recently understood the *IATA* line of jurisprudence in the same way. The court held that a claim for damages for breach of duties owed to disabled persons was a claim for damages on an individual basis and therefore the *IATA* line of jurisprudence did not assist the claimant’s attempt to escape the bar set out in the *Montreal* *Convention*: *Stott*, at para. 58. I respectfully agree and would apply the same reasoning here.
   * + 1. The Appellants’ Claims Do Not Fall Within the Temporal Scope of the Montreal Convention’s Limitations
6. Mr. and Ms. Thibodeau submit that, even if their claims fall within the substantive scope of the *Montreal Convention*, they nonetheless fall outside its temporal scope for cases involving personal injuries.Article 17 of the *Montreal Convention* deals with personal injuries suffered “on board the aircraft or in the course of any of the operations of embarking or disembarking”. Mr. and Ms. Thibodeau argue that the assignments of non-bilingual flight attendants on the relevant flights by Air Canada were decisions made long before the embarkation process and were, as the application judge found, the result of systemic problems within the management of the airline. Thus, they submit, the failure to provide French language services did not occur “on board the aircraft or in the course of any of the operations of embarking or disembarking”.
7. This submission is not well founded and I cannot accept it.
8. The Supreme Court of the United Kingdom rejected a similar argument, in my view correctly, in *Stott*. The appellant in that case argued that he “had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage”: para. 60. The court rightly held that, by this logic, “most accidents or mishaps” could be “traced back to earlier operative causes” and that such an approach to the *Montreal Convention* “would distort [its] broad purpose”: *ibid.* Rather, courts must focus their application of the exclusivity principle on the location or the activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault: *ibid.* See also Dempsey, at pp. 439-41; *Shawcross and Beaumont*, at pp. VII-685 to VII-687.
9. In this case, the Thibodeaus were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights; they were aboard the aircraft for the three breaches for which damages were set aside by the Court of Appeal. I therefore reject the Thibodeaus’ submission based on the temporal aspect of Article 17 of the *Montreal Convention*.
   * + 1. Conclusion
10. The claims before this Court fall squarely within the exclusion established by the *Montreal* *Convention*.
    1. Are Mr. and Ms. Thibodeau Nonetheless Entitled to Monetary Damages Because the OLA and the Montreal Convention Conflict and the OLA Prevails?
       1. Introduction
11. I have concluded that if the *Montreal* *Convention* applies, it bars the Thibodeaus’ claims for damages under the *OLA*. The appellants say, however, that even if this is so, the *Montreal* *Convention* conflicts with the *OLA* and that the *OLA* prevails. They submit that the power of the Federal Court under s. 77(4) of the *OLA* to “grant such remedy as it considers appropriate and just in the circumstances” conflicts with the exclusion of actions for damages under the *Montreal* *Convention*. The first question therefore is whether these provisions conflict. I agree with the Federal Court of Appeal that they do not.
12. Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible.
13. When we apply these principles, we see that the provisions in issue here do not conflict. They have markedly different purposes. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. Moreover, the power to grant an “appropriate and just” remedy may easily be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not “appropriate and just” if awarding it would constitute a breach of Canada’s international obligations under the *Montreal Convention*.
    * 1. What Is “a Conflict”?
14. The appellants contend that there is a conflict between two acts of the same legislature. The *Carriage by Air Act*, incorporating the *Montreal Convention*, purports to preclude an award of damages while s. 77(4) of the *OLA* permits the court to grant an “appropriate and just” remedy, including damages. In short, the appellants’ position is that the exclusion of damages during international air travel conflicts with the power to award an “appropriate and just” remedy.
15. The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other. This case turns on the first two of these principles and I will explore them in somewhat more detail.
16. Courts presume that “the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 325; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. This is sometimes expressed as a presumption of coherence, based on the common sense idea that the legislature does not intend to make contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38. This is why courts take a very restrictive approach to defining what constitutes a conflict: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 375.
17. What then is a conflict in this context? The provisions must be “so inconsistent with . . . or repugnant” to each other that they are “incapable of standing together”: *Daniels v. White*, [1968] S.C.R. 517, at p. 526; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at pp. 491 and 499; *Canadian Westinghouse Co. v. Grant*, [1927] S.C.R. 625, at p. 630; *International Brotherhood of Electrical Workers v. Town of Summerside*,[1960] S.C.R. 591, at pp. 598-99; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, at paras. 41-45.Application of one provision “must implicitly or explicitly preclude application of the other”: P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350, adopted by the Court in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47; see also Côté (4th ed.), at p. 376.
18. Bastarache J. held in *Lévis* that “[u]navoidable conflicts . . . occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results”: para. 47. It is not an absurd result to exclude one particular remedy — damages — in the particular context of international air travel. Therefore, the live issue here is whether the provisions are directly contradictory.
19. A “direct contradiction” exists if the application of one law excludes the application of the other. For example, in *Massicotte v. Boutin*, [1969] S.C.R. 818, one statute allowed for an extension of time only before the time limit expired, while another statute allowed for an extension to be granted even after the time limit had expired. There was thus a direct conflict between the two laws with respect to an application for an extension of time sought after the time limit had expired: p. 820. Similarly, in *Lévis*, one provision required dismissal of a police officer who has been convicted of a criminal offence while another provision allowed the officer to retain the position upon showing special circumstances. As Bastarache J. put it, one enactment said yes while the other said no: paras. 48-49.
20. This is not the situation that faces us here. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant “appropriate and just” remedies. The exclusion of a damages remedy in the context of international air travel is thus not a direct contradiction of the remedial power under the *OLA*.
21. This case is therefore not one of direct contradiction but of overlap. The *OLA*’sbroad and discretionary remedial provisions permit an award of damages where that is what the court considers to be an appropriate and just remedy in the circumstances. The *Montreal* *Convention*, on the other hand, restricts claims for damages by passengers in the context of international air travel. Overlapping provisions, however, do not necessarily conflict. Laws do not conflict simply because “they overlap, are active in the same field or deal with the same subject matter”: Côté (4th ed.), at p. 376; *Toronto Railway*, at p. 499. If the overlapping laws can both apply, it is presumed that they are meant to apply, and “[t]he only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law”: Sullivan, at p. 326.
22. Courts strive through interpretation to avoid finding that overlapping provisions conflict. As Bastarache J. said in *Lévis*, “an interpretation which results in conflict should be eschewed unless it is unavoidable” (para. 47). Courts are therefore slow to find that broadly worded provisions were intended to be an exhaustive declaration of the applicable law where the result of that conclusion creates rather than avoids conflict. For example, when overlapping provisions have different purposes or touch on different aspects, they will generally not be found to conflict: Sullivan, at p. 328. As Professor Côté explains, the court must consider the purpose of the law in order to determine whether in the circumstances the enactment of one norm may be interpreted as excluding all others: 4th ed., at pp. 379-80.
23. To pause here for a moment, the two allegedly conflicting laws in this case have markedly different purposes and touch on distinct subject matters. The remedial provisionsof the *OLA* are part of a larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada’s official languages in our federal institutions. It applies to only one airline, Air Canada. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing damages claims in the field of international carriage by air. Given these two dramatically different purposes and spheres of operation, we should be slow to find a conflict in the narrow point at which the schemes overlap. It will be helpful to review briefly three judgments of this Court dealing with overlapping provisions in order to see how these principles play out in specific cases.
    * 1. The Jurisprudence
24. In *The King v. Williams*, [1944] S.C.R. 226, Mr. Williams was fined as a result of his conviction under the *Foreign Exchange Control Order*, P.C. 7378, made under the *War Measures Act*, R.S.C. 1927, c. 206, for attempting to export a quantity of gold from Canada without a licence. When he was pursued for forfeiture of the gold, he argued that the exportation of gold was addressed under *The Gold Export Act*, S.C. 1932, c. 33,which did *not* provide for forfeiture. It followed, he argued, that forfeiture was not available in the case of exporting gold contrary to the *Foreign Exchange Control Order*.The submission in effect was that *The Gold Export Act* dealt exhaustively and exclusively with the consequences of attempting to export gold from Canada. That position was rejected by a majority of the Court. The point is perhaps made most clearly in the concurring reasons of Hudson J., at p. 240:

In the present case there is no repugnancy. Two measures were passed for different purposes and are to be enforced through different organs of the Government. The *Foreign Exchange Control Order* is very comprehensive, covering the whole field of currency, securities and commodities. I do not think that the Court could properly imply an intention to exclude from “currency” gold coins and from “commodities” fine gold, which nominally determines the value of all currency and monetary obligations. [Emphasis added.]

1. There is a clear parallel between *Williams* and this case. The two provisions were enacted for very different purposes, as I discussed earlier. The *Montreal Convention* is a “very comprehensive” scheme in relation to claims for damages in the field of international carriage by air. The remedial provisions in the *OLA*,by contrast, are very generally worded and cannot realistically be thought to mandate that damages must be available for every breach. Following the reasoning of *Williams*,there is no “repugnancy” between the two provisions.
2. In *Myran v. The Queen*, [1976] 2 S.C.R. 137, a memorandum of agreement with the force of statute assured the appellants, who were Treaty Indians, that they would have the right of hunting, trapping and fishing for food on all unoccupied Crown lands (and certain other lands). However, another statute made it an offence to hunt without due regard for the safety of other persons in the vicinity. There was no serious question that the appellants, while hunting, had failed to show due regard for the safety of other persons. The question was whether the statute creating the offence conflicted with the appellants’ right to hunt. The Court concluded that it did not. There was no “irreconcilable conflict” between the two provisions: they served very different purposes (p. 142, *per* Dickson J.). One was concerned with conservation of game to secure a continuing supply of food for the Indians while the second was concerned with the risk of death or serious injury when hunters disregarded the safety of others. The obligation to hunt in a manner that did not risk death or serious injury did not diminish the right to hunt: *ibid.* This was a case in which the Court concluded that the broad and general words affirming the right to hunt could not be taken as an exhaustive and exclusive statement of the law governing its exercise.
3. There is once again a clear parallel between *Myran* and this case. The two schemes have different purposes and the broad right to an “appropriate and just” remedy is not inconsistent with the restriction on damages claims in relation to injuries during international carriage by air.
4. A third case, in which the Court reached the opposite conclusion, is *Perron-Malenfant v.* *Malenfant (Trustee of)*, [1999] 3 S.C.R. 375. The analysis leading to that conclusion is instructive.
5. Without getting too immersed in the details, the question in *Perron-Malenfant* concerned whether one of the bankrupt’s assets became the property of the trustee upon bankruptcy. More precisely, the issue was whether the cash surrender value of a life insurance policy was exempt from seizure by the trustee on the policyholder’s bankruptcy. By virtue of the incorporation of certain elements of provincial laws by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the answer to the issue depended on the interpretation of certain provisions of the *Civil Code of Lower Canada*. If two articles (art. 2552 and 2554) were exhaustive statements of the applicable exemptions, the surrender value would *not* be exempt. However, jurisprudence developed under another article (art. 1031), if applicable, would (the Court assumed without deciding) result in the surrender value *being* exempt. The question boiled down to whether the two articles, which did not allow for an exemption of the surrender value in this case, were intended to be an exhaustive statement of the exemptions from seizure of life insurance.
6. In answering this question, the Court examined the legislative history and evolution of the provisions, their text and their purpose. The legislative history and evolution revealed that arts. 2552 and 2554 were part of a comprehensive legislative treatment of every aspect of insurance law which had created “an insurance code within the *Civil Code*”: paras. 36-37. The Court then turned to the text and purpose of the provisions, concluding that the legislature “must have had all elements of the life insurance contract in mind, including the right to surrender the contract for its cash surrender value”: para. 39. To read the provisions as being other than comprehensive would “empt[y] them of much of their meaning”: para. 41. The Court also placed its textual analysis within the overall thrust of the insurance reforms of which these articles formed a part. This led to the conclusion that the articles in question reflected a “careful balancing of the relevant considerations”: para. 50. Taking all of these elements into account, the Court concluded that arts. 2552 and 2554 were intended to be a comprehensive and exclusive set of rules in relation to the seizability of the rights under life insurance contracts:

. . . it defies common sense to assume that the legislator wished to remain silent, in its exemption provisions, on the most important value of a life insurance policy for creditors — the cash surrender value. On the contrary, given the legislator’s policy of making rights under insurance contracts more available to creditors as part of the policyholder’s collateral, the most reasonable conclusion is that the cash surrender value of the insurance contract was exactly what the legislature had in mind when determining, in arts. 2552 and 2554, which policies should be exempt, and which should not be. [para. 52]

1. To paraphrase the Court in *Perron-Malenfant*, the issue here is whether it defies common sense to assume that by permitting a court to grant an “appropriate and just” remedy for violation of the *OLA*, Parliament intended that the court would be free to make an order violating Canada’s international treaty obligations. In other words, does it make sense that Parliament intended that a court order in breach of Canada’s international obligations would be an “appropriate and just” remedy? The appellants would have us answer yes to both questions.
   * 1. Application
2. With these principles in mind, I return to the question of whether there is a conflict between the broad remedial discretion under s. 77(4) of the *OLA* and the specific limitation on that remedial authority that results from Article 29 of the *Montreal* *Convention*.
3. These provisions bear all of the hallmarks of the sorts of provisions that have been found *not* to conflict. They were enacted for markedly different purposes. They may easily be interpreted in a way that permits them to operate together without absurdity: an “appropriate and just” remedy must not violate Canada’s international obligations. The only serious question is whether the so-called presumption of overlap is rebutted because s. 77(4) of the *OLA* was intended as an exhaustive and exclusive declaration of the court’s remedial power such that damages must always be available for breach of the *OLA*. This position, in my respectful view, is untenable.
4. The appellants suggest that the quasi-constitutional status of the *OLA* prevents a harmonious interpretation of s. 77(4) of the *OLA* and Article 29 of the *Montreal Convention*: Commissioner’s factum, at paras. 90-95. The argument goes that to read s. 77(4) as not permitting an award of damages in the context of international air travel would run counter to the *OLA*’sstatus as quasi-constitutional legislation and therefore would run counter to Parliament’s intention. With respect, I cannot accept this submission.
5. Section 77(4) of the *OLA* is certainly part of a quasi-constitutional statutory scheme designed to both reflect and to actualize the “equality of status” of English and French as the official languages of Canada and the “equal rights and privileges as to their use in all institutions of the Parliament and government of Canada” as declared in s. 16(1) of the *Charter*: see, e.g., *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Lavigne*,at para. 23. Like s. 24(1) of the *Charter*, s. 77(4) of the *OLA* confers a wide remedial authority and should be interpreted generously to achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires us to read “the words of an Act . . . in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Lavigne*, at para. 25, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983),at p. 87. As I see it, the *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada’s international obligations given effect by another federal statute.
6. It is unlikely that, by means of the broad and general wording of s. 77(4), Parliament intended this remedial power to be read as an exclusive and exhaustive statement in relation to the Federal Court’s remedial authority under the *OLA*, overriding all other laws and legal principles. The appellants’ position in effect is that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada’s international undertakings as incorporated into federal statute law. This proposition runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada’s international law obligations: see, e.g., *Daniels*, at p. 541; *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at paras. 128-31; Sullivan, at pp. 539-42.
7. I find it impossible to discern any such intent in the broad and general language of s. 77(4). Instead, this provision should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles — including Canada’s international undertakings incorporated into Canadian statute law — which guide the court in deciding what remedy is “appropriate and just”.
8. Moreover, a review of the legislative history of this provision provides no evidence that Parliament intended to authorize awards of damages in violation of Canada’s international commitments. The legislative record shows that members of Parliament discussing the scope of s. 77 of the *OLA* at the time of its enactment did not focus on the specific remedies available under this provision, but rather on how it gave courts the ability to enforce, through remedies, certain parts of the new *OLA*, in contrast to its predecessor that was merely declaratory: see *House of Commons Debates*, vol. X, 2nd Sess., 33rd Parl., February 8, 1988, at pp. 12706, 12712, 12715 and 12737 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, Mr. Jean-Robert Gauthier, Ms. Marion Dewar, Hon. Warren Allmand); *House of Commons Debates*, vol. XIV, 2nd Sess., 33rd Parl., July 7, 1988, at p. 17224 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada). While the debate contemplated that damages could constitute an “appropriate and just” remedy in certain circumstances, it highlighted the open-ended nature of these terms and that they left to the courts the duty of determining what would be an “appropriate and just remedy” in the circumstances: *Debates of the Senate*, vol. IV, 2nd Sess., 33rd Parl., July 27, 1988, at pp. 4135-36. There is nothing in this to suggest any intent that this power would override other limitations on the court’s authority to award damages.
9. We are not in a situation like that faced by the Court in *Perron-Malenfant* in which allowing both provisions to operate empties the remedial provisions in the statute of much of their meaning. It is not suggested that the powers of the Commissioner, including his authority to apply to the Federal Court for remedies under s. 78 of the *OLA*, conflict with the limitation on damages under the *Montreal* *Convention*.  Damages are by no means the only remedies available under s. 77(4) and the limitation on their availability set out in Article 29 of the *Montreal* *Convention* applies only in respect of claims by passengers arising out of international carriage by air. I therefore reject the contention that my proposed interpretation of the *Montreal Convention* somehow silences language rights.
10. In short, there are no indicators here of a conflict between these two provisions in the narrow and strict sense of conflict which applies in this context, and there is no hint in the text, scheme or purpose of the *OLA* that the brief, broad, general and highly discretionary provision in s. 77(4) was intended to permit courts to make orders in breach of Canada’s international undertakings which have been incorporated into federal law.
11. I conclude that there is no conflict between these provisions and that, in fashioning an appropriate and just remedy under the *OLA* in a case of international carriage by air, the Federal Court must apply the limitation on damages set out in Article 29 of the *Montreal* *Convention*. In light of that conclusion, I do not need to consider which provision would prevail in the event of conflict.
    1. Did the Federal Court of Appeal Err in Allowing the Appeal in Relation to the Structural Order?
       1. Introduction
12. The Thibodeaus sought a structural order requiring Air Canada to take all necessary measures so that it could comply with its obligations to provide services in the French language. These included measures to ensure that it had the bilingual capability to provide in-flight services in French when there is sufficient demand for them; to actively offer service in French at the outset of communications by providing signs, notices, and other information on services and initiating communication with the public; to establish an adequate monitoring system and procedures designed to quickly identify, document and quantify potential violations of language rights; and to ensure that language rights prevail over any contract and collective agreement signed by the airline.
13. The application judge concluded that “Air Canada and Jazz make considerable efforts and invest substantial sums to comply with their linguistic duties”: para. 145. She found, however, that “not everything is perfect and that more remains to be done”: para. 146. She noted that major improvements were implemented following the Thibodeaus’ complaints but expressed surprise that there was no monitoring system that enabled Air Canada to determine the number of times where no bilingual flight attendant is assigned to a flight on which there is a significant demand for services in French: para. 151. The judge found that there was a “systemic problem” at Air Canada:

. . . even though Air Canada is making efforts to comply with its linguistic duties, problems persist, and both Air Canada and Jazz have not completely developed a reflex to proactively implement all the tools and procedures required to comply with their duties, to measure their actual performance in the provision of services in French and to set improvement objectives. This finding, combined with Jazz’s admission that it still has difficulty complying with all its duties, leads me to conclude that there is a systemic problem at Air Canada. [para. 153]

1. The application judge concluded in light of these findings that it was “fair and appropriate to require that Air Canada make every reasonable effort to fulfill all its duties under Part IV of the OLA and to ensure that it implement a monitoring process to allow it to identify and document the occasions on which [Air Canada] does not assign the required bilingual personnel on board flights on which there is significant demand for services in French”: para. 154. She therefore ordered Air Canada to

* make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*;
* introduce, within six months of this judgment, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, .  .  . particularly by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendants able to provide services in French on board flights on which there is significant demand for services in French; [application judge’s reasons, at p. 153]

1. The Federal Court of Appeal set this order aside. It held that the portion of the order that required Air Canada to “make every reasonable effort to comply with all of its duties” under Part IV of the *OLA* was simply a general order to comply with the law, a type of order that should be granted only in exceptional circumstances which did not exist here: paras. 55-60. Turning to the rest of the order, the court found that it was not supported by the evidence and that it, too, was not sufficiently precise: para. 63. As Trudel J.A. put it on behalf of the court:

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

1. The Commissioner submits that the Federal Court of Appeal exceeded its proper appellate role by weighing the evidence *de novo* and thereby not giving appropriate appellate deference to the findings at first instance. However, in my respectful view, the order was properly set aside.
2. The first part of the order simply requires Air Canada to comply with the law. But those types of orders should only be made in exceptional circumstances which do not exist here. The appellants did not attempt to defend this part of the application judge’s order and, for the reasons given by the Federal Court of Appeal on this point, my view is that the application judge erred in making it.
3. With respect to the second aspect of the order — requiring Air Canada to put a monitoring system in place — it too was correctly set aside. My view is that the order is too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner’s statutory powers and expertise in relation to monitoring compliance with the *OLA*.
   * 1. Legal Principles
4. Structural orders play an important, but limited, role in the enforcement of rights through the courts: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 56. Orders of this nature are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision — ongoing supervision being something that courts only exceptionally undertake.
5. With respect to clarity, we must bear in mind that the ultimate sanction for failure to abide by an order of this nature is a finding of contempt of court and consequent imposition of a fine or a period of incarceration. Orders must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply and to prevent a potentially endless round of further applications to determine whether the parties have complied. As the Court put it in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 24:

The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. . . . While the specificity requirement is linked to the claimant’s ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.

1. Ongoing judicial supervision will be appropriate in some cases, as discussed in *Doucet-Boudreau*.However, absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the order is being complied with. This is particularly so in this case given the statutory powers and expertise of the Commissioner to identify problems in relation to compliance with the *OLA* and to monitor whether appropriate progress is being made in implementing measures to correct them: ss. 49 to 75.
   * 1. Application
2. Tested against these principles, my view is that the Federal Court erred in law by making the structural order in this case. I will focus on the monitoring provisions of the order as there was no serious effort on the appellants’ part to defend the first part of the judge’s order that simply directed Air Canada to obey the law.
3. On its face, the monitoring aspects of the order immediately raise a number of questions about its scope and limits. In order to comply with the order, what would constitute a “proper” monitoring system? Would periodic inspections be sufficient or does the monitoring system have to be capable of documenting each and every “potential” violation? How “quickly” does it have to identify “potential violations”? For that matter, what is a “potential” violation? These rather obvious questions arising from a review of the order, and to which neither the order nor the record provides any answers, point to its lack of precision. While the application judge appears to have intended to focus on the assignment of flight attendants capable of providing services in French to flights on which there is a significant demand for services in French, her order goes far beyond that, as the Federal Court of Appeal noted.
4. In addition to these difficulties, there is also the fact that the Commissioner has both the statutory powers and the institutional expertise to monitor compliance and ameliorative efforts. This will generally make ongoing judicial supervision in relation to this statutory scheme something that should be undertaken in only truly compelling circumstances that did not exist here.
5. I agree with the Federal Court of Appeal that the structural order should not have been made. The declaration, apology, and costs of the application constituted appropriate and just remedies in this case.
6. Disposition
7. I would dismiss the appeals. The respondent has not requested costs and I would order none.

The reasons of Abella and Wagner JJ. were delivered by

1. Abella J. (dissenting) — International law is a work in progress. Courts in liberal democracies are increasingly grappling with the domestic effect of international human rights law. Most of these cases involve interpreting domestic rules in light of broader international human rights protection. This case presents the opposite scenario — how to interpret an international treaty that may be in conflict with the broader protection of fundamental rights available domestically.
2. Air Canada breached its duty to provide services in French to Michel and Lynda Thibodeau on three flights between Canada and the United States. The Thibodeaus applied to the Federal Court for damages and for “structural” orders to redress Air Canada’s allegedly systemic violations of its bilingualism duties. Air Canada acknowledged that it is subject to the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), but relied on the limitations on carrier liability in the *Convention for the Unification of Certain Rules for International Carriage by Air*, signed in Montréal, as set out in Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26 (the *Montreal Convention* or *Convention*) as a barrier to the Thibodeaus’ claims for damages.
3. There is no dispute that Air Canada breached its obligations under s. 22 of the *Official Languages Act* by failing to provide services and announcements in French. The remaining issue is whether the *Montreal Convention* prevents the Thibodeaus from recovering damages from Air Canada for these breaches.
4. In my respectful view, the *Montreal Convention* neither contemplates nor excludes the type of damages at issue on these appeals. I would therefore allow the appeals.

Analysis

1. The general focus of these appeals is on the scope of the liability provisions in the *Montreal Convention*. The particular focus is on Article 29, which is found in Chapter III of the *Convention*, headed “Liability of the Carrier and Extent of Compensation for Damage”. Article 29 states:

*Article 29 — Basis of Claims*

*In the carriage of passengers, baggage and cargo*, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

1. Interpreting this language takes us to Article 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, which requires that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (entered into force January 27, 1980).
2. The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In my respectful view, this exercise leads to the conclusion that Article 29 of the *Montreal Convention* does not exclusively govern the universe of damages for which carriers are liable during international carriage by air.
3. The first words of Article 29 are words that restrict its scope by declaring that any action for damages “*[i]n the carriage of passengers, baggage and cargo*” must be brought subject to the conditions set out in the *Convention*. I accept that the words which immediately follow — “however founded, whether under this Convention or in contract or in tort or otherwise” — are, if read in isolation, broad in scope. But I do not see this as an independent, defining phrase, I see it as a clause dependent for its meaning on the preceding opening words. Thus, “action” refers only to an action for damages “[i]n the carriage of passengers, baggage and cargo”.
4. It is, therefore, only an action for damages incurred “[i]n the carriage of passengers, baggage and cargo” that must be brought “subject to the conditions and such limits of liability as are set out” in the *Convention*, whether or not the action is brought in contract or tort, under the *Convention* or otherwise. No other actions for damages are included in the scope of Article 29.
5. What then does an action for damages “[i]n the carriage of passengers, baggage and cargo” mean? For interpretive assistance, we look to other provisions of the *Convention*, and, in particular, to Chapter III in which we find Article 29.
6. Chapter III sets out the limited liability of carriers in the carriage of passengers, baggage and cargo. Article 17(1) establishes the conditions of liability for “Death and Injury of Passengers”. Articles 17(2), 17(3) and 17(4) establish the conditions of liability for “Damage to Baggage”. Article 18 establishes the conditions of liability for “Damage to Cargo”. Article 19 establishes the conditions of liability “for damage occasioned by delay in the carriage by air of passengers, baggage or cargo”. Subsequent provisions establish the limits on recovery for these types of damage. Article 21 establishes the rules of “Compensation in Case of Death or Injury of Passengers” and Article 22 outlines the “Limits of Liability in Relation to Delay, Baggage and Cargo”.
7. Article 19 actually tracks the opening words of Article 29 (“[i]n the carriage of passengers, baggage and cargo”) and the other provisions refer to the same subject areas: death or bodily injury of a passenger, destruction or loss of, or damage to, baggage, destruction or loss of, or damage to, cargo, and delay in the carriage of persons, baggage or cargo. The rest of Article 29 (“any action for damages, however founded . . . can only be brought subject to the conditions and such limits of liability as are set out in this Convention”) merely confirms that the Treaty exclusively governs actions for damages in respect of these subjects.
8. Significant support for this interpretation can be found in the relationship between Article 29 of the *Montreal Convention* and its predecessor, Article 24 of the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw, October 12, 1929, as amended at The Hague, 1955, as set out at Schedule I of the *Carriage by Air Act* (the *Warsaw Convention*). Article 24 states:

*Article 24*

(1) *In the cases covered by Articles 18 and 19* any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) *In the cases covered by Article 17* the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

1. Article 24 of the *Warsaw Convention* clearly limits the scope of the words “any action for damages, however founded” to “the cases covered by” Articles 17, 18 and 19. Those Articles had set out the conditions of liability for personal injury to passengers, for damage to baggage or cargo and for damage caused by delay. The language used in these provisions of the *Warsaw Convention* is almost identical to the language found in Articles 17, 18 and 19 of the *Montreal Convention*.
2. The only real difference, in fact, between the language in Article 24 of the *Warsaw Convention* and Article 29 of the *Montreal Convention* is that the words in Article 24 clarifying that the actions for damages relate to the cases covered by Articles 17, 18 and 19, are not found in Article 29. I do not see this as particularly meaningful for two reasons.
3. First, the U.S. Supreme Court examined this variation in language in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,525 U.S. 155 (1999). Writing for eight of the members of the court, Ginsburg J. concluded that a shift from the words “[i]n the cases covered by” to the words “[i]n the carriage of passengers and baggage” does not change, but “merely clarifies” the scope of exclusivity of the provision (p. 175).
4. Second, seeing this shift in language as reflecting an intention to expand protection for air carriers beyond the actions covered by Articles 17, 18 and 19 contradicts the historic reality that the *Montreal Convention* was the culmination of a decades-long effort to improve consumer protection, not restrict it.
5. The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. The relative frequency of accidents exposed carriers to unpredictable and significant losses. This made it difficult to secure investment capital or insurance protection (Paul Stephen Dempsey, *Aviation Liability Law* (2nd ed. 2013), at pp. 309-10).
6. Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses.
7. The *Warsaw Convention* attempted a protective reconciliation for both airlines and passengers. Airlines would benefit from the introduction of a uniform scheme of limited liability to protect against the financial risks and uncertainty posed by accidents, passengers would benefit from access to predetermined amounts of limited compensation for death or injury — about US$8,300 per passenger — and a prohibition on airlines requiring passengers to waive all liability (Paul Stephen Dempsey and Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), at pp. 15-16 and 50-51; John E. J. Clare, “Evaluation of Proposals to Increase the ‘Warsaw Convention’ Limit of Passenger Liability” (1949), 16 *J. Air L. & Com.* 53). The *Warsaw Convention* thus sought “to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability” (*Tseng*, at p. 170).
8. As safety in the industry improved, governments turned their attention from protecting the financial viability of airlines to introducing a more passenger-friendly legal regime. The focus tilted towards increasing the exceptionally low limits on carrier liability established in the *Warsaw Convention* (Dempsey, at pp. 315-16).
9. Statessubsequently signed on to different international efforts to expand carrier liability. The *Hague Protocol* of 1955, for example, doubled liability limits for death and personal injury of passengers to about US$16,600 (*Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*,done at The Hague, September 28, 1955, 478 U.N.T.S. 371, as set out in Schedule III of the *Carriage by Air Act*). The *Guatemala City Protocol* of 1971 introduced an absolute limit on carrier liability of about US$100,000, and expanded the circumstances under which carriers could be found liable under the *Warsaw Convention* (*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage* *by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City, March 8, 1971 (not in force)). The *Guadalajara Convention* of 1961 extended the *Warsaw Convention*’s liability regime to cover both a contracting carrier *and* the carrier that actually provided service (*Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara, September 18, 1961, 500 U.N.T.S. 31, as set out in Schedule V of the *Carriage by Air Act*). And *Montreal Protocol No. 4* of 1999 increased cargo liability limits (*Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, September 25 1975; Dempsey and Milde, at pp. 17-41).
10. Notwithstanding the increasing recognition that compensation for passengers was too low, a single international instrument increasing ceilings on carrier liability proved elusive. Out of concern that this fractured response could lead to the demise of a unified system of international air law, the industry took action. The *Montreal Agreement* of 1966, a private arrangement between airlines, increased carrier liability under the *Warsaw Convention* for personal injury for carriage to, from or through the U.S. up to US$75,000 (*Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, May 13, 1966). In 1974, some European and Japanese carriers agreed to increase passenger liability under the *Warsaw Convention* through their tariffs up to US$58,000, and later to US$100,000 (the Malta Agreement) (see Dempsey and Milde, at pp. 29-31).
11. In 1992, Japanese carriers effectively agreed to a liability regime for passenger injury of strict liability up to an initial limit greater than that established in the *Warsaw Convention*, and “a fault-based reversed burden of proof” that would apply thereafter without any limit (the Japanese Initiative) (Dempsey and Milde, at p. 32). In 1995, the International Air Transport Association (IATA), the trade association for the world’s airlines, endorsed an intercarrier agreement revising the “grossly inadequate” liability limits installed by the *Warsaw Convention* and adopting a two-tier fault system of strict and then presumed liability(*IATA Intercarrier Agreement on Passenger Liability*, preamble; Dempsey and Milde, at p. 417). The signatory carriers to the *IATA Intercarrier Agreement* resolved “[t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding, or other bodily injury of a passenger . . . so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger” (Article 1; see Dempsey, at pp. 332-34; Dempsey and Milde, at pp. 32-35 and 417).
12. Having been “upstaged” by industry initiatives to address the low ceilings on carrier liability, States began to work towards updating the *Warsaw Convention* (Dempsey, at p. 336; Dempsey and Milde, at pp. 36-38). Through the International Civil Aviation Organization, the *Montreal Convention* came into being in 1999, adopting the two-tier liability schemes for passenger injury or death outlined in the Japanese Initiative of 1992 and the *IATA* *Intercarrier Agreement* of 1995, as well as an initial limit on recovery of around US$150,000 (Dempsey and Milde, at pp. 40-41).
13. The *Montreal Convention* thereby sought to replace the patchwork system that had attempted to expand the limits on liability set by the *Warsaw Convention* in 1929. The drafters of the *Montreal Convention* continued to maintain a uniform liability scheme, as had the *Warsaw Convention*, but while the primary goal of the *Warsaw Convention* had been to limit the liability of carriers in order to foster the growth of the nascent commercial aviation industry, the state parties to the *Montreal Convention* were more focused on the importance of “ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution” (*Montreal Convention*, preamble; *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), at p. 371 (fn. 4)).
14. As this history shows, interpreting the change in language from Article 24 of the *Warsaw Convention* to Article 29 of the *Montreal Convention* in a way that narrows protection for consumers and expands it for carriers, is both counter-intuitive and historically anomalous. At no time was there ever any suggestion that the new *Convention* was designed to *reduce* the ability of passengers to sue carriers.
15. There is, in fact, no evidence that state parties intended to replace the subject-specific scope of exclusivity established in Article 24 of the *Warsaw Convention* with a *universal* rule of exclusivity in Article 29 of the *Montreal Convention*. What little evidence there is of the preparatory work preceding the adoption of the *Montreal Convention* suggests the opposite. As Dempsey and Milde point out, “[a] study of the history of drafting in the convoluted procedure rather indicates that there was no creative courage to innovate with new concepts” (p. 42).
16. I also find the absence of any reference in the Parliamentary record to the changes in language between Article 24 of the *Warsaw Convention* and Article 29 of the *Montreal Convention* revealing. The sponsors of the *Convention*’s implementing bill never mentioned Article 24 or Article 29 in the House of Commons or the Senate (speech of André Harvey (Parliamentary Secretary to the Minister of Transport), opening second reading in Parliament of Bill S-33, *An Act to amend the Carriage by Air Act*, *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., November 20, 2001, at p. 7346; see also speech of the Hon. Ross Fitzpatrick, moving the second reading in the Senate of Bill S-33, *Debates of the Senate*, vol. 139, 1st Sess., 37th Parl., October 2, 2001, at p. 1346). Nor did any of the witnesses who gave evidence before the House of Commons and Senate committees that reviewed the implementation of the *Convention* into federal law (transcript of statement of Mr. Vayzel Lee (Policy Advisor, Domestic Air Policy, Department of Transport) to the House of Commons Standing Committee on Transport and Government Operations, Meeting No. 40 — Evidence, November 29, 2001 (online); *Proceedings of the Standing Senate Committee on Transport and Communications*, Issue No. 15 — Evidence, October 31, 2001 (online)).
17. Given the suggestion that the wording in Article 29 of the *Montreal Convention* changes the focus from Article 24 of the *Warsaw Convention* by expanding protection for air carriers to *all* actions for damages, this silence is, to say the least, surprising. Dramatic changes in law tend to attract dramatic reactions. This purported change attracted none. The most logical explanation for the silence, therefore, is that there was no change in law. In fact, it is hard to imagine such a drastic domestic intrusion without either express language or Parliamentary disclosure. The silence about such consequences suggests that no such consequence was either contemplated or intended.
18. Finally, it is worth noting that Article 3(4) of the *Montreal Convention* also confirms a narrow interpretation of the scope of claims governed by the Treaty. It states:

*Article 3 — Passengers and Baggage*

4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

This sets out what information passengers are entitled to know about the range of liability limitations covered by the *Convention*, namely, “death or injury and for destruction or loss of, or damage to, baggage, and for delay”. Article 29 must, it seems to me, be read harmoniously with this provision. Concluding instead that Article 29 expands this list to include *all* claims for damages arising in the course of international carriage by air, suggests that the intention of the *Convention* was to give passengers notice only about some aspects of a carrier’s limited liability, without warning them that all other actions are simply barred. This, it seems to me, contradicts the consumer protection purpose of the *Convention* by inferring that the state parties’ intention was to mislead passengers by providing notice to them about only some, but not all, of the limits on a carrier’s liability.

1. All Article 29 does, therefore, is direct that the *Montreal Convention* exclusively governs only those actions brought for damages incurred “[i]n the carriage of passengers, baggage and cargo”, which in turn means those actions covered by Articles 17, 18 and 19.
2. The Thibodeaus, on the other hand, seek damages for violations of a statute that reifies constitutionally protected rights. This Court has held that those laws “which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them preeminence over ordinary legislation” (*Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, at p. 1154, *per* L’Heureux-Dubé J., dissenting; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156). As stated in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, at para. 23, quoting *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at p. 386, the *Official Languages Act* has a special status because “[i]t reflects both the Constitution of the country and the social and political compromise out of which it arose.” The *Official Languages Act* is therefore synergistically aligned with the language protections in the *Canadian Charter of Rights and Freedoms*.
3. Why does this matter? Because it helps broker the interpretive outcome. In my view, Article 29 of the *Montreal Convention* should be interpreted in a way that is respectful of the protections given to fundamental rights, including language rights, in domestic legislation.
4. And this goes to the object and purpose of the *Convention*. There is no evidence in the Parliamentary record or the legislative history of the *Convention* to suggest that Canada, as a state party, intended to extinguish domestic language rights protection by ratifying or implementing the *Montreal* *Convention*. Given the significance of the rights protected by the *Official Languages Act* and their constitutional and historic antecedents, the *Montreal Convention* ought to be interpreted in a way that respects Canada’s express commitment to these fundamental rights, rather than as reflecting an intention to subvert them.
5. I am aware of the jurisprudential division about the scope of the Treaty. Some courts, as in *Walker v. Eastern Air Lines, Inc.*, 785 F.Supp. 1168 (S.D.N.Y. 1992), and *Beaudet v. British Airways, PLC*, 853 F.Supp. 1062 (N.D. Ill. 1994), have assumed limits on the range of actions covered. Others, as in *Sidhu v. British Airways Plc.*, [1997] A.C. 430 (H.L.), *Tseng*, *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), *In re* *Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 A.C. 495, and *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 W.L.R. 521, have attributed it significantly wider coverage. But it seems to me that it would be an aberrant rule of treaty interpretation, and one which is hard to see as being consistent with the “good faith” required by Article 31 of the *Vienna Convention*, to conclude that a treaty which is silent as to its effect on domestic legislation protecting fundamental, let alone constitutional rights, can be construed as silencing those rights.
6. Finally, although it is not determinative, we cannot ignore the fact that we are dealing with a commercial treaty. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.
7. Just as Parliament is not presumed to legislate in breach of a treaty, it should not be presumed to implement treaties that extinguish fundamental rights protected by domestic legislation.
8. The meaning of Article 29, consideredin context and in light of the object and purpose of the *Montreal Convention*, therefore, points to a limited scope of exclusivity, and should be interpreted as directing that the *Montreal Convention* governs only those actions brought for damages incurred “[i]n the carriage of passengers, baggage and cargo”, namely, actions covered by Articles 17, 18 and 19.
9. The remaining question is whether the Thibodeaus’ action for damages falls within those Articles.
10. Articles 17(2), (3) and (4), 18 and 19 contemplate damages sustained in respect of baggage, cargo and delay. The only substantive provision of the *Convention*, therefore, that might relate to the Thibodeaus’ action is Article 17(1), which states:

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

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

1. The majority concludes that the Thibodeaus’ claim for damages relates to the circumstances contemplated by Article 17(1) because they suffered the breach of their language rights “aboard the aircraft” (para. 86). The language of Article 17(1) makes it clear that the provision does not apply to all events that take place on board an aircraft or in the course of the operations of embarking or disembarking. Rather, Article 17(1) imposes the requirements that (1) there must have been an accident, (2) which caused (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking (Dempsey and Milde, at p. 124; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), at pp. 535-36).
2. There is no complaint of an accident. That, in my view, is dispositive since Article 17(1) talks of “death or bodily injury” caused by an accident. That makes the rest of the provision redundant in this case. The Thibodeaus have not suffered any bodily injury. The fact that the breaches of the Thibodeaus’ language rights occurred “on board the aircraft” is irrelevant since those circumstances are only pertinent if there was an accident.
3. Consequently, the *Montreal Convention* does not bar a damage award for breach of language rights during international carriage by air.
4. Accordingly, while I am not persuaded that a structural order was justified in the circumstances, I would allow the appeals with respect to the damages claims and restore the damages awarded by the Application Judge.

**APPENDIX**

*Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw, October 12, 1929, as set out at Schedule I of the *Carriage by Air Act*, R.S.C. 1985, c. C-26

[Note: The paragraphs of the Convention shown in italics were deleted and replaced (except in the case of paragraph (2) of Article 20) by the Protocol set out in Schedule III, *infra*.]

. . .

*Article 17*

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

*Article 18*

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

*Article 19*

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

*Article 20*

(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) *In the carriage of cargo and baggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.*

*Article 22*

(1) *In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.*

(2) *In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.*

(3) *As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.*

(4) *The sums mentioned above shall be deemed to refer to the French franc* consisting *of 65 ½ milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.*

*Article 23*

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

[Note: This provision was renumbered as paragraph (1) and another provision added as paragraph (2) by Article XII of the Protocol set out in Schedule III, *infra*.]

*Article 24*

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

*Article 25*

(1) *The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct.*

(2) *Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.*

[Note: A new article numbered as Article 25A was added by Article XIV of the Protocol set out in Schedule III, *infra*.]

*Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montréal, as set out at Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26

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

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

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

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term “baggage” means both checked baggage and unchecked baggage.

*Article 18 — Damage to Cargo*

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(*a*) inherent defect, quality or vice of that cargo;

(*b*) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(*c*) an act of war or an armed conflict;

(*d*) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

*Article 19 — Delay*

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

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

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

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

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

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

*Article 22 — Limits of Liability in Relation to Delay, Baggage and Cargo*

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger’s actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor’s actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier’s liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

*Article 26 — Invalidity of Contractual Provisions*

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

*Article 29 — Basis of Claims*

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

*Article 49 — Mandatory Application*

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

*Carriage by Air Act*, R.S.C. 1985, c. C-26

**2.** (1) Subject to this section, the provisions of the Convention set out in Schedule I and of the Convention set out in Schedule V, in so far as they relate to the rights and liabilities of carriers, carriers’ servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(2) Subject to this section, the provisions of the Convention set out in Schedule I, as amended by the Protocol set out in Schedule III or by the Protocols set out in Schedules III and IV, in so far as they relate to the rights and liabilities of carriers, carriers’ servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(2.1) Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers’ servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(3) The Governor in Council may from time to time, by proclamation published in the *Canada Gazette*, certify who are the parties to any convention or protocol set out in a schedule to this Act, in respect of what territories they are respectively parties, to what extent they have availed themselves of the Additional Protocol to the Convention set out in Schedule I, which of those parties have made a declaration under the Protocol set out in Schedule III or IV and which of those parties have made a declaration under the Convention set out in Schedule VI.

(4) Any reference in Schedule I to the territory of any party shall be construed as a reference to the territories subject to its sovereignty, suzerainty, mandate or authority, in respect of which it is a party.

(5) Any liability imposed by Article 17 of Schedule I or Article 17 of Schedule VI on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger under any law in force in Canada, and the provisions set out in Schedule II shall have effect with respect to the persons by whom and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.

(6) Any sum in francs mentioned in Article 22 of Schedule I shall, for the purposes of any action against a carrier, be converted into Canadian dollars at the rate of exchange prevailing on the date on which the amount of any damage to be paid by the carrier is ascertained by a court.

(7) For the purposes of subsection (6), the Canadian dollar equivalents of francs or Special Drawing Rights, as defined in Article 22 of the Convention set out in Schedule I, are determined by

(*a*) converting francs into Special Drawing Rights at the rate of one Special Drawing Right for 15.075 francs; and

(*b*) converting Special Drawing Rights into Canadian dollars at the rate established by the International Monetary Fund.

*Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.)

**10.** (1) The *Official Languages Act* applies to the Corporation [Air Canada].

(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.

. . .

*Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.)

**2.** The purpose of this Act is to

(*a*) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(*b*) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(*c*) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

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

(*a*) within the National Capital Region; or

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

**76.** In this Part, “Court” means the Federal Court.

**77.** (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

. . .

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

. . .

**78.** (1) The Commissioner may

(*a*) within the time limits prescribed by paragraph 77(2)(*a*) or (*b*), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;

(*b*) appear before the Court on behalf of any person who has applied under section 77 for a remedy under this Part; or

(*c*) with leave of the Court, appear as a party to any proceedings under this Part.

(2) Where the Commissioner makes an application under paragraph (1)(*a*), the complainant may appear as a party to any proceedings resulting from the application.

(3) Nothing in this section abrogates or derogates from the capacity of the Commissioner to seek leave to intervene in any adjudicative proceedings relating to the status or use of English or French.

*Canadian Charter of Rights and Freedoms*

**16.** (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

**24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

. . .

*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37

Article 31

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

*Appeals dismissed,* Abella *and* Wagner JJ. *dissenting.*

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