Federal Court		Cour fédérale

Date: 20101013

Docket: T-239-09

Citation: 2010 FC 1008

BETWEEN:

CANADIAN TRANSPORTATION AGENCY

Applicant

and

EDDY MORTEN, AIR CANADA and
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

Docket: T-281-09

AND BETWEEN:

AIR CANADA

Applicant

and

EDDY MORTEN and
CANADIAN HUMAN RIGHTS COMMISSION

Respondents

REASONS FOR JUDGMENT

[1] There are two applications for judicial review against the decision made by the Canadian Human Rights Tribunal (the Tribunal) dated January 26, 2009, in the matter of a complaint filed by Eddy Morten against Air Canada. Both were heard together. The application on Court file T-281-09 was filed by Air Canada challenging the jurisdiction of the Tribunal and the merits of the decision. Mr. Morten and the Canadian Human Rights Commission (the Commission) are the respondents in that application. The second application in Court file T-239-09, was filed by the Canadian Transportation Agency (the Agency) and challenges only the jurisdiction of the tribunal. The respondents in that application are Mr. Morten, Air Canada and the Commission.

[2] Air Canada requests the Tribunal decision be quashed and remanded to the same or a differently constituted Tribunal for a determination consistent with the reasons of this Court.

[3] The Agency requests that this Court order that the decision of the Tribunal is invalid or alternatively, that the decision be set aside and referred back to the Tribunal for redetermination by a differently constituted panel in accordance with such directions as it considers to be appropriate.

Background

[4] The respondent, Eddy Morten, suffers from Ushers Syndrome. He is profoundly deaf and blind in his left eye. He has very limited vision in his right eye.

[5] On August 19, 2004, Mr. Morten's travel agent was informed by an agent of the respondent, Air Canada, that he could not fly alone and would need an attendant. This decision had been confirmed by Air Canada's meda desk. No individualized assessment was conducted for Mr. Morten.

[6] In Canada, an authorized air carrier's displayed tariffs include its schedules of rates, charges and terms and conditions of carriage. Under Air Canada's applicable tariff dealing with the terms of carriage for disabled persons, "self-reliant" means a person who is self-sufficient and capable of taking care of his/her needs during a flight or during an emergency evacuation or decompression and has no special or unusual needs beyond assistance in boarding or deplaning. Mr. Morten was considered to be non self-reliant and required an attendant.

[7] On February 1, 2005, Mr. Morten filed a complaint with the Agency under Part V of the *Canada Transportation Act*, S.C. 1996, c. 10 (the CTA), alleging that Air Canada's requirement that he travel with an attendant was an undue obstacle to his mobility.

[8] After being provided with evidence, the Agency issued Decision 435-AT-A-2005 (the Agency decision) concluding that while Mr. Morten encountered an obstacle to his mobility, it was not an undue obstacle as it was predicated on safety risks. Accordingly, the Agency took no action on the complaint.

[9] On September 19, 2005, Mr. Morten filed a complaint with the Commission with respect to the same facts, alleging that Air Canada had contravened section 5 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA). On February 23, 2007, the Commission referred the complaint to the Tribunal.

[10] On August 7, 2007, Air Canada filed a motion with the Tribunal asking it to permanently stay the hearing of Mr. Morten's complaint on the basis of issue estoppel or alternatively, on the basis that it was an abuse of process or a collateral attack in light of the previous Agency decision.

[11] The Tribunal dismissed the motion in a preliminary decision dated October 25, 2007 (2007 CHRT 48, [2007] C.H.R.D. No. 49). The Tribunal recognized that the test used by the Agency for finding an "undue obstacle" to mobility under the CTA is the same as the test for determining "undue hardship" to be applied by the Tribunal. However, the Tribunal found that issue estoppel did not apply because one of the pre-conditions for issue estoppel (that the parties or the privies are the same in both proceedings) was not met. The Commission, which was a party before the Tribunal, was not a party before the Agency. Section 51 of the CHRA makes it clear that when appearing at a hearing, the Commission represents the public interest and not the complainant.

[12] The Tribunal also took the view that there was no abuse of process in holding its hearing. The lack of the Commission's presence and input at the Agency hearing was one factor militating against finding an abuse of process. A second factor was that the Agency, in the Tribunal's view,

had not properly dealt with Mr. Morten's human rights claim. The Tribunal stated at paragraphs 27 and 28 of its decision:

> 27 Secondly, it is apparent from its decision that the Agency's analysis in dealing with Mr. Morten's claim falls far short of what would be required under the *Via Rail* test. Mr. Morten's services complaint under s. 5 of the CHRA is ongoing in nature and impugns a policy that Air Canada continues to pursue.
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> 28 It would be an injustice to deprive both Mr. Morten and the CHRC of the opportunity to put Air Canada to the strict proof of its contention that accommodating his needs or others with similar needs, would cause it undue hardship within the meaning of these terms.

[13] The Tribunal also denied that it was a collateral attack on the Agency decision.

[14] The Tribunal proceeding was heard in Vancouver on three days during March and April of 2008.

The Tribunal's Decision

[15] On January 26, 2009, the Tribunal rendered its decision (*Morten v. Air Canada*, 2009 CHRT 3, [2009] C.H.R.D. No. 3 (the decision)), concluding that Air Canada had discriminated against Mr. Morten on the basis of his disability. Air Canada indeed had conceded that the proper procedure was not followed in Mr. Morten's case. It was the Tribunal's remedy which the Agency and Air Canada say took the Tribunal outside its jurisdiction.

[16] The Tribunal first analyzed the medical condition of Mr. Morten and his active lifestyle before analyzing the events giving rise to the complaint.

[17] Mr. Morten made his reservation on August 12, 2004. On August 17, 2004, his travel agent advised the reservations agent that Mr. Morten was deaf and blind and wanted to travel alone. On August 19, 2007, a reservation agent advised that this was not possible but that Mr. Morten would need an attendant to fly at a discounted fare. This decision had been confirmed by the Air Canada meda desk, a division of the reservations department, handling passengers' special needs as it may affect their ability to fly.

[18] The persons who work on the meda desk are not medically trained. It is Air Canada's occupational health services department (OHS), staffed by health professionals, which assesses medical information from passengers or their medical provider and determines whether they can fly on Air Canada with or without conditions. Air Canada's OHS will attempt to reconcile any differences between its assessment and that of the passenger's medical provider, but the final decision resides with OHS.

[19] In Mr. Morten's case, the meda desk simply advised that Air Canada's policy, set out in a document entitled "CIC 57/8", required deaf/blind passengers to fly with an attendant. This was an error as CIC 57/8 does not make such a blanket statement and contains no criteria for deciding when a deaf/blind person requires an attendant. Air Canada conceded that an error was made. The reservation should have been referred to the OHS for an individual assessment.

[20] The Tribunal concluded and Air Canada conceded that Mr. Morten had established a *prima facie* case (decision at paragraph 56). Air Canada imposed on Mr. Morten, as a condition of providing service, the blanket requirement that deaf/blind passengers must travel with an attendant. This requirement was not imposed on other passengers, able-bodied or otherwise disabled. This standard affected his freedom to travel and increased his costs.

[21] Once a *prima facie* case had been established, it was up to Air Canada to demonstrate that accommodating Mr. Morten's request to travel alone would have imposed undue hardship, considering health, safety and cost (a *bona fide* justification). A blanket requirement creates an arbitrary category of deaf/blind without allowing for the possibility of differing degrees of visual and auditory impairment. Since Air Canada acknowledged that individual assessments are the proper procedure for many disabled passengers, the Tribunal concluded that there was no *bona fide* justification for the standard applied to Mr. Morten (decision paragraphs 61 to 65).

[22] By way of remedy and after canvassing several sources of evidence on safety issues related to deaf/blind persons, the Tribunal ordered that Air Canada's attendant policy be formalized with respect to persons with visual and hearing impairments so that there were no more misunderstandings as occurred with Mr. Morten. It should be formalized in a legal document by revising the applicable tariff (paragraph 180).

[23] The Tribunal rejected Air Canada's argument that its tariffs or amendments to its tariffs were something for the Agency to deal with and concluded that the CTA does not appear to require the Agency's prior approval of tariffs (paragraph 183).

[24] Air Canada protested that permitting Mr. Morten to fly unattended would violate regulations and standards under the *Aeronautics Act*, R.S. 1985, c. A-2 (Aeronautics Act) which require the provision of safety related briefings for passengers at various phases of flight, including emergency situations. The Tribunal dismissed this argument on the basis that it was not making any such order. It was only making orders for the fair assessment of passengers (paragraph 188).

[25] The Tribunal then responded to Air Canada's argument that the Agency has primary jurisdiction to decide questions of human rights in the context of the transportation of passengers by air as follows:

> 197 The Tribunal does not accept Air Canada's "primacy" argument. First of all, in *Via Rail*, the Supreme Court of Canada was not dealing with the question of whether the jurisdiction of the CHRT was ousted or in any way diminished by the mandate of the CTA under s. 5 or s. 172 of the *Canada Transportation Act*. This is how Air Canada has framed the issue, not the Supreme Court of Canada.
>
> 198 Secondly there is a long line of Supreme Court decisions that the CHRA is quasi- constitutional and takes precedence over any other federal legislation unless an exception is expressly created […]. Surely, it can not be seriously argued that the Supreme Court in dealing with the standard of review meant to overturn this long standing principle of statutory interpretation.
>
> 199 Finally, the reasoning of the Court in paragraphs 136-139 (particularly in para. 138 relied on by Air Canada) is the Court's explaining that the words "as far as is practicable" found in s. 5 of the

> *Canada Transportation Act* is the statutory acknowledgement of the undue hardship standard in the transportation context.

[26] The Tribunal indicated that because of the amendment to section 5 of the CTA, it could be argued that the removal of the words "as far as is practicable" means that the obligations of the duty to accommodate to the point of undue hardship is no longer the human rights standard in the transportation context. In the Tribunal's view, less protection would be offered to persons with disabilities than under human rights legislation (paragraphs 201 to 204).

[27] In the order section of the decision, the Tribunal emphasized its reliance on the U.S. Department of Transportation (DOT) attendant policy which, according to the tribunal, was formulated or derived from DOT's 1987 *Southwest Airlines* decision. That policy only required that a passenger possess some means of communicating with carrier personnel adequate to permit transmission of the pre-takeoff safety briefing. Importantly, it did not require a passenger to be able to receive mid-flight or emergency communications.

[28] In the Tribunal's view, the DOT rule and the *Southwest Airlines* above decision suggest that greater accommodation is still possible (paragraph 208).

[29] Ultimately, the Tribunal ordered Air Canada to work with the Commission and Mr. Morten to develop a new policy that takes into account communication strategies used by people like Mr. Morten (paragraph 212). Within four months, the policy had to be formalized in a legal document.

If the parties were unable to reach an agreement, the Tribunal retained jurisdiction to determine an appropriate attendant policy (paragraph 215).

[30] The Tribunal also ordered Air Canada to pay $10,000 damages for pain and suffering to Mr. Morten. The damages award has since been satisfied. Air Canada brings this application for judicial review of the decision, but does not seek to disturb the ordered payment of monetary damages to Mr. Morten.

Issues

[31] The issues are as follows:

1. What is the standard of review?
2. Did the Tribunal act without jurisdiction when it heard Mr. Morten's case?
    a. If not, was the Tribunal's jurisdiction confined to ordering a monetary remedy?
3. In crafting its remedy, did the Tribunal err in its account of the evidence, and, in particular, the aeronautical laws of Canada and the United States?

The Agency's Written Submissions

[32] The Agency's primary submission is that it has exclusive jurisdiction to hear and decide questions of accessibility within the federal transportation system. The Agency is an independent

and highly specialized regulatory authority with the exclusive mandate to apply the CTA. Orders or regulations made under the CTA prevail over any other orders or regulations in respect of a mode of transportation. Determinations by the Agency on matters within its jurisdiction are binding and conclusive with an option to appeal to the Federal Court of Appeal only on a question of law or jurisdiction with leave.

[33] The National Transportation Policy is contained in Section 5 of the *CTA*, an objective of which is to ensure the removal of undue obstacles for persons with disabilities. Regulations under the CTA require air carrier tariffs to contain the terms and conditions for the carriage of persons with disabilities. Part II of the CTA also sets out a complaint process through which the Agency may order a variety of remedial actions for the failure of a carrier to comply with its tariffs. Part V of the CTA deals specifically with the transportation of persons with disabilities. It was enacted with the intention that transportation legislation rather that human rights legislation would handle issues of accessibility. This specific Parliamentary intent was confirmed by the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650. Under Part V, the Agency has the broad power to investigate and make regulations for the purpose of removing undue obstacles to the mobility of persons with disabilities. The CHRA, on the other hand, provides that the Commission ought not deal with a complaint if it could be more appropriately dealt with under another Act of Parliament.

[34] *Via Rail* above, confirmed that section 5 and subsection 172(1) of the CTA constitute a legislative direction to the Agency to determine the existence of any undue obstacles and confirmed the Agency's mandate to apply the CTA in a manner consistent with human rights legislation.

[35] While the Tribunal's human rights mandate is of a general nature, the Agency has the unique specialized expertise to balance the human rights of those with disabilities against the practical realities of the federal transportation system. The human rights components of the CTA were also enacted more recently than the relevant CHRA provisions. It was not the legislator's intention to have the Tribunal decide questions regarding accessibility in transportation or to have those questions decided by two different tribunals. The Tribunal acted without jurisdiction when it heard Mr. Morten's case as the matter was within the exclusive jurisdiction of Part V of the CTA.

[36] In the alternative, even if the Agency and the Tribunal had concurrent jurisdiction, the Agency is the preferred Tribunal to resolve questions of accessibility in the transportation system. In any event, concurrent jurisdiction would not allow the Tribunal to sit in appeal of the Agency's decision. The Agency's decision could have been appealed to the Federal Court of Appeal.

Air Canada's Written Submissions

[37] Air Canada submits that the standard of review is correctness. Both in matters of jurisdiction and in matters where the Tribunal has neither experience nor expertise, such as aeronautical laws, no deference is to be afforded.

[38] Air Canada submits that the principal issue raised in Mr. Morten's complaint falls within the exclusive jurisdiction of the Agency: the determination of what terms a carrier may fairly and reasonably impose. This was recently made clear by the Supreme Court of Canada in *VIA Rail* above. The Agency has undoubted jurisdiction to examine and determine human rights complaints under Part V of the CTA. If it should err, there is a statutory appeal route. If a complaint under Part V requires examination of a carrier's tariff, the Agency has a clear statutory mandate to undertake that examination. Any orders or regulations it makes as a consequence take priority over any order of the Tribunal.

[39] Mr. Morten filed his initial complaint with the Agency which issued a decision. Mr. Morten then raised the same issue before the Commission. When the Tribunal elected to hear and determine this issue, it effectively decided to sit in appeal of the Agency's decision. It acted without jurisdiction.

[40] The Tribunal and the Agency have concurrent jurisdiction to hear a human rights claim insofar as this claim may arise out of the same set of facts in the transportation context. However, in the context of a complaint regarding what terms a carrier may fairly and reasonably impose, the Agency has exclusive jurisdiction over remedies.

[41] This position is supported by the case law which has developed in the labour arbitration context. When a labour arbitrator has made a ruling with respect to a non-discrimination claim, a human rights Tribunal is generally not entitled to subsequently exercise its jurisdiction and to arrive

at a different conclusion. This principle is applicable here since both the CTA and CHRA are comprehensive, equivalent statutory schemes for dealing with human rights and because of the preference for disputes to be solved in a single proceeding.

[42] Air Canada further submits that the Tribunal made fundamental errors in its evaluation of the aeronautical laws of Canada and the United States. It failed to take into account the regulatory requirements for an air carrier and effectively required Air Canada to change its operating procedures in violation of the *Canadian Aviation Regulations*, SOR/96-433 (CARS). Compliance with Standard 3.4B.3 of a published standard which outlines minimal requirements for compliance with CARS, requires that flight attendants on carriers like Air Canada "relay safety related messages to passengers (e.g. whenever flight conditions change, abnormal or emergency situations)." The Tribunal ignored this and ignored the evidence which supported the proposition that without an attendant for a passenger with severe visual and auditory impairments, the carrier cannot communicate safety information in an emergency situation.

[43] Air Canada acknowledges the Tribunal's ability to suspend the application of other legislation in granting a remedy but submits that the Tribunal failed to respect limits in the exercise of that ability.

[44] Air Canada further submits that the Tribunal made conclusions about the state of the law in the United States which it felt supported its decision. The Tribunal fundamentally misunderstood the uncontradicted expert evidence. The expert, in fact, testified that the U.S. law in question (DOT

Part 382), allows carriers to require an attendant when a passenger is unable to receive safety information due to severe auditory and visual impairments at any time during a flight. The Tribunal clearly ignored his testimony when it held that under U.S. law a carrier can only require an attendant for a deaf/blind passenger when that passenger cannot establish some means of communications with carrier personnel adequate to permit the transmission of the pre-flight information only.

Written Submissions of the Respondent, Commission

[45] The Commission agrees that the standard of review on the issue of jurisdiction is correctness, however, on the issues of the interpretation of the CHRA and the appreciation of the facts and evidence, the proper standard of review is reasonableness.

[46] With regard to the issue of jurisdiction, the Commission simply submits that the paramountcy of human rights law makes it possible for two tribunals to have concurrent jurisdiction to adjudicate human rights matters. However, the final decision will reside in the decision maker to which the complaint is referred by the Commission under the CHRA. Even the CTA expressly directs that the Commission and the Agency coordinate their activities in order to foster complimentary policies and to avoid jurisdictional conflicts. However, the Commission has a broad public interest mandate and once the complaint was referred to the Tribunal, the Tribunal has full jurisdiction to hear and adjudicate the matter under the CHRA.

[47] Generally, all administrative tribunals are empowered to resolve human rights issues. A tribunal's enabling legislation is paramount but there is only a limited extent to which Parliament could oust the application of human rights law due to its quasi-constitutional status. Human rights law is to be interpreted broadly and offered accessible application. As the "final refuge of the disadvantaged and the disenfranchised", human rights law can be rendered meaningless if barriers are placed in front of it. Thus, if the Agency is to have exclusive jurisdiction over human rights in the context of transportation, the legislative direction must be explicit. There is no such direction in the CTA and thus, the Commission and the Tribunal retain jurisdiction. Just because the Agency is required to consider human rights law does not mean that it has exclusive jurisdiction to do so.

[48] Regarding the issue of the evidence, the Commission points out that Air Canada does not suggest that the Tribunal's decision was unreasonable. Air Canada only takes issue with Tribunal not accepting some of its evidence. Air Canada simply restates the evidence and submits that it should have been preferred without explaining why. This does not demonstrate unreasonableness. There is no reason to believe that the evidence of Ms. Lepage was not considered. It was repeated in the decision itself. Her evidence was not relevant since she was a flight attendant and it would have been a professional from OHS which would have made a determination regarding Mr. Morten had he been afforded an individual assessment.

[49] The allegation by Air Canada that the Tribunal has ordered it to ignore its flight attendant standard is unfounded. The Tribunal clearly stated at paragraph 188 of its decision that the remedy was simply that Mr. Morten be assessed once Air Canada had revised its policy. This did not

amount to an order that Air Canada violate the *Aeronautics Act* or other legislation. The Tribunal allowed for sufficient flexibility.

Analysis and Decision

[50] **Issue 1**

What is the standard of review?

The challenge that the Tribunal should not have to engage in an inquiry or craft a remedy regarding Air Canada's policy tariffs is a true question of an administrative tribunal's jurisdiction. True questions of jurisdiction must be reviewed on the standard of correctness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). The Supreme Court in *Dunsmuir* above, emphasized this with respect to areas of competing jurisdiction when it stated at paragraph 61:

> Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis.

[51] The applicants' second challenge is that the Tribunal erred in its account for the evidence, in particular, the aeronautical laws of Canada and the United States. "Account" in that context is a broad term. The applicants seek to have this Court review the Tribunal's acceptance, understanding and weighing of that evidence on the correctness standard. The applicants say that since the Tribunal has neither experience nor expertise in aeronautical laws, it must have correctly accounted for that evidence. I cannot agree.

[52] The Supreme Court of Canada has indicated a presumption that administrative decisions within the decision maker's jurisdiction are to be afforded deference and reviewed against the standard of reasonableness unless a correctness review is required (see *Dunsmuir* above, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339). This concept was stated by Mr. Justice Binnie in *Khosa* above, at paragraph 25:

> …*Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts….

[53] The CHRA creates a statutory regime of broad application. The Tribunal's expertise is in human rights which arise in a wide variety of contexts. It is acceptable for the Commission and Tribunal to analyze medical reports presented to them to arrive at factual conclusions. The Tribunal was not applying medical expertise it did not have (see *Irvine v. Canada (Canadian Armed Forces)*, 2005 FC 122, 268 F.T.R. 201 at paragraphs 35 and 36, aff'd 2005 FCA 432).

[54] It would not make sense, on the one hand, to accept that the Tribunal's ultimate decisions are subject to deference, but simultaneously afford the Tribunal no deference whatsoever anytime it has regard for laws or regulations in any field of activity in which the human rights issue arises. Parliament cannot have intended that the Tribunal only be allocated decision making with regard to human rights arising within contexts and subject areas which the Tribunal has background expertise. Therefore, I cannot accept that simply because the Tribunal heard and accepted evidence of aeronautical regulations, the standard of review becomes correctness.

[55] The Court in *Dunsmuir* above, stated at paragraph 51 that:

> …questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness…

The evidence regarding Canadian and American aeronautical laws arose in the "Remedy" section of the Tribunal's decision and provided a part of the factual and regulatory background against which the Tribunal intended to affix its remedy. The Tribunal's account of that evidence is entitled to deference and should be reviewed on the reasonableness standard if jurisdiction is found.

[56] **Issue 2**

Did the Tribunal act without jurisdiction when it heard Mr. Morten's case?

Both Air Canada and the Canadian Transportation Agency allege that the Tribunal acted without jurisdiction when it heard Mr. Morten's case because, on the facts of this case, the Agency had exclusive jurisdiction to hear and determine the matter.

[57] It should be noted that the award of $10,000 to Mr. Morten is not the subject of review on this judicial review. Air Canada has already paid this amount to Mr. Morten and does not contest the award.

[58] Part V of the CTA titled "TRANSPORTATION OF PERSONS WITH DISABILITIES" contains three sections. Section 170 empowers the Agency to "make regulations for the purpose of eliminating undue obstacles in the transportation network", including regulations respecting the

"conditions of carriage applicable in respect of the transportation of persons with disabilities". Section 171 makes reference to the Commission and states that the Commission and the Agency must coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

[59] Under section 172(1), the Agency "may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities." Where the Agency determines that an undue obstacle to the mobility of persons with disabilities exists, the Agency may, pursuant to subsection 172(3), require the taking of appropriate corrective measures. Decisions of the Agency ordering remedial measures may be appealed with leave to the Federal Court of Appeal pursuant to subsection 41(1).

[60] The above sections give teeth to the statement in the National Transportation Policy that Canada's transportation services will be accessible to persons with disabilities (CTA subsection 5(d)).

[61] The Supreme Court of Canada looked extensively at the mandate and jurisdiction of the Agency to handle human rights issues and order remedial action in *VIA Rail* above. That case concerned VIA Rail's purchase of 139 rail cars which, despite some modifications, were not accessible to people in wheelchairs. The Council of Canadians with Disabilities (CCD) applied to the Agency under section 172 of the CTA. Once seized of the issue, the Agency made inquiries and

inspected the rail cars and the methods by which VIA Rail proposed to accommodate persons using wheelchairs. The Agency also allowed and heard oral arguments from the parties. The Agency considered that there were undue obstacles to the mobility of persons with disabilities and communicated to VIA Rail its expectations for getting it's intended fleet into a reasonably accommodating state. VIA Rail argued that the various options would be too expensive and too onerous to undertake. Ultimately, the Agency was not convinced and ordered VIA Rail to implement six remedial measures, five of which involved making physical changes to the cars with cost implications.

[62] The majority decision authored by Justice Abella determined that Parliament, with its enactment of the CTA, intended the Agency, and not the Commission, to assess barriers in the unique transportation context. Importantly, the majority also held upon examination of the precise wording of the CTA, that the test set out therein to assess "undue obstacles" was exactly the same as the test for "reasonable accommodation" or "undue hardship" from *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868, [1999] S.C.J. No. 73 (QL) (*Grismer*), used by the Tribunal in many other contexts.

[63] The crux of the *VIA Rail* above decision lies in the following passage:

> 133 It bears repeating that "[i]t is important to remember that the duty to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. Those words do not constitute independent criteria. Rather, they are alternate methods of expressing the same concept": *Chambly*, at para. 33 (…). The factors set out in s. 5 of the *Canada Transportation Act* flow out of the very balancing inherent in a "reasonable accommodation" analysis. Reconciling accessibility for persons with disabilities with cost, economic viability, safety, and

the quality of service to all passengers (some of the factors set out in s. 5 of the Act) reflects the reality that the balancing is taking place in a transportation context which, it need hardly be said, is unique.

134 Setting out the factors is Parliament's way of acknowledging that the considerations for weighing the reasonableness of a proposed accommodation vary with the context. It is an endorsement of, not a rebuke to the primacy of human rights principles, principles which anticipate, as this Court said in *Chambly* and *Meiorin*, that flexibility and common sense will not be disregarded.

135 Each of the factors delineated in s. 5 of the Act is compatible with those that apply under human rights principles. …

136 Section 5 of the *Canada Transportation Act*, together with s. 172(1), constitute a legislative direction to the Agency to determine if there is an "undue obstacle" to the mobility of persons with disabilities. Section 5(g)(ii) of the Act states that it is essential that "each carrier or mode of transportation, *as far as is practicable*, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute an *undue obstacle* to the mobility of persons, including persons with disabilities". The Agency's authority to identify and remedy "undue obstacles" to the mobility of persons with disabilities requires that it implement the principle that persons with disabilities are entitled to the elimination of "undue" or "unreasonable" barriers, namely those barriers that cannot be justified under human rights principles.

137 The qualifier, "as far as is practicable", is the statutory acknowledgment of the "undue hardship" standard in the transportation context. The fact that the language is different does not make it a higher or lower threshold than what was stipulated in *Meiorin*: (…). The same evaluative balancing is required in assessing how the duty to accommodate will be implemented.

138 That is precisely why Parliament charged the Agency with the public responsibility for assessing barriers, not the Canadian Human Rights Commission. The Agency uniquely has the specialized expertise to balance the requirements of those with disabilities with the practical realities - financial, structural and logistic - of a federal transportation system.

(Underlining my emphasis)

[64] The applicants argue that the applicable provisions of the CTA combined with the decision in *VIA Rail* above, give the Agency exclusive jurisdiction to hear the matter.

[65] In *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667, the Supreme Court dealt with the competing jurisdiction of two administrative regimes in the employment-human rights context. The Court concluded that the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) (PESRA) and not the competing Commission, had exclusive jurisdiction over a Parliamentary employee's complaint that he was discriminated against and constructively dismissed on the basis of his race. Exclusive jurisdiction could be found where Parliament's intention to have an adjudicative body resolve a dispute obliges an individual to seek relief there.

[66] The *Vaid* above Court posed the question as follows:

> 90 I have concluded, as stated, that the *Canadian Human Rights Act* anti-discrimination norms are applicable to parliamentary employees. The remaining question is whether the investigatory and adjudicatory *Canadian Human Rights Act* procedures also apply as the respondents contend, or whether the respondent Vaid is obliged to seek relief under PESRA.
>
> 91 The Court has in a number of cases been required to examine competing legislative schemes to determine which of the potential adjudicative bodies is intended by the legislature to resolve a dispute. Mr. Vaid's claim of workplace discrimination and harassment could potentially fall under both PESRA and the *Canadian Human Rights Act*. The allegation of jurisdiction in such circumstances is a familiar administrative law problem, even in the context of human rights tribunals …
>
> 93 The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian

> Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at para. 49; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at p. 721).
>
> (Emphasis added)

[67] The Court concluded that although Mr. Vaid's specific allegations included allegations of racial discrimination, there was nothing to lift the complaints out of their specific employment context (at paragraph 94). Ultimately, it was an employment dispute with a human rights component, but not the other way around as stated at paragraph 98:

> 98 In this case, we are not dealing with an allegation of systemic discrimination. We are dealing with a single employee who says he was wrongfully dismissed against a background of alleged discrimination and harassment. A different dispute may involve different considerations that may lead to a complaint properly falling under the jurisdiction of the Canadian Human Rights Commission. But that is not this case.

[68] In my view, the intention of Parliament is quite clear. While one could conceive of cases where the Commission and Tribunal might have jurisdiction, that is not the situation on the facts of this case.

[69] I am of the opinion that Parliament's intention was that the Agency and not the Commission or Tribunal would handle such complaints when they relate to a carrier's policies, tariffs or transportation regulations. It would not make sense if two distinctively separate administrative bodies competed for oversight and management of carriers' policies and tariffs.

[70] Paragraph 41(1)(b) of the CHRA allows the Commission to refer complaints more appropriately dealt with according to a procedure provided for under another Act of Parliament. Paragraph 44(2)(b) provides another opportunity for referral to the Agency after the Commission has conducted an investigation and prepared a report.

[71] In the present case, the Commission referred Mr. Morten's case to the Tribunal despite the fact that the Agency had previously rendered its own decision on the matter in 2005. The Tribunal made the preliminary determination that the Agency decision, which pre-dated the Supreme Court's decision in *VIA Rail* above, fell "far short of what would be required under the *VIA Rail* test."

[72] *VIA Rail* above, marked a fundamental change in the method under which the Agency was required to handle human rights complaints. As noted above, it confirmed that the Agency was to apply the same test when assessing an "undue obstacle" under section 5 of the CTA, as human rights tribunals across the country applied when assessing "undue hardship" (*VIA Rail* above, at paragraphs 134 to 137). This is commonly referred to as the *Meiorin* test after the Supreme Court decision in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union*, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (QL) (*Meiorin*). There is evidence that before *VIA Rail* above, the Agency did not consistently apply a similar test. Indeed, in the Agency decision regarding Mr. Morten's claim, there is no discussion of the *Meorin* test or the duty to accommodate. In the Agency's 2003 Decision No. 175-AT-R-2003 which precipitated the *VIA Rail* above court proceedings, the Agency clearly indicates this difference at page 17:

> … The Agency also has a human rights mandate found in Part V of the legislation and the national transportation policy reflects the importance of having a federal transportation network that is accessible to persons with disabilities. However, in its elucidation of that mandate, Parliament specifically inserted the notion of practicability in the policy and had directed the Agency to consider whether the needs of persons with disabilities have been accommodated as far as practicable.
>
> The Agency notes that the notion of practicability has been specifically rejected by the courts in their assessment of the appropriate standard to be adopted by human rights bodies and courts in favour of the use of a standard closer to impossibility. In this way, and in that context, human rights bodies and courts have been directed to require something much more than evidence of the impracticability of accommodating measures before they will find that the failure to accommodate is justified. The Agency is of the opinion, however, that it cannot adopt this higher standard…

[73] While the Supreme Court upheld the Agency's ultimate decision in *Via Rail* above, the court clearly overturned any notion of a different standard. The Agency now agrees that it applies the *Meorin* test to human rights complaints.

[74] The Supreme Court of Canada has made it very clear that the Agency can deal with a human rights complaint as part of a complaint that arises in the context of the federal transportation system.

[75] It should also be noted that the Agency has already made a decision with respect to Mr. Morten's complaint. It does not seem proper for the Tribunal to be sitting in appeal of that decision. There are other routes available to attempt to appeal the Agency's decision.

[76] In conclusion, it is my view that the Tribunal, based on the facts of this case, acted beyond its jurisdiction. The matter falls to be heard by the Agency including the human rights aspect of the case since the test to be applied when assessing an undue obstacle under section 5 of the CTA is the same test as human rights tribunals across the country applied when assessing undue hardship (see *Via Rail* above, at paragraphs 134 to 137).

[77] Because of my decision with respect to jurisdiction, I need not deal with the remaining issues.

[78] The applications for judicial review must be allowed and the decision of the Tribunal must be set aside except for the $10,000 award for pain and suffering which was not appealed and has been paid.

[79] I retain jurisdiction to deal with any issues that may arise from this judgment and reasons.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Canadian Human Rights Act, R.S.C. 1985, c. H-6

5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	5. Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	a) d'en priver un individu;
(b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.	b) de le défavoriser à l'occasion de leur fourniture.
. . .	. . .
15.(1) It is not a discriminatory practice if	15.(1) Ne constituent pas des actes discriminatoires :
. . .	. . .
(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.	g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

. . .

. . .

41.(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

41.(1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

a) la victime présumée de l'acte discriminatoire devrait épuiser d'abord les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

b) la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale;

(c) the complaint is beyond the jurisdiction of the Commission;

c) la plainte n'est pas de sa compétence;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

e) la plainte a été déposée après l'expiration d'un délai d'un an après le dernier des faits sur lesquels elle est fondée, ou de tout délai supérieur que la Commission estime indiqué dans les circonstances.

. . .

. . .

44.(1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

44.(1) L'enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l'enquête.

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(2) La Commission renvoie le plaignant à l'autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

a) que le plaignant devrait épuiser les recours internes ou les procédures d'appel ou de règlement des griefs qui lui sont normalement ouverts;

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

it shall refer the complainant to the appropriate authority.

Canada Transportation Act, S.C. 1996, c. 10

5. It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when	5. Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :
(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;	a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;	b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of persons, including persons with disabilities; and

d) le système de transport est accessible sans obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience;

(e) governments and the private sector work together for an integrated transportation system.

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

. . .

. . .

170.(1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

170.(1) L'Office peut prendre des règlements afin d'éliminer tous obstacles abusifs, dans le réseau de transport assujetti à la compétence législative du Parlement, aux possibilités de déplacement des personnes ayant une déficience et peut notamment, à cette occasion, régir :

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

a) la conception et la construction des moyens de transport ainsi que des installations et locaux connexes — y compris les commodités et l'équipement qui s'y trouvent — , leur modification ou la signalisation dans ceux-ci ou leurs environs;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

b) la formation du personnel des transporteurs ou de celui employé dans ces installations et locaux;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

c) toute mesure concernant les tarifs, taux, prix, frais et autres conditions de transport applicables au transport et aux services connexes offerts aux personnes ayant une déficience;

(d) the communication of information to persons with disabilities.

d) la communication d'information à ces personnes.

(2) Regulations made under subsection (1) incorporating standards or enactments by reference may incorporate them as amended from time to time.

(2) Il peut être précisé, dans le règlement qui incorpore par renvoi des normes ou des dispositions, qu'elles sont incorporées avec leurs modifications successives.

(3) The Agency may, with the approval of the Governor in Council, make orders exempting specified persons, means of transportation, services or related facilities and premises from the application of regulations made under subsection (1).

(3) L'Office peut, par arrêté pris avec l'agrément du gouverneur en conseil, soustraire à l'application de certaines dispositions des règlements les personnes, les moyens de transport, les installations ou locaux connexes ou les services qui y sont désignés.

171. The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

171. L'Office et la Commission canadienne des droits de la personne sont tenus de veiller à la coordination de leur action en matière de transport des personnes ayant une déficience pour favoriser l'adoption de lignes de conduite complémentaires et éviter les conflits de compétence.

172.(1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of

172.(1) Même en l'absence de disposition réglementaire applicable, l'Office peut, sur demande, enquêter sur toute question relative à l'un des

whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

domaines visés au paragraphe 170(1) pour déterminer s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

(2) L'Office rend une décision négative à l'issue de son enquête s'il est convaincu de la conformité du service du transporteur aux dispositions réglementaires applicables en l'occurrence.

(3) En cas de décision positive, l'Office peut exiger la prise de mesures correctives indiquées ou le versement d'une indemnité destinée à couvrir les frais supportés par une personne ayant une déficience en raison de l'obstacle en cause, ou les deux.

FEDERAL COURT

SOLICITORS OF RECORD

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