The "Teeth" in the *Official Languages Act*: The Court Remedy Under Part X

Renée Soublière

PART X OF THE *Official Languages Act* creates a court remedy before the Federal Court, designed to ensure full compliance with certain provisions of the Act. The objective of this paper is to present the state of the law as regards the court remedy created under section 77 of the Official Languages Act and, more generally, with respect to the provisions of Part X of the Act entitled "Court Remedy." The paper is therefore not intended to present a summary of all available court remedies for violations of the provisions of the *Official Languages Act* nor is it intended to present a summary of all the different remedies, whether administrative or legal, that exist in the realm of language rights. The paper focuses solely on the legal remedy created by Part X of the *Official Languages Act* and on the relevant case law. The paper will first review the conditions for application of the court remedy: who may apply for such a remedy? For which provisions of the Act can the court remedy be brought? What are the limitation periods to apply for such a remedy? The text then explores the nature of this court remedy as well as certain procedural issues, including the issue of the Crown's language obligations when such legal remedy is sought. The fourth part of the text focuses on evidence issues and the fifth on the specific remedies that may be granted when the Federal Court finds that a federal institution has not complied with the *OLA*. The issue of costs is addressed in the final part of the text.

LA PARTIE X DE la *Loi sur les langues officielles* instaure devant la Cour fédérale un recours judiciaire pour revendiquer le plein respect de certaines dispositions de la *LLO*. L'objectif de ce texte est de présenter l'état du droit en ce qui concerne le recours judiciaire prévu par l'article 77 de la Loi sur les langues officielles et, plus généralement, sur les dispositions de la partie X de la Loi intitulée «Recours judiciaire». Le texte n'a donc pas pour objet de présenter l'ensemble des recours judiciaires disponibles pour sanctionner des violations aux dispositions de la Loi sur les langues officielles et encore moins l'ensemble des recours, administratifs ou judiciaires, qui existent en droits linguistiques. Il se concentre sur le recours prévu à la partie X de la Loi et sur la jurisprudence afférente. Le texte traite d'abord des conditions d'application du recours: qui peut déposer un tel recours? Quelles dispositions de la Loi peuvent faire l'objet du recours? Quels sont les délais applicables pour le dépôt du recours? Le texte explore par la suite la nature du recours prévu à la partie X puis aborde certaines questions liées à la procédure, y compris celle des obligations linguistiques qui incombent à la Couronne lorsque de tels recours sont intentés. La quatrième partie porte sur des questions relatives à la preuve et la cinquième des réparations pouvant être octroyées lorsque la Cour fédérale estime qu'une institution fédérale n'a pas respecté la Loi. La question des dépens est traitée en conclusion. La version anglaise du texte est disponible sur le site web de la *Revue de droit d'Ottawa*.

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I. INTRODUCTION

Part X of the *Official Languages Act* (*OLA*) creates a remedy before the Federal Court, designed to ensure full compliance with certain provisions of the *OLA*.[1] This remedy was described as follows by the Federal Court of Appeal in *Canadian Food Inspection Agency v Forum des maires de la péninsule acadienne*:

> However, to ensure that the *Official Languages Act* has some teeth, that the rights or obligations it recognizes or imposes do not remain dead letters, and that the members of the official language minorities are not condemned

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* This paper does not necessarily reflect the position of the Department of Justice Canada. Please note that this is a translation of the French version of this article, which is available on the website of the *Ottawa Law Review* in its 47:1 issue. I would like to thank Marie Lasnier, a former member of the Official Languages Law Team, at the Department of Justice, who wrote a framework opinion on Part X of the *OLA*, which inspired me greatly. I must also thank Helen Kneale, a summer student with the Team, as well as Chadia Brahim, a paralegal with the Team, for their assistance with the footnotes.

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1 *Official Languages Act*, RSC 1985, c 31 (4th Supp), s 76ff [*OLA*].

> to unceasing battles with no guarantees at the political level alone, Parliament has created a "remedy" in the Federal Court that the Commissioner herself (section 78) or the complainant (section 77) may use.[2]

The objective of this paper is to present the state of the law regarding the remedy created under section 77 of the *OLA* and, more generally, with respect to the provisions of Part X of the *OLA* entitled "Court Remedy." This paper does not intend to present a summary of the remedies available for violations of the *OLA* (for example, judicial review under section 18.1 of the *Federal Courts Act*[3]) or a summary of the legal recourse that exists to sanction violations of the language provisions of the *OLA*, the *Canadian Charter of Rights and Freedoms* (the *Charter*)[4] or other language provisions.[5]

This paper will first review the conditions for application as well as the nature of the remedy under Part X. It will then address the issue of the Crown's language obligations when such legal remedy is sought, as well as certain evidentiary issues. This will be followed by a discussion on remedies that may be granted when the Federal Court finds that a federal institution has not complied with the *OLA*. The issue of costs will be addressed in the paper's conclusion.

II. CONDITIONS FOR APPLYING THE REMEDY

A. Who May Apply for a Remedy?

1. The Complainant

Part X of the *OLA* contains statutory provisions that define the conditions necessary to apply for a remedy under the *OLA*. Before taking the matter to Federal Court, however, one must first have filed a complaint with the Commissioner of Official Languages.[6] The capacity as an "applicant" to

2 2004 FCA 263 at para 17, [2004] 4 FCR 276 [*Forum*]. See also *Canada (Commissioner of Official Languages) v CBC*, 2014 FC 849 at para 64, [2015] 3 FCR 481 [*CBC/Radio-Canada*].

3 RSC 1985, c F-7, s 18.1.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

5 See François Larocque, "Les recours en droits linguistiques" in Michel Bastarache & Michel Doucet, eds, *Les droits linguistiques au Canada*, 3rd ed (Cowansville, QC: Yvon Blais, 2013) at 993–1145 (for a more extensive review of language rights remedies). See also René Cadieux, "La Loi sur les langues officielles de 1988 : le recours de l'article 77 est-il exclusif?" in *Développements récents en droit administratif et constitutionnel* (Cowansville, QC: Yvon Blais, 1999) at 51–116 (for a discussion on other available remedies for violations of the *OLA*).

6 See *Lavigne v Canada Post Corporation*, 2006 FC 1345 at paras 37, 62, 303 FTR 156. The Commissioner's complaints and investigations process is described in sections 58–75 of the *OLA*.

the Court is derived from the capacity as a "complainant" to the Commissioner.[7] As stated by the Court in *Forum des maires*, "[t]he 'complainant', according to subsection 58(2), may be a 'person' or a 'group.'"[8]

It should be noted that the complainant's ability to file an application with the Federal Court does not depend on the results of the Commissioner's investigation. In other words, the complainant may apply to the Federal Court for a remedy regardless of the content of the Commissioner's report. A complainant may also file an application if the Commissioner has refused to open an investigation.[9]

Contrary to the conditions prescribed in subsection 18.1(1) of the *Federal Courts Act*, the remedy under section 77 of the *OLA* "may be undertaken by a person or a group, which may not be 'directly affected by the matter in respect of which relief is sought,'"[10] since subsection 58(2) of the *OLA* grants any person or group of persons the right to make a complaint to the Commissioner of Official Languages.

2. Commissioner of Official Languages

Under section 78 of the *OLA*, the Commissioner of Official Languages may personally apply to the Court for the remedy available to the complainant, if the Commissioner has the complainant's consent,[11] or appear before the Court on behalf of any person who has applied.[12]

The Commissioner may also appear, with leave of the Court, as a party to any proceedings under section 78.[13] The judge's discretion to grant leave is guided by a single test: necessity. The issue, therefore, is whether

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7 *Forum*, *supra* note 2 at para 17. See *OLA*, *supra* note 1, s 77(1).

8 *Forum*, *supra* note 2 at para 17. See also *Desrochers v Canada (Industry)*, 2009 SCC 8 at para 34, [2009] 1 SCR 194 [*Desrochers* SCC].

9 See *OLA*, *supra* note 1, s 58(4) ("[t]he Commissioner may refuse to investigate or cease to investigate any complaint if in the opinion of the Commissioner (a) the subject-matter of the complaint is trivial; (b) the complaint is frivolous or vexatious or is not made in good faith; or (c) the subject-matter of the complaint does not involve a contravention or failure to comply with the spirit and intent of this Act, or does not for any other reason come within the authority of the Commissioner under this Act."). See also *OLA*, *supra* note 1, s 58(5) (complainant to be notified of refusal to investigate); *OLA*, *supra* note 1, s 77(2) (limitation period of 60 days following receipt of the notice under subsection 58(5) to file an application with the Federal Court).

10 *Forum*, *supra* note 2 at para 18.

11 See *OLA*, *supra* note 1, s 78(1)(a). In this case, subsection 78(2) provides that the complainant may appear as a party to the proceeding.

12 *Ibid*, s 78(1)(b).

13 *Ibid*, s 78(1)(c). See e.g. *Thibodeau v Air Canada*, 2014 SCC 67, [2014] 3 SCR 340 [*Thibodeau* SCC (2014)].

"it is necessary to grant the Commissioner status as a party to completely adjudicate and settle the issues raised in these proceedings."[14]

Under subsection 78(3) of the *OLA*, the Commissioner has the capacity to seek leave to intervene in "any adjudicative proceedings relating to the status or use of English or French."[15] This discretionary capacity also includes the right to intervene at any time, even after the parties have completed their respective files.[16]

Requests for intervention by the Commissioner are normally granted by the Federal Court. This is the same for provincial courts and tribunals; however, the Commissioner's jurisdiction has, in certain circumstances, been successfully challenged.[17]

B. Under Which Provisions of the *OLA* May the Remedy be Sought?

It is apparent from the wording of subsection 77(1) that Parliament has established a court remedy that is limited to certain specific provisions of the *OLA*. Section 77 provides that the rights and duties to which the remedy applies are set out in sections 4 (Proceedings of Parliament), 5 to 7 and 10 to 13 (Legislative and other instruments), 91 (Staffing generally),

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14 *Air Canada v Thibodeau*, 2012 FCA 14 at para 12, 438 NR 321 [*Thibodeau* FCA 14 (2012)] (the Supreme Court did not rule on this issue).

15 *OLA*, *supra* note 1, s 78(3).

16 See e.g. *Lavigne v Canada Post Corporation*, 2009 FC 756 at para 37, 350 FTR 46 [*Lavigne* FC (2009)].

17 See especially *Parasiuk c Tribunal administratif du Québec*, [2004] RJQ 2545 at paras 14–16, 2004 CanLII 16530 (QCCS) (in which the Superior Court of Quebec dismissed the Commissioner's application for leave to intervene in a matter pertaining to the interpretation of subsection 73(1) of Quebec's *Charter of the French Language*). In the Court's view:

> The Commissioner shall act for the purposes of her jurisdiction only and no provision of her enabling statute authorizes the Commissioner to intervene in a dispute involving a provision of a Quebec language statue (*ibid* at para 15 [translated by author]).

See also *Westmount (ville de) c Québec (Procureur général)*, [2001] RJQ 2520 at paras 205–210, 2001 CanLII 13655 (CAQ) (this approach seems restrictive in the sense that subsection 78(3) clearly grants the Commissioner the power to seek leave to intervene in any adjudicative proceedings relating to the status or use of English or French, and not solely those relating to the *OLA*). See generally Mark C Power & Justine Mageau, "Réflexions sur le rôle du Commissaire aux langues officielles devant les tribunaux", (2011) 41 RGD 179 (the authors conclude that the *OLA* grants the Commissioner considerable latitude to take effective action before the courts, but at the time the article was written "it seems that Commissioners in the position since 1988 have been hesitant to exercise the full range of powers to take legal action that have been granted to them to date" at 186 [translated by author]).

and parts IV (Communications with and services to the public), V (Language of work), and VII (Advancement of English and French).[18]

Thus, "only those complaints made in respect of a right or duty under certain sections or parts of the Act could be the subject-matter of the remedy under Part X."[19] Subsection 77(1) therefore contains an "exhaustive list"[20] of possible complaints.

In 2005, the initial scope of the remedy created by section 77 of the *OLA* was expanded by the addition of Part VII (Advancement of English and French) to the list of provisions under which relief could be sought.[21] Prior to that addition, the courts had held on several occasions that the remedy created in section 77 was not available to examine alleged violations under Part VII.[22]

It should be noted here that the powers of investigation and recommendation conferred on the Commissioner of Official Languages are not limited to specific provisions of the *OLA*. Under subsection 58(1), the Commissioner may investigate any complaint concerning any act or omission in the context of the administration of the affairs of any federal institution where "the status of an official language was not or is not being recognized; any provision of any Act of Parliament or regulation relating to the status or use of the official languages was not or is not being

18 *OLA*, *supra* note 1, s 77(1).

19 *Forum*, *supra* note 2 at para 25.

20 *Ayangma v Canada*, 2002 FCT 707 at para 65, 221 FTR 81 [*Ayangma* FCT], aff'd 2003 FCA 149, [2003] FCJ No 457 [*Ayangma* FCA]. See also *Forum*, *supra* note 2 at paras 25, 27; *Desrochers v Canada* (*Industry*), 2006 FCA 374 at para 73, [2007] 3 FCR 3 [*Desrochers* FCA]; *Norton v Via Rail Canada Inc*, 2009 FC 704 at para 117, [2009] ACF No 1043 (QL) [*Norton* FC (2009)]; *CBC/Radio-Canada*, *supra* note 2 at para 65. See also *Devinat v Canada* (*Immigration and Refugee Board* [2000] 2 FCR 212 at para 38, 181 DLR (4th) 441 (the Federal Court of Appeal indicated that the court remedy under section 18.1 of the *Federal Courts Act* could be exercised for violations of s 20 of the *OLA*, a provision that is not included in s 77). See however *Lavoie v Canada* (*AG*), 2007 FC 1251 at para 42, 325 FTR 198 (the Federal Court stated that an application under section 18.1 of the *Federal Courts Act* cannot be used to enforce the provisions of the *OLA* that do not create a duty or a right but simply consist of a commitment by the government (in that case, the provisions of Part VI of the *OLA*)).

21 The addition was made by the adoption of Bill S-3, *An Act to amend the Official Languages Act* (*promotion of English and French*), 1st Sess, 38th Leg, 2005 (assented to 25 November 2005), SC 2005, c 41.

22 See *Canada* (*Commissioner of Official Languages*) *v Canada* (*Department of Justice*), 2001 FCT 239 at para 77, 194 FTR 181; *Forum*, *supra* note 2 at para 46; *Desrochers v Canada* (*Industry*), 2005 FC 987, [2005] 4 FCR 3, aff'd *Desrochers* FCA, *supra* note 20, aff'd *Desrochers* SCC, *supra* note 8. See also *Ayangma* FCT, *supra* note 20, aff'd *Ayangma* FCA, *supra* note 20 (concerning Part VI of the *OLA*, which is not mentioned in section 77).

complied with, or; the spirit and intent of this Act was not or is not being complied with."[23]

C. What are the Limitation Periods Regarding a Remedy Application?

The various limitation periods within which a complainant can apply for a remedy are set out in section 77 of the *OLA* and were reiterated by Justice Dubé in *Canada* (*Commissioner of Official Languages*) *v Air Canada* in 1998:

> [T]he four specific times at which the application may be made by the complainant:
>
> 1. Sixty days after the complainant was informed of the Commissioner's decision to refuse or cease to investigate the complaint (subsections 77(2) and 58(5));
> 2. Six months after the complaint is made if the complainant has not yet been informed of the results of the investigation (subsection 77(3));
> 3. Sixty days after the results of an investigation of the complaint by the Commissioner are reported to the complainant (subsection 77(2)); and
> 4. Sixty days after the complainant is informed that the Commissioner is of the opinion that the institution concerned has not taken action within a reasonable time on the recommendations he made previously (subsections 77(2) and 64(2) [of the *OLA*]).[24]

A recent decision and the administrative practices of the Office of the Commissioner of Official Languages appear to recognize the existence of a fifth time limit, sixty days after the Complainant has been informed of the results of a follow-up to the Commissioner's investigation of a complaint.[25] In a decision dated July 14, 2015, Prothonotary Richard Morneau of the Federal Court affirmed that a complainant may bring an action before the Federal Court "whether or not the Commissioner concluded that a government institution implemented recommendations in a satisfactory manner."[26] This interpretation, based on a broad and liberal reading of subsection 77(2), appears to conflict with the restrictive clause in

23 *OLA*, *supra* note 1, s 58(1).

24 [1998] 152 FTR 1 at para 14, 1998 CanLII 8008 (FC).

25 These five time limits are indicated on the website of the Office of the Commissioner of Official Languages. See Office of the Commissioner of Official Languages, "Court Remedy FAQ's" (19 March 2015), online: Your Language Rights: <www.officiallanguages.gc.ca>.

26 *Dionne c Canada* (*Procureur général*), 2015 CF 862 at para 19 [*Dionne*] [translated by author].

subsection 64(2) and referenced in subsection 77(2). Where recommendations have been made by the Commissioner "*but adequate and appropriate action has not, in the opinion of the Commissioner, been taken thereon within a reasonable time after the recommendations are made*,"[27] the Commissioner may inform the complainant accordingly. In the *Dionne* case, the complainant had received a follow-up report that was positive—that is in which the Commissioner of Official Languages expressed the view that he was satisfied that adequate and appropriate action had been taken to implement the recommendations that had been made in the final investigation report. This explains why the Attorney General of Canada argued that subsection 64(2) did not apply in this particular case. The Court disagreed. According to the Court, the purpose of subsection 64(2) is the communication of a follow-up report, the content of the report does not matter.[28] In other words, whether or not the federal institution implemented the Commissioner of Official Languages' recommendations in a satisfactory manner, the complainant has sixty days after the receipt of the follow-up report to file an application.[29] In this situation, the time limit allowed for initiating proceedings is calculated from the date of receipt of the unfavourable follow-up report. In any event, it would be highly unlikely to see a complainant initiate legal proceedings following receipt of a follow-up report, which, in the Commissioner's opinion, accounted for full and satisfactory implementation of all recommendations made in the Commissioner's final report on the investigation.

In addition, subsection 77(2) confers on the Court the discretionary power to extend the time limits for allowing a person to commence proceedings. In *Étienne v Canada*, the Federal Court confirmed that it has this discretionary power, but it must exercise this discretion in a judicious manner—*i.e.* when the plaintiff submits an acceptable reason.[30] In other words, the Court should not deprive complainants of their right to file an application based on stipulated time limits, but complainants must have a valid reason for failing to seek the remedy within the time limit prescribed by law.[31] A few years later, in *Montreuil v Air Canada Corp*, Prothonotary Morneau set out two cumulative tests that must be met before the Court can accept a motion to extend a limitation period: (1) the reasons for

27 *OLA*, *supra* note 1, s 64(2) [emphasis added].

28 *Dionne*, *supra* note 26 at paras 16–21.

29 *Ibid* at para 19.

30 [1992] 54 FTR 253 at para 16, [1992] FCJ No 438 (QL) (FC).

31 *Ibid*.

failing to observe the limitation period are based on satisfactory explanations; (2) the application has a reasonable chance of success.[32] In *Dionne*, in July 2015, Prothonotary Morneau granted an extension to the complainant, even though such an extension had not been requested and based solely on the first condition, finding that: "the Commissioner's letters and website provided the applicant with valid reason for initiating proceedings outside the permitted time limit."[33]

It is important to note one last point concerning the issue of time limits: in situations where the Commissioner of Official Languages personally decides to apply to the Court for a remedy, paragraph 78(1)(a) indicates that the Commissioner may "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."

III. NATURE OF THE REMEDY CREATED UNDER SECTION 77

The remedy created under section 77 "is a *sui generis* proceeding."[34] This remedy is not an application for judicial review within the meaning of section 18.1 of the *Federal Courts Act*. As the Federal Court noted in *Forum*, "[t]his application is instead similar to an action."[35] The matter is therefore heard *de novo*, and the Court is not limited to the evidence provided during the Commissioner's investigation.[36]

The remedy provided for in Part X looks to verify the merits of the complaint filed with the Office of the Commissioner of Official Languages, as opposed to the merits of the Commissioner's report, and, where applicable, "to secure relief that is appropriate and just in the circumstances."[37] It can therefore be said that a court remedy under Part X is a "constantly shifting" remedy,[38] since the Federal Court must determine the merits of the complaint based on the facts as they were at the time that the complaint was filed. However, the remedy that the Court orders "must be adapted to the circumstances that prevail at the time the matter is adjudicated"[39] in order

32 [1996] 121 FTR 17 at para 3, 69 ACWS (3d) 169 (FC).
33 *Dionne*, *supra* note 26 at para 26 [translated by author].
34 See *Marchessault v Canada Post Corporation*, 2003 FCA 436 at para 10, 315 NR 111.
35 *Forum*, *supra* note 2 at para 15.
36 *Ibid* at paras 19–20.
37 *Ibid* at para 17.
38 *Ibid* at para 20.
39 *Ibid*.

to be appropriate and just. Any remedy ordered by the Court will therefore consider whether or not the breach of the *OLA* has been corrected.[40]

IV. PROCEEDINGS

A. Application of the *Federal Courts Rules*

Under section 80 of the *OLA*, the remedy under Part X of the *OLA* is heard and determined in a summary manner "in accordance with any special rules made in respect of such applications pursuant to section 46 of the *Federal Courts Act*."[41] However, no rule has been established for that purpose.

We must therefore turn to the *Federal Courts Rules* (the *Rules*).[42] Under paragraph 300(b), Part 5 (Applications) of the *Rules* applies to proceedings engaged under an Act of Parliament to be determined by summary procedure.[43] Thus, although the court remedy provided for in Part X of the *OLA* is not an application for judicial review within the meaning of section 18.1 of the *Federal Courts Act*, it is governed, in procedural terms, by the rules applicable to such applications.[44]

The remedy applied for under section 77 will therefore proceed quite quickly, with the applicable general principle being that of the expeditiousness of the proceedings. The tests generally applicable in case law to the consideration of motions to allow any acts likely to extend proceedings apply within the context of a remedy under section 77.[45]

Lastly, paragraph 304(1)(c) of the *Rules* provides that, where a motion for court remedy is filed under Part X of the *OLA*, the applicant shall serve the notice of application on the Commissioner of Official Languages within 10 days of its issuance.[46]

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40 *Ibid*. See also *Desrochers* SCC, *supra* note 8 at para 37.

41 *OLA*, *supra* note 1, s 80.

42 SOR/98-106 [*Rules*].

43 *Ibid*, s 300(b) (under this provision, Part 5 of the *Federal Courts Rules* applies to proceedings required or permitted by or under an Act of Parliament to be brought by application, motion, originating notice of motion, originating summons or petition, or to be determined in a summary way).

44 See *Lavigne v Canada* (*Human Resources Development*), 96 FTR 68 at para 2, [1995] FCJ No 737 (QL) (FC) [*Lavigne* FC (1995)]; *Forum*, *supra* note 2 at para 15.

45 See e.g. *Côté v Canada* (*Department of the Environment*), [1992] FCJ No 469 at para 6 (QL) (FC), 1992 CarswellNat 1325; *Côté v Canada*, 78 FTR 65, [1994] FCJ No 423 [*Côté* FC (1994)].

46 *Rules*, *supra* note 42, s 304(1)(c).

B. Striking Before the Hearing

Even though the provisions of the *Rules* do not specifically allow for striking an application for judicial review, it is well established that the Federal Court, in exercising its inherent jurisdiction, can order the striking of such an application when it is bereft of any possibility of success.[47]

In the context of an application under Part X of the *OLA*, as noted by the Federal Court of Appeal in *Norton v VIA Rail Canada Inc*,[48] a motion to strike should only be granted under very specific circumstances. In the opinion of the Court, this "extraordinary remedy" only allows an application to be struck when there is no possibility that the judge hearing the application will grant a remedy.[49]

C. The Crown's Language Obligations in the Context of the Remedy under Part X[50]

When a remedy is sought in Federal Court under Part X, Part III of the *OLA* (Administration of Justice) applies. This part establishes a comprehensive regime of language rights and obligations that apply to all federal courts.[51] Section 14 of the *OLA*, for example, provides that "English and French are the official languages of the federal courts and [that] either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court."[52] Under section 18 of Part III, the federal Crown and federal institutions have an obligation to use, "in any oral or written pleadings in the proceedings," the official language chosen by the other parties unless they establish that reasonable notice of the language chosen has not been given. Section 18 *in fine* states that "if the other parties fail to choose or agree on the official language to be used in

47 *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 at 600, 176 NR 48 (FCA).

48 2005 FCA 205 at para 15, 255 DLR (4th) 311.

49 *Ibid*.

50 A description of Part III and of the rights and duties set out therein is provided in the *Civil Litigation Deskbook* of the Department of Justice, which includes departmental directives relating to the implementation of the Crown's obligations.

51 *OLA*, *supra* note 1, s 14ff.

52 *Ibid*, s 14. This right, which was originally provided for by section 133 of the *Constitution Act, 1867* (UK) (30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5), is restated in subsection 19(1) of the *Charter* and incorporated in virtually the same language in section 14 of the *OLA*. See *Charter*, *supra* note 4, s 19(2); *OLA*, *supra* note 1, s 14.

those pleadings, [the federal Crown] shall use such official language as is reasonable, having regard to the circumstances."[53]

Regardless of the interpretation that may be given to the word "pleadings," it does not include evidence adduced during a proceeding. Testimony in the form of an affidavit is not an oral or written pleading with the meaning of section 18. The same rule applies to the documents attached to affidavits as exhibits.[54]

V. EVIDENTIARY ISSUES

A. In General

According to case law, the onus is on the applicant not only to demonstrate the existence of a violation of the *OLA*, but also to prove the causal relationship between the violation and the remedies sought.[55]

Furthermore, when an application for remedy is made under section 77, the parties to the case (the complainant and federal institution) are not limited to the evidence provided during the investigation of the Commissioner of Official Languages. As noted above, the matter is heard *de novo*.[56]

The Commissioner's investigation reports may, and often do, constitute evidence before the Court. However, the Court is not bound by the Commissioner's findings and the investigation reports may be contradicted like any other evidence.[57] In any application for remedy under Part X, it is the judge who, after hearing and weighing the evidence, will decide whether the federal institution is in compliance with the *OLA*.[58]

Although the Commissioner shall not disclose any information that comes to his or her knowledge during an investigation,[59] the Commissioner is expressly authorized under paragraph 73(b) of the *OLA* to disclose information in the course of proceedings before the Federal Court under Part X of the *OLA* or an appeal therefrom.[60] The Commissioner may therefore submit to the Court all facts that, in the Commissioner's opinion,

53 *OLA*, *supra* note 1, s 18.

54 See *Lavigne* FC (1995), *supra* note 44 at paras 7–11; *Charlebois v Saint John (City)*, 2005 SCC 74 at paras 7, 53, [2005] 3 SCR 563; *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2013 SCC 42 at para 19, [2013] 2 SCR 774.

55 See *Leduc v Canada*, 2000 CanLII 15454 at para 20, [2000] ACF No 716 (QL) (FC).

56 *Forum*, *supra* note 2 at para 20.

57 *Ibid* at para 21.

58 See *Rogers v Canada (Department of National Defence)*, 2001 FCT 90 at para 27, 201 FTR 41.

59 See *OLA*, *supra* note 1, s 72.

60 *Ibid*, s 73(b).

are relevant to the proceedings (specific facts related to the complaint, the findings of the investigation, any recommendations, and the answer from the federal government institution concerned). Note that paragraph 73(b) indicates only that the Commissioner may "disclose" information; it imposes no duty on the Commissioner to disclose written materials.[61]

Section 74 of the *OLA* provides that "[t]he Commissioner or any person acting on behalf or under the direction of the Commissioner is not a compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation,"[62] with the exception of proceedings commenced before the Federal Court under Part X of the *OLA*. However, as the Federal Court confirmed in *Lavigne* (2009), the Commissioner is not compelled under section 74 to file evidence in proceedings commenced under Part X to which he is not a party.[63]

B. Section 79 of the *OLA*

Under section 79 of the *OLA*, "the Court may admit as evidence information relating to any similar complaint under this Act in respect of the same federal institution."[64] In *Air Canada* (1997), *Thibodeau v Air Canada* (2005), and *Lavigne* (2009), the Federal Court determined that section 79 "is one of a kind and does not appear in other similar legislation."[65]

The case law also confirms that this provision has a dual purpose: first, to present the courts with a full portrait of the context and, second, to enable a party to present proof that there may be a systemic *OLA* compliance problem within the institution. This provision helps the Court to assess the scope of the problem and the circumstances of the application so that it can best determine appropriate relief.[66]

Therefore, Parliament intended that the Court "should be able to have before it an overall view, and thus an idea of the scope of the problem, if a

61 *Lavigne* FC (2009), *supra* note 16 at para 30.

62 *OLA*, *supra* note 1, s 74.

63 *Lavigne* FC (2009), *supra* note 16 at para 36.

64 *OLA*, *supra* note 1, s 79.

65 *Canada* (*Commissioner of Official Languages*) *v Air Canada*, 141 FTR 182 at para 17, 1997 CanLII 5843 (FC), [*Air Canada* FC (1997)]; *Thibodeau v Air Canada*, 2005 FC 1156 at para 53, [2006] 2 FCR 70 [*Thibodeau* FC (2005)]; *Lavigne* FC (2009), *supra* note 16.

66 *Lavigne* FC (2009), *supra* note 16 at para 32. See also *Air Canada* FC (1997), *supra* note 65 at paras 17–18.

problem exists."[67] The Court has held that section 79 prevails over other rules of evidence, and determined that "this section should be considered an exception to the general rules in evidentiary matters."[68]

Thibodeau (2011) establishes that section 79 can be used by the Commissioner or by all applicants. The Court held as follows:

> [A]nd section 79, according to which the Court may admit in evidence information relating to any similar complaint under the OLA, makes no distinction as to the identity of the applicant. Parliament did not restrict the admissibility in evidence of such information only to cases where the remedy is applied for by the Commissioner…In enacting section 79, Parliament wanted to allow both the Commissioner and applicants who meet the conditions of subsection 77(1) to raise systemic problems and to adduce in evidence information in support of such allegations.[69]

Moreover, *Lavigne* (2009) confirms that section 79 does not create a duty or an obligation for the Commissioner to disclose information relating to similar complaints in litigation, but renders these types of information admissible.[70] In *Lavigne* (2009), to which the Commissioner was not a party, the Commissioner chose to exercise his discretion under paragraph 73(b) of the *OLA* and to prepare only a list of similar complaints.[71]

What is the situation regarding closed investigation files? Can section 79 nevertheless apply to closed files? This issue is not completely clarified by the case law. In *Air Canada* (1999), the Federal Court of Appeal appears to respond in the affirmative.[72] However, in *Thibodeau* (2012), the Federal Court of Appeal emphasized the difficulty in assessing closed complaints.[73] Specifically, the Court discussed the quality of evidence required with respect to allegations of systemic problems and referred to the criteria

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67 *Canada* (*Commissioner of Official Languages*) *v Air Canada*, 167 FTR 157 at para 13, 1999 CanLII 8095 (FCA) [*Air Canada* FCA (1999)].

68 *Thibodeau* FC (2005), *supra* note 65 at para 83.

69 *Thibodeau v Air Canada*, 2011 FC 876 at para 104, 394 FTR 160 [*Thibodeau* FC (2011)]. An appeal from *Thibodeau* FC (2011) was allowed by the Federal Court of Appeal, but the Court did not rule on this point. See *Thibodeau* FCA 14 (2012), *supra* note 14. The Supreme Court of Canada, which dismissed the appeal from the decision of the Federal Court of Appeal, did not rule on the point either. See *Thibodeau* SCC (2014), *supra* note 13. A position similar to that of the Federal Court in *Thibodeau* FC (2011), appears to emerge from the decision in *Air Canada* FCA (1999), *supra* note 67 at para 8.

70 *Lavigne* FC (2009), *supra* note 16 at para 31.

71 *Ibid* at para 33.

72 *Air Canada* FCA (1999), *supra* note 67 at para 8.

73 *Thibodeau* FCA 14 (2012), *supra* note 14 at para 71.

set out in *Canada (AG) v Jodhan*.[74] In *Thibodeau* (2014), the Federal Court of Appeal concluded that the structural order provided by the Federal Court did not rest on very substantial, abundant, and precise evidence as required under *Jodhan*.[75]

VI. REMEDIES

A. General Considerations

Where the Federal Court concludes, in proceedings under subsection 77(1) of the *OLA*, that a federal institution has failed to comply with the *OLA*, the Court has very wide latitude under subsection 77(4) of the Act and may grant such remedy as it "considers appropriate and just in the circumstances."[76] The Supreme Court recently confirmed that "[l]ike 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."[77] Since the wording of subsection 77(4) is identical to that of subsection 24(1) of the *Charter*, the case law that applies to subsection 24(1) is relevant to the interpretation of subsection 77(4).

We have known since the decision in *Forum des maires* that, if the Federal Court finds that the complaint was justified at the time it was filed with the Office of the Commissioner of Official Languages, it must allow the application.[78] The remedy, however, "must be adapted to the circumstances that prevailed at the time the matter was adjudicated. The remedy will vary according to whether the breach continues."[79] In other words, if the federal institution has taken measures to remedy all the alleged deficiencies at the time of the trial, the judge may choose not to order any relief except, for example, in the form of costs.[80]

Again, in *Forum des maires*, the Federal Court of Appeal introduced, in the interpretation of the discretion granted by subsection 77(4) of the OLA, the principles developed in *Doucet-Boudreau v Nova Scotia (Minister*

74 *Ibid* at para 69; *Canada (Attorney General) v Jodhan*, 2012 FCA 161 at paras 92–93, 350 DLR (4th) 400.

75 *Thibodeau* FCA 14 (2012), *supra* note 14 at paras 63, 69–70.

76 *OLA*, *supra* note 1, s 77(4).

77 *Thibodeau* SCC (2014), *supra* note 13 at para 112.

78 *Forum*, *supra* note 2 at para 53.

79 *Ibid* at para 20.

80 *Ibid* at paras 20, 53, 62; *Desrochers* FCA, *supra* note 20 at para 82ff, *Desrochers* SCC, *supra* note 8 at para 37.

of Education)[81] for the purposes of the remedies granted under section 24(1) of the *Charter*. In that case, the judge of the Supreme Court of Nova Scotia rendered a structural order against the Minister of Education and the Conseil scolaire acadien provincial, and retained jurisdiction to hear reports from the province on progress made.[82] In its decision to dismiss an appeal against the order, the Supreme Court of Canada noted that "[t]he requirement of a generous and expansive interpretive approach holds equally true for *Charter* remedies as for *Charter* rights."[83] It specified that a purposive approach to remedies requires at least two things: first, the purpose of the rights being protected must be promoted (courts must craft responsive remedies); and, second, the purpose of the remedies provision must be promoted (the courts must craft effective remedies).[84]

The Court's remedy must consider the applicant's specific situation and the circumstances surrounding the violation of the linguistic rights concerned.[85] The proposed remedy must support the constitutional principle regarding separation of powers, as well as the role of the courts in terms of dispute resolution, and should not cause the Court to assume "functions for which its design and expertise are manifestly unsuited."[86] Lastly, the remedy must be fair to the respondent.[87] The Court further added that, in terms of remedies, a flexible and case-by-case approach is preferred.[88]

Those principles, developed in the context of remedies under section 24 of the *Charter*, are therefore relevant in the same manner as for remedies ordered under subsection 77(4) of the *OLA*.

B. Specific Remedies

Now let us consider the various types of remedies that have been granted by the courts in applications made under Part X.

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81 *Forum*, *supra* note 2 at para 56; *Doucet-Boudreau v Nova-Scotia* (*Minister of Education*), 2003 SCC 62 at para 25, [2003] 3 SCR 3 [*Doucet-Boudreau*].

82 *Doucet-Boudreau*, *supra* note 81 at paras 7–8.

83 *Ibid* at para 24.

84 *Ibid* at paras 24–25.

85 *Ibid* at para 55.

86 *Ibid* at para 57.

87 *Ibid* at para 58.

88 *Ibid* at para 59.

1. Damages

In 1996, in *Lavigne v Canada* (*Human Resources Development*),[89] the Federal Court indicated that the *OLA* is designed to create practical and effective legal rights and obligations and that, to accomplish this objective, damages must be included among the realm of remedies available under subsection 77(4). The Court found that the ability to award damages was essential to the enforcement of guaranteed quasi-constitutional rights. Moreover, in the clause-by-clause analysis of Bill C-72 (*Official Languages Act*), the remedies clause (then subsection 75(4)) expressly provided for the possibility of the Court to grant damages.[90]

However, a claimant who claims damages must establish a causal link between the violation of the *OLA* and the harm suffered. In such a case, the Court may order damages for loss of salary and benefits[91] and damages for loss of enjoyment of life.[92] The broad interpretation given to subsection 77(4), however, does not authorize a court to award a monetary remedy absent evidence pertaining to the actual loss, and independent of the principles of mitigation.[93] The broad interpretation given to subsection 77(4) also does not authorize a court to provide a remedy that contravenes Canada's international commitments as incorporated in federal law.[94] This issue is discussed in Part VII of this paper.

We must note that damages were awarded to certain individuals by the Supreme Court of the Northwest Territories in the case involving the Northwest Territories' *Official Languages Act* (NWT *OLA*).[95] In *Attorney General of the Northwest Territories v Fédération Franco-ténoise*,[96] the

89 *Lavigne v Canada* (*Human Resources Development*), [1996] FCJ No 1418 at para 25 (QL) (FC), 122 FTR 131, [*Lavigne* FC (1996)], aff'd 228 NR 124, [1998] FCJ No 686 (QL) (FCA).

90 Canada PL C-72, *Loi concernant le statut et l'usage es langues officielles du Canada*, 2nd Sess, 33rd Parl, 1988. The description read as follows:

> With regard to remedies under section 75(4), it should be noted that the Federal Court – Trial Division can grant those remedies authorized by sections 17 and 18 of the *Federal Court Act* S.R.C. 1970, c. 10. Thus, the Federal Court–Trial Division can issue an injunction, a writ of *certiorari*, a writ of prohibition, a writ of *mandamus*, a writ of *quo warranto* or declaratory relief. The Court can also grant damages against the Crown.

91 *Duguay v Canada*, 175 FTR 161 at para 43, [1999] FCJ No 1548 (QL) (FC) [*Duguay*].

92 See *Lavigne* FC (1996), *supra* note 89 at para 27; *ibid* at para 42.

93 *Rogers v Canada* (*Correctional Service*), [2001] 2 FCR 586 at para 76, 2001 CanLII 22031 (FC).

94 *Thibodeau* SCC (2014), *supra* note 13 at para 115.

95 RSNWT 1988, c O-1 [NWT *OLA*].

96 *Fédération franco-ténoise v Attorney General of Canada*, 2006 NWTSC 20, [2006] NWTJ No 33 (QL) [*Fédération*].

Fédération brought an action against the government of the Northwest Territories under section 32 of the NWT *OLA* for systematic violations of Francophones' language rights in the Northwest Territories since the government of the Northwest Territories adopted the NWT *OLA*. Similar to subsection 77(4) of the *OLA*, subsection 32(1) of the NWT *OLA* allows a court of competent jurisdiction to grant a remedy that it considers appropriate and just in the circumstances.[97] The Supreme Court therefore awarded compensatory damages to certain individual applicants for the violation of their language rights while refusing to award punitive damages, because it felt that the overall evidence did not establish that the territorial defendant acted in an abusive, contemptuous, or malicious way.[98] The Court of Appeal for the Northwest Territories upheld most of the Supreme Court decision,[99] while the Supreme Court of Canada denied the application for leave to appeal.[100] Given the similarity between subsection 77(4) of the *OLA* and subsection 32(1) of the NWT *OLA*, the decisions in this case are relevant in the context of a remedy based on subsection 77(4).

2. Letters of Apology

One remedy that is sometimes ordered is the submission of a letter of apology to the complainant, which may or may not have to be advertised.[101] The most recent example, and the one that has received the most media coverage, is the letter that Air Canada sent to the Thibodeau couple following the Supreme Court judgment of their case. Having found that the *Montreal Convention* precluded any award of damages to the Thibodeau couple and that the structural order should not have been made, the Supreme Court held that "the declaration, apology and costs of the application constituted appropriate and just remedies."[102]

97 NWT *OLA*, *supra* note 95, s 32(1).

98 *Fédération*, *supra* note 96 at paras 939–49.

99 *Procureur général des Territoires du Nord-Ouest v* Fédération Franco-ténoise, 2008 NWTCA 5 at paras 312–16, 440 AR 56.

100 *Territoires du Nord-Ouest* (*PG*) *v* Fédération franco-ténoise, 2009 CanLII 9789 (SCC), [2008] SCCA No 432 (QL) (leave to appeal refused on 5 March 2009).

101 See e.g. *Lavigne* FC (1996), *supra* note 89; *Thibodeau v Air Canada*, 2005 FC 1621 at paras 20–21, 284 FTR 79; *Thibodeau* FC (2011), *supra* note 69 (see Schedule A to the judgment).

102 *Thibodeau* SCC (2014), *supra* note 13 at para 132.

3. Structural Orders

Structural injunctions are few and far between in Canada.[103] When the Court renders a structural order, it imposes certain expenses and/or administrative measures on the associated federal institution to ensure compliance with the obligations under the *OLA*. The Court, in this context, therefore intervenes directly in the way that the institution structures its operations.

The possibility of making a structural order recently arose in *Thibodeau*. At trial, the Federal Court notably ordered Air Canada to:

> [M]ake every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*; introduce, within six months of this judgment, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, as set out at Part IV of the OLA and at section 10 of the ACPPA, particularly by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendants able to provide services in French on board flights on which there is significant demand for services in French.[104]

The Court of Appeal found that the structural order issued by the Federal Court was not justified in light of the evidence, and that the order could not stand because it was imprecise and disproportionate to the prejudice suffered.[105] The Court deemed that the order was not supported by a careful assessment of the facts, and was "not a solution that was effective, realistic, and adapted to the facts of the case."[106] It further held that, by ordering the implementation of a monitoring system, the Federal Court had assumed a role for which it did not have the necessary expertise.[107]

The Supreme Court, in the *Thibodeau* judgment, essentially concurred with the Court of Appeal. In that decision, the Supreme Court confirmed that structural orders "play an important, but limited, role in the enforcement of rights through the courts."[108] The Supreme Court invited the courts to exercise special care when considering this type of remedy for the following two reasons. First, such an order ought to be sufficiently clear to the party subject to it, so as to avoid the possibility of additional requests

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103 *Air Canada v Thibodeau*, 2011 FCA 343 (CanLII) at para 19, 425 NR 297.

104 *Thibodeau* FC (2011), *supra* note 69 at para 168.

105 *Thibodeau v Air Canada*, 2012 FCA 246 at para 63, [2013] 2 FCR 155 [*Thibodeau* FCA 246 (2012)].

106 *Ibid* at para 74.

107 *Ibid* at para 75.

108 *Thibodeau* SCC (2014), *supra* note 13 at para 126.

for clarifications. Second, orders that require ongoing judicial supervision are to be avoided.[109] However, as discussed in *Doucet-Boudreau*, a decision concerning section 23 of the *Charter* and the right to minority-language education, ongoing judicial supervision will be necessary in some cases.[110]

It is interesting to note that the Supreme Court adds that this is particularly true in *Thibodeau*, a case involving Air Canada, "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."[111]

4. *Specific Remedies for Violations of Section 91 of the* OLA *(Staffing)*

Under section 91, the language requirements attached to a position must be "objectively required to perform the functions" associated with that position.[112] This provision has been the subject of several judicial decisions. In *Côté*, the Federal Court indicated that it would be possible, as a remedy for a violation of section 91 of the *OLA*, for it to order a federal institution to conduct a new selection process to give candidates who are disadvantaged by the initial linguistic profile, deemed to be a violation of section 91, an opportunity to apply for the position.[113]

5. *Specific Remedies Possible for Violations of Provisions of Part V of the* OLA *(Language of Work)*

In *Forum des maires*, the Federal Court indicated that, in cases where a remedy does not relate to Part V of the *OLA* nor to provisions concerning employer-employee relations, an order demanding the restoration of a position would only be issued on rare occasions.[114] These comments by the Court suggest that such an order could very well be one of the measures available under Part X, where the remedy is sought under provisions of Part V of the *OLA* and in an appropriate context.[115]

109 *Ibid*.
110 *Ibid* at para 128.
111 *Ibid*.
112 *OLA*, *supra* note 1, s 91.
113 *Côté* FC (1994), *supra* note 45 at para 11.
114 *Forum*, *supra* note 2 at para 78.
115 *Ibid*.

6. Possible Remedies for Violations of Part VII (Advancement of English and French)

Part VII, as noted above, was amended in 2005, and this part of the *OLA* is now part of the provisions enumerated in subsection 77(1) as giving rise to the court remedy under the *OLA*.

What remedy can the Federal Court order in cases where it deems that a federal institution has failed to comply with Part VII? In 2010, in *Picard*, the Federal Court found that a violation of Part VII of the *OLA* cannot result in the same remedies as violations of Parts I to V of that Act. Deciding otherwise would, in the Court's view, amount to disregarding the difference between the various provisions of the law and ignoring the precise limits provided in Parts I to V of the *OLA*.[116]

However, the Court observed that it can make orders to force an institution to take specific measures to remedy violations of its obligations under Part VII. Deciding otherwise "would make Parliament's choice 'to give [Part VII] teeth' by making it enforceable pointless and ineffective."[117]

In short, the Court may impose a specific positive measure on a federal institution to remedy a violation, but that positive measure cannot be designed to indirectly impose the statutory regime of Part II or Part IV on a situation to which that regime does not directly apply.[118]

7. Remedies in the Context of an International Convention

In *Thibodeau* (2014), the Supreme Court of Canada had to determine whether, in the specific context of the violation of *OLA*-protected rights during international air carriage, Article 29 of the *Montreal Convention*,[119] which is part of Canadian federal law by virtue of the *Carriage by Air Act*,[120] was one of the factors that the Court had to consider in seeking an appropriate and just remedial measure. Article 29 limits any action for damages

116 *Picard v Canada* (*Commissioner of Patents*), 2010 FC 86 at para 75, [2011] 2 FCR 192 [*Picard*].

117 *Ibid* at para 76.

118 *Ibid* at para 77. See also *CBC/Radio-Canada*, *supra* note 2 at paras 3–4 (Part VII was also raised here, but given the conditions imposed by the CRTC to renew the Corporation's licences, the Federal Court felt that recourse had generally become moot. It therefore did not rule on the alleged violations of Part VII or on the remedies that could be granted in that context).

119 *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, 2242 UNTS 309, art 29 (entered into force 4 November 2003) [*Montreal Convention*].

120 RSC 1985, c C-26.

related to damages suffered during international air carriage to the specific circumstances provided by the Convention.[121]

The Supreme Court ruled that the power conferred on the Federal Court by section 77(4) of the *OLA*—as vast as it is—does not authorize the Court to disregard or ignore the international obligations incumbent on Canada including those, as in this case, under the *Montreal Convention*.[122] In the Court's opinion, 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*."[123] The provisions in issue overlap but do not conflict. The Court then pointed out that this was not a situation where the application of the specific limitation provided in Article 29 "empties the remedial provisions in the statute of much of their meaning."[124] Moreover, Article 29 of the *Montreal Convention* applies only in respect of claims arising from an incident during an international flight and only against Air Canada. Only in such circumstances would a Court be precluded from awarding damages and would another form of remedy have to be provided.[125] In this situation, as indicated above, the "appropriate" remedy would be a declaratory judgment, apologies, and costs related to the application.[126]

In short, the Court found that subsection 77(4) of the *OLA*

> 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."[127]

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121 Article 29 reads as follows:

> 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.

Montreal Convention, *supra* note 119, art 29.

122 *Thibodeau* SCC (2014), *supra* note 13 at para 90.

123 *Ibid* at para 5.

124 *Ibid* at para 116.

125 *Ibid*.

126 *Ibid* at para 132.

127 *Ibid* at para 114.

Therefore, in the context of deciding an appropriate and just remedy, within the meaning of the *OLA*, in the context of an international flight involving Air Canada, the Federal Court is not in a position to grant damages.

Certain aspects of the majority reasoning are problematic. If the terms of subsection 77(4) are given their ordinary meaning, they clearly allow for damages to be awarded in all cases where the Court feels that damages are "appropriate and just in the circumstances."[128] In this case, these circumstances include the obligations imposed by the *Montreal Convention*.[129] According to the majority of the Court, article 29 prevents the granting of damages in this case. Therefore, before conformity with international law can even be invoked, it would seem that domestic law allows what international law prohibits. It can therefore be argued that there is in fact a conflict and domestic law (in this case, the *OLA*, a quasi-constitutional statute) should prevail. However, the Court appears to be more concerned with ensuring that Canada's international obligations are respected, rather than ensuring that fundamental rights, including language rights, are respected. Moreover, although the Convention's objective was to implement uniform rules to govern liability for damages for international air carriers,[130] there is absolutely nothing in the Convention that prevents the signing parties from imposing additional obligations on its own air carriers. This is what Canada did with Air Canada, and it did not result in prejudice to other carriers or parties to the Convention. The deterrent character of a remedy order against Air Canada can be questioned when damages cannot be awarded.

In short, it is appropriate and entirely possible to limit the scope of this decision to the specific facts and circumstances of this case, namely, to international air transport. In this particular context, damages are no longer available as a sanction for violations of the *OLA*.

VII. COSTS

Subsection 81(1) of the *OLA* provides that the costs related to the court remedy set out in section 77 are left to the discretion of the Federal Court

128 *OLA*, *supra* note 1, s 77(4).

129 Recall that the Federal Court, in *Lavigne* (1996), stated the following: "The ability of the Court to award damages is, in my view, essential to the enforcement of guaranteed quasi-constitutional rights." *Lavigne* FC (1996), *supra* note 89 at para 25.

130 *Montreal Convention*, *supra* note 119, preamble.

and, unless otherwise ordered, shall follow the event.[131] Subsection 81(2) specifically provides that "[w]here the Court is of the opinion that an application under section 77 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result."[132]

In *Picard*, despite the partial success of the applicant, the Federal Court awarded costs to the applicants under subsection 81(2).[133] The Court was of the opinion that "[a]part from all the technical details, the fact that patents granted by a country that considers itself bilingual are unilingual is an important question."[134] It further added that this question had never been raised since the adoption of the *OLA* and that the applicant had done "Canadians a service by making it a subject of public debate."[135]

In *Norton*, the Court also awarded costs to the applicant even though the applicant was not successful in the result.[136] The Court was of the opinion that the "clarification of the scope of these [*OLA*] provisions in the context of the challenged staffing actions goes far beyond the immediate interests of the parties involved in this litigation" and that this "case sheds additional light on general guiding principles governing the assessment of reasonableness of bilingual requirements in cases where a federal institution provides services to the traveling public."[137] The Federal Court also awarded costs to the Thibodeau couple under subsection 81(2), based on the fact that the interaction between the *OLA* and the *Montreal Convention* truly constituted an "important and novel question."[138]

More recently, and quite surprisingly, the Federal Court, in *Tailleur v Canada (AG)*,[139] seems to depart from the case law on this specific issue. The *Tailleur* case notably raised the issue of the interaction between Parts IV and V of the *OLA*. The Court was also asked to examine, for the very first time, the scope of subsection 36(2) of the *OLA*.[140] Mr. Tailleur, an agent occupying a bilingual position in a Canada Revenue Agency (CRA) call center of the Canada Revenue Agency (CRA) in Montreal—a bilingual region for the

131 *OLA*, *supra* note 1, s 81(1).
132 *Ibid*, s 81(2).
133 *Picard*, *supra* note 116 at para 84.
134 *Ibid*.
135 *Ibid*.
136 See *Norton* FC (2009), *supra* note 20 at para 130.
137 *Ibid*.
138 *Thibodeau* FCA 246 (2012), *supra* note 105 at para 81.
139 2015 FC 1230 [*Tailleur*].
140 *OLA*, *supra* note 1, s 36(2).

purposes of Part V of the *OLA*—was challenging a CRA directive requiring employees in its call centres to write notes in their clients' files in the preferred official language of the client. Mr. Tailleur argued that this internal directive violated his right to work in the official language of his choice. The Federal Court had to decide whether this CRA directive was consistent with Part V and if it was necessary to meet the public's rights under Part IV of the *OLA*, as alleged by the CRA. The Court ultimately determined that the CRA had taken all reasonable steps to allow Mr. Tailleur and other employees to use the official language of their choice at work, but the directive in question was necessary to enable the CRA to provide equal service to English and French taxpayers in accordance with Part IV. Mr. Tailleur's application was therefore dismissed. However, the Court correctly points out, in paragraph 116 of its decision, that the subject of Mr. Tailleur's application raised an important principle in the application and implementation of the *OLA*, and about the tension between language of service and language of work.[141] One would therefore have expected the Court to award costs to the applicant. The Court, however, exercised its discretion by not granting costs and expenses. By doing so, the Court seems to ignore not only the clear wording of subsection 81(2) but also the previous case law on the issue of costs.

VIII. CONCLUSION

This paper examined the court remedy provided under Part X of the *OLA*. Obviously, there are other court remedies in Canada to ensure respect for linguistic rights. Moreover, subsection 77(5) of the *OLA* explicitly provides that "[n]othing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section."[142] Today, the importance of court remedies as a tool for making claims, and ensuring compliance with constitutional and legislative linguistic rights, is not in question. The courts, and notably the Federal Court in the context of applications under Part X, have made many decisions that have clarified, elucidated, and breathed life into the language rights set out in the *OLA*.

However, it is important to point out that the *OLA* creates other mechanisms intended to ensure compliance with the provisions of this

141 *Tailleur*, *supra* note 139 at para 116.

142 *OLA*, *supra* note 1, s 77(5).

important legislation. In particular, the *OLA* created the position of a language ombudsman (*i.e.*, the Commissioner of Official Languages) whose mission, as set out in section 56 of the *OLA*, is to:

> [T]ake all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.[143]

In *Lavigne*, the Supreme Court highlighted the importance of the Commissioner's role:

> [T]he Commissioner of Official Languages plays an important role. It is his job to take the measures that are necessary in respect of the recognition of each of the two official languages, and to secure compliance with the spirit of the *Official Languages Act*, in particular in the administration of the affairs of federal institutions. It is therefore the Commissioner who has been given the mandate to ensure that the objectives of that Act are implemented. To allow him to fulfil a social mission of such broad scope, he has been vested with broad powers by the Parliament of Canada. For instance, he may conduct investigations into complaints that in any particular case the status of an official language was not recognized, or any provision of an Act of Parliament or regulation relating to the status or use of the two official languages, or the spirit or intent of the *Official Languages Act*, was not complied with
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> ...
>
> The Commissioner may also exercise his persuasive influence to ensure that any decision that is made is implemented and that action is taken on the recommendations made in respect of an investigation. For instance, s. 63(3) of the *Official Languages Act* provides that he may request the deputy head or other administrative head of the federal institution concerned to notify him within a specified time of the action, if any, that the institution proposes to take to give effect to those recommendations. He may also, in his discretion and after considering any reply made by or on behalf of any federal institution concerned, transmit a copy of the report and recommendations to the Governor in Council, and the Governor in Council may take such action as the Governor in Council considers appropriate in

143 *Ibid*, s 56.

> relation to the report (s. 65(1) and (2)). The Commissioner may make a report to Parliament where the Governor in Council has not taken action on it (s. 65(3)). He also has the authority to apply to the Court for a remedy, with the consent of the complainant.[144]

Although a language ombudsman exists in Canada, reliance on the courts will likely always be "necessary, even inevitable,"[145] in certain cases. Various Commissioners have admitted this themselves. However, it must be acknowledged that these legal remedies require the time, energy, and resources of the official language minority communities. Perhaps, a question to ponder is whether another mechanism would be more effective to ensure that language rights under the *OLA* are fully respected. In March 2015, the outgoing president of the Fédération des communautés francophones et acadienne du Canada, Mme Marie-France Kenny, criticized what she saw as repeated and systematic breaches of the *OLA*, which she felt had "no consequences," insinuating that it was time to address the issue.[146] More recently, in an October 7, 2015 article in the newspaper *Le Droit*, Gilles Levasseur suggested amending the *OLA* to confer the Commissioner of Official Languages with an administrative power to correct major violations by the federal government.[147] He felt that such an amendment would ensure, to a certain extent, that official language minority communities would not need to rely on the courts.[148] The debate therefore seems to have been launched. In the meantime, the hope is that *Thibodeau* (which did in fact cause a slight crack in the "teeth" of the *OLA*) will not limit the remedies that are possible under Part X of the *OLA*, and that other decisions will clarify, enhance, and enrich the current *OLA* jurisprudence.

144 *Lavigne v Canada* (*Office of the Commissioner of Official Languages*), 2002 SCC 53 at para 35, [2002] 2 SCR 773.

145 Office of the Commissioner of Official Languages, "Preface", *Language Rights 2009–2011* (Ottawa: Department of Public Works and Government Services Canada, 2012) at II. See also Office of the Commissioner of Official Languages, *Annual Report 1985* (Ottawa: Department of Public Works and Government Services Canada, 1986) at 11–12; Office of the Commissioner of Official Languages, *Language Rights 2003–2004* (Ottawa: Department of Public Works and Government Services Canada, 2005) at 37–49.

146 House of Commons, Standing Committee on Official Languages, 2nd Sess, 41st Leg, No 43 (26 March 2015) at 7 (Marie-France Kenny) (*Fédération des communautés francophones et acadiennes du Canada*).

147 Gilles Levasseur, "Ottawa et les médias communautaires", *Le Droit* (7 October 2015) at 14.

148 *Ibid*.