Federal Court of Appeal | Cour d'appel fédérale

Date: 20211022

Docket: A-74-20

Citation: 2021 FCA 204

CORAM: **DE MONTIGNY J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

AIR CANADA

Appellant

and

LORNE ROBINSON and CANADIAN TRANSPORTATION AGENCY

Respondents

Heard by online video conference hosted by the Registry on April 19, 2021.

Judgment delivered at Ottawa, Ontario, on October 22, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] Air Canada appeals under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the CTA) from the decision of the Canadian Transportation Agency (the Agency) in *Robinson v. Air Canada*, Decision No. 72-AT-A-2019, in which the Agency issued remedial orders after finding that the level of wheelchair assistance Air Canada provided Mr. Robinson constituted an

undue obstacle to his mobility. The Agency imposed these remedies without hearing from either party regarding their appropriateness or the Agency's jurisdiction to order them and without affording Air Canada an opportunity to make representations as to whether implementing the measures would cause it undue hardship.

[2] For the reasons that follow, I would allow this appeal, set aside the decision of the Agency and remit the matter to the Agency for redetermination in accordance with these Reasons.

I. Background

[3] At the outset, I note that several amendments to the CTA came into force after the events giving rise to this appeal took place. Of particular significance, sections 170 - 172.4 of the CTA now refer to "barrier(s)" rather than "obstacles" and section 172.1 now includes an expanded range of remedies the Agency may award where it finds that there is an undue barrier to the mobility of persons with disabilities. Notably, the Agency may now award compensation for lost wages and for pain and suffering arising out of a barrier as well as additional compensation where the Agency determines that the barrier results from a wilful or reckless practice. However, these new provisions did not apply to the case at bar, which was instead governed by the CTA as it read when the events giving rise to Mr. Robison's application to the Agency took place. As such, the present Reasons employ the terminology in the CTA as it then read.

A. *The Background to the Application*

[4] On August 2, 2017, Mr. Robinson, who was then 92 years-old and used a wheelchair, travelled on Air Canada from Dublin to Calgary with a connection through Toronto. His arrival in Toronto was delayed due to weather conditions. The connection time became too tight for him to board his connecting flight, and the second leg of the trip was automatically rebooked to the next available flight to Calgary. Upon Mr. Robinson's arrival in Toronto, Air Canada personnel assisted him through customs and into the baggage hall. Mr. Robinson then realized he had forgotten his carry-on baggage on the plane. With the assistance of Air Canada personnel, he returned to the gate to attempt to retrieve his carry-on bag, but it was too late to re-board the plane to retrieve it.

[5] Air Canada personnel then assisted Mr. Robinson through domestic security screening and instructed him to wait at a "pole" or "seating area", as described by Mr. Robinson and Air Canada respectively, for an agent to help him to his departure gate. Mr. Robinson claimed he was left waiting for 40 minutes, without anyone checking on him. Concerned that he would miss his flight, he left the area on his own and made his way to the gate for his connecting flight, which he was able to board on time.

[6] While Air Canada had no direct evidence of how the incident unfolded, it submitted to the Agency that it was unlikely that Mr. Robinson would have been required to wait for a period of 40 minutes, as Air Canada usually provides wheelchair assistance within 10 to 15 minutes. The Agency found, on a balance of probabilities, that Air Canada's usual procedure had not been

followed and that Mr. Robinson was left unattended for significantly more than 10 to 15 minutes with no one checking on him.

[7] Ms. Acheson, who said she was a friend of Mr. Robinson, filed an application with the Agency regarding the incident, after being dissatisfied with the treatment of the complaint by Air Canada's customer service staff. Ms. Acheson had been travelling with Mr. Robinson, but they had parted ways at the Dublin airport, where she had left him in Air Canada's care. As such, she did not witness the events that form the basis of the complaint. The remedy requested by Ms. Acheson, both in speaking to Air Canada's customer service staff and in the application to the Agency, was a pair of return tickets to Amsterdam, one for Mr. Robinson and one for herself. With the application to the Agency, Ms. Acheson filed a letter signed by Mr. Robinson, in which he confirmed that Ms. Acheson was acting on his behalf.

[8] In an opening pleading letter to Air Canada and Ms. Acheson dated July 11, 2018, the Agency indicated that it accepted the application against Air Canada pursuant to subsection 172(1) of the CTA and outlined the process it would follow and the Agency's approach to determining whether there is an undue obstacle to the mobility of a person with a disability.

[9] In Decision No. LET-AT-71-2018, the Agency indicated that it required more information on certain issues that had not been addressed in the pleadings and directed Mr. Robinson and Air Canada to each respond to a list of questions. The questions for Air Canada requested details of Air Canada's policies and practices for the provision of

wheelchair assistance. The questions for Mr. Robinson focused on whether and how he had been notified about the rebooking and gate changes, and whether, when and how he had requested assistance and what response he had received.

[10] In responding to the questions, Ms. Acheson indicated that Mr. Robinson was no longer speaking with her or answering her calls because she had not resolved his issues with Air Canada. Before providing more detail about the incidents, she further explained:

> I have accurate notes from our initial discussion and refer to them 100% to respond to your questions. That said, Mr. Robinson was in a state of confusion after his trip and remains so about that trip […] A lasting impact. However, he is certain about his facts.

[11] Air Canada objected to the filing of Ms. Acheson's responses and requested that they be removed from the record, arguing that in light of her statement that Mr. Robinson was no longer speaking to her, the last submission was made without the authorization of Mr. Robinson.

[12] In subsequent communications in the file, Ms. Acheson became increasingly aggressive, making inflammatory and inappropriate remarks regarding Air Canada's counsel, including by suggesting, in vulgar terms, that the lawyer assigned to the case was incompetent and should be removed from the file. Ms. Acheson also sent photos that were irrelevant and inappropriate in the context of the Agency's process, including photos of herself with a cat as well as shirtless photos of Mr. Robinson.

B. *The Agency's Preliminary Decision*

[13] In Decision No. LET-AT-25-2019 (the Disability and Obstacle Decision), the Agency dealt with two preliminary matters. First, with respect to Mr. Robinson's request for monetary compensation, or alternatively, compensation in the form of two return tickets for travel to Amsterdam, the Agency underscored that the CTA "does not provide for monetary compensation in the nature of general damages for matters such as inconvenience, treatment perceived as lacking in dignity, or for pain and suffering" (Disability and Obstacle Decision at paras. 8-9). As mentioned above, amendments to the CTA allowing the Agency to award such compensation had not yet come into force.

[14] Second, the Agency rejected Air Canada's argument that the burden of proof had not been met because the allegations in the complaint had been reported by Ms. Acheson, who did not witness the events, and Mr. Robinson had not provided a signed statement recounting the events. The Agency noted that section 16 of the *Canada Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*, SOR/2014-14) (the Agency Rules) explicitly provides for representation by a third party and that ignoring or discounting a representative's submissions and requiring the type of sworn evidence that Air Canada sought would hinder access to justice and to potential remedies for those who appoint a representative (Disability and Obstacle Decision at paras. 10-11).

[15] Turning to the test under subsection 172(1) of the CTA, the Agency found that Mr. Robinson, as a senior citizen who requires wheelchair assistance when travelling, was a

person with a disability for the purposes of Part V of the CTA (Disability and Obstacle Decision at paras. 15-16). This was and is not disputed by Air Canada.

[16] The Agency went on to assess whether Mr. Robinson had encountered an obstacle to his mobility. It explained that a person with a disability faces an obstacle to their mobility "if they demonstrate that they need – and were not provided with – accommodation, thereby being denied equal access to services available to others in the federal transportation network" (Disability and Obstacle Decision at para. 29). The Agency noted that the applicant bears the burden of proving, on a balance of probabilities, their need for accommodation and that if this need was not met, a person will have faced an obstacle (Disability and Obstacle Decision at para. 30).

[17] The Agency determined that the issue surrounding Mr. Robinson's carry-on bag was not an obstacle to his mobility, finding that by the time he realized he had forgotten it on the plane, it was too late to retrieve it and there was no evidence that he had specifically requested that his carry-on bag be handled by Air Canada staff as a disability-related accommodation (Disability and Obstacle Decision at para. 31). The Agency also dismissed the part of Mr. Robinson's complaint relating to the missed connection as he missed his connecting flight to Calgary due to the result of a late arrival from Dublin, not due to lack of assistance. It further dismissed the portion of his complaint respecting his arrival in Calgary, finding that Air Canada staff were waiting for him with a wheelchair but he appeared to have left the plane on his own, without waiting for assistance (Disability and Obstacle Decision at para. 35).

[18] However, weighing Mr. Robinson's submission that he waited at "the pole" for 40 minutes without receiving any assistance against Air Canada's submission that service is usually provided within 10 to 15 minutes but that it was unable to provide direct evidence to confirm the amount of time Mr. Robinson waited, the Agency found that "on a balance of probabilities, Air Canada's usual procedure was not followed and Mr. Robinson was left unattended at the 'pole' for significantly more than 10-15 minutes, with no one checking in on him which led him to leave the area on his own as he was understandably concerned that he would miss his flight" (Disability and Obstacle Decision at para. 33). The Agency went on to hold that "the lack of assistance at 'the pole' [...] constituted an obstacle to Mr. Robinson's mobility" (Disability and Obstacle Decision at para. 33).

[19] In terms of next steps, the Agency indicated that it would provide Air Canada an opportunity to either:

- explain, taking into account any proposals from the applicant, how it proposed to remove the obstacle through a general modification to a rule, policy, practice, technology, or physical structure or, if a general modification is not feasible, an individual accommodation measure; or
- demonstrate that it cannot remove the obstacle without experiencing undue hardship.

[20] In response, counsel for Air Canada made brief submissions contained in a two-paragraph email:

> Air Canada apologies for any mishandling that resulted in Mr. Robinson waiting for wheelchair assistance. Air Canada submits that all of its policies, procedures and training materials are aligned so as to ensure that passengers are assisted in a timely fashion, and submits that Mr. Robinson's alleged experience was an unfortunate exception to the rule.

> Furthermore, as the Agency is already aware, Air Canada will be issuing a bulletin regarding the provision of wheelchair assistance as per Decision No. 11-A-AT-2019.

[21] The second paragraph referred to a final decision and order in another matter– issued the day before Air Canada filed the above response – in which the Agency required Air Canada to, among other things, "ensure that its policies and procedures with respect to the provision of wheelchair assistance include a clear requirement that when there is a delay in the provision of that assistance, Air Canada personnel inform the affected passenger when the assistance is expected to be available and what the implications of the delay are for any connection the passenger needs to make", and to "implement internal communication and training measures to ensure that relevant personnel are fully aware of this requirement" (*Cheguer v. Air Canada*, Decision No. 11-AT-A-2019, at para. 24).

[22] No reply was filed on behalf of Mr. Robinson.

II. The Decision under Appeal

[23] In the decision under appeal, Decision No. 72-AT-A-2019 (the Remedy Decision), the Agency considered whether Air Canada could remove the obstacle encountered by Mr. Robinson without suffering undue hardship, and if so, what corrective measures would be required. The Agency concluded that the obstacle could be removed without undue hardship and ordered adjustments to Air Canada's policies and internal communications procedures to address the lack of wheelchair assistance (Remedy Decision at paras. 3-4, 21).

[24] The Agency noted its concern "with the fact that despite the carrier's policies with respect to assistance for persons with disabilities, [Mr. Robinson] did not receive an adequate level of service from Air Canada". It further noted that Air Canada had not provided any evidence to justify why Mr. Robinson had received this unsatisfactory level of service, and concluded that "[i]n the absence of compelling reasons communicated to the passenger, it is unacceptable that a person with a disability be left unattended for 40 minutes to wait for assistance" (Remedy Decision at para 16).

[25] The Agency explained that "Air Canada's process for passengers arriving in Toronto from an international flight and transiting to a domestic flight requires the hand-off of passengers between [different] Air Canada agents", which carries "an inherent risk of miscommunication" (Remedy Decision at para. 17). More specifically, the Agency was of the opinion that the lack of adequate procedures governing the communication between staff responsible for different parts of the process to provide mobility assistance was likely to increase the risk of miscommunication (Remedy Decision at para. 18).

[26] The Agency was critical of Air Canada for not having a service standard for passenger wait times in the seating area (Remedy Decision at para. 19). The Agency explained its view that an "activity log", setting out among other things the names of passengers who have requested services, the names of agents on duty who are to provide the requested assistance, the time frames, and any issues that arise, would be an effective tool to follow up on the services provided and take corrective actions to resolve any deficiencies. Such an activity log, combined with the Agency's previous orders and Air Canada's existing policies, would provide Air Canada

management with “a mechanism to review incidents and take remedial measures, such as additional training, on a proactive basis” (Remedy Decision at para. 19).

[27] Finding that the level of wheelchair assistance provided by Air Canada to Mr. Robinson constituted an undue obstacle to his mobility, the Agency ordered Air Canada to take the following measures by November 26, 2019 (approximately four weeks from the date the Remedy Decision was issued):

- modify its policies and procedures related to wheelchair assistance to include a reasonable service standard for waiting times when assistance is to be provided by the carrier;
- include, in the new service standard, a recognition that, sometimes, the service will have to be provided faster if connection times are tight and, if the service standard will not be met, requirements to advise the passenger of the delay, including the reason for it, and to check in on the passenger regularly;
- implement internal communication and training measures to ensure that relevant personnel are fully aware of this requirement;
- set up an activity log with the names of passengers who have requested services and their flight numbers, the names of the agents on duty who are to provide the assistance, the waiting time to receive assistance, and any issues that arise in the provision of this service;
- incorporate a management review in the activity log, which would provide for the identification of systemic issues and related corrective measures; and
- file the activity log, including an identification of systemic issues and any proposed corrective measures, with the Agency's Chief Compliance Officer by April 28, 2020.

(Remedy Decision at para. 21)

[28] Air Canada sought and was granted leave to appeal the Remedy Decision to this Court pursuant to subsection 41(1) of the CTA. Mr. Robinson did not participate in the appeal.

III. The Issues

[29] Air Canada raises the following issues:

1. Did the Agency err in law or breach procedural fairness by accepting Mr. Robinson's version of events on the basis of submissions made by Ms. Acheson, who did not witness the events?

2. Did the Agency err in law in finding that waiting for wheelchair assistance at a "pole" for a period of 40 minutes constituted an undue obstacle to Mr. Robinson's mobility within the meaning of subsection 172(1) of the CTA?

3. Did the Agency err in law in rendering an order that is *ultra vires* the powers of the Agency under subsection 172(1) given that the order is more in the nature of a regulatory function?

4. Did the Agency breach procedural fairness by ordering structural changes without first informing Air Canada that the Agency intended to order such measures and without giving Air Canada the chance to make representations as to the Agency's authority to make such order, the order's feasibility and undue hardship impact?

[30] For the reasons that follow, I have decided that it is unnecessary to address the third issue. The others are discussed in order in the sections that follow.

IV. Analysis

A. *Did the Agency err in law or violate Air Canada's rights to procedural fairness in accepting the evidence submitted by Ms. Acheson?*

[31] By virtue of section 41 of the CTA, the only issues that may be examined by this Court in the context of this appeal are errors of law or jurisdiction, and, in light of the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, appellate standards of review are to be applied by this Court in this appeal. The correctness standard is accordingly applicable to all issues that may be examined by this Court in this appeal, including allegations of violations of procedural fairness: *Canadian National Railway Company v. Emerson Milling Inc*., 2017 FCA 79, [2018] 2 F.C.R. 573, at paras. 18-19 & 24; *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, [2021] CarswellNat 947, at paras. 44-47; *Canadian National Railway Company v. Canada (Transportation Agency)*, 2021 FCA 173, at para. 40.

[32] As noted, Air Canada submits that the Agency erred in law and violated Air Canada's procedural fairness rights in finding that Mr. Robinson had encountered an undue obstacle to his mobility in the absence of any evidence presented by Mr. Robinson or by someone "actually" representing him or having contemporaneous knowledge of the events. In Air Canada's view, the Agency ruled on this point in the absence of any proper evidence. It submits that Ms. Acheson's erratic behaviour, combined with her admission that Mr. Robinson was no longer speaking with her, should have led the Agency to revoke the authorization to act on Mr. Robinson's behalf. Air Canada also points to inconsistencies arising from the several versions of events presented by

Ms. Acheson, which, in its view, highlight her lack of credibility. It asserts that the Agency's failure to dismiss the complaint on the basis of the lack of adequate evidence served to wrongly shift the burden of proof to Air Canada.

[33] The Agency responds that it simply considered and weighed the evidence submitted by both parties and concluded that the version of facts provided by Mr. Robinson regarding the time he waited for assistance at "the pole" was not refuted by the evidence provided by Air Canada. It contends that it was entitled to accept and rely on the submissions of Ms. Acheson and that the impugned finding is a factual one, and thus not appealable to this Court under section 41 of the CTA.

[34] I agree that it was open to the Agency to have relied on the information provided by Ms. Acheson in support of its factual determination, which is not reviewable under section 41 of the CTA.

[35] Section 16 of the Agency Rules specifically permits an applicant to be represented by another person in dispute proceedings before the Agency; such person need not be a member of the bar of a province, so long as the applicant authorizes the person to act on their behalf by filing the prescribed information with the Agency. Mr. Robinson did so. Thus, the Agency committed no error in allowing Mr. Robinson to present his case through Ms. Acheson. Her indication, midway through the proceedings, that she was no longer speaking to Mr. Robinson does not change this. Mr. Robinson never filed a revocation of his authorization. In addition,

Ms. Acheson indicated that she would continue working diligently on his file and that Mr. Robinson still agreed to pay her for her services.

[36] Moreover, the Agency is not bound by the same rules of evidence that apply to a court and is empowered to accept hearsay evidence. Thus, the Agency was not required to obtain a signed statement directly from Mr. Robinson. As the Agency notes, accepting Air Canada's position and requiring that an applicant submit a signed statement risks imposing an unnecessary burden on applicants who chose to be represented by another person, and, ultimately, may well hinder access to justice.

[37] Thus, the Agency's conclusion regarding the lack of assistance encountered by Mr. Robinson at the Toronto airport, contrary to what Air Canada asserts, was based upon evidence that the Agency was entitled to consider. It accordingly did not err in law, improperly reverse the onus of proof, violate Air Canada's procedural fairness rights or decide a point in the absence of any evidence. And, its determination as to the time Mr. Robinson was required to wait at "the pole" is a factual one, and thus not reviewable under section 41 of the CTA which limits appeals to this Court to questions of law or jurisdiction in respect of which leave has been granted.

B. *Did the Agency err in concluding that Mr. Robinson had encountered an undue obstacle?*

[38] Air Canada next contends that the Agency erred in finding that Mr. Robinson had encountered an "undue obstacle" to his mobility as contemplated by subsection 172(1) of the CTA. In Air Canada's view, the Agency failed to appropriately interpret the term "obstacle" and

to analyze whether the “obstacle” encountered by Mr. Robinson was “undue” within the meaning of that provision.

[39] Air Canada more specifically submits that a 40 minute waiting period, in and of itself, is insufficient to constitute an “undue obstacle” as defined 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, notably at para. 140 [*Via Rail SCC*]. According to Air Canada, Mr. Robinson suffered no prejudice from the wait – it may have been an inconvenience, but it was in no way “excessive or oppressive”. Air Canada highlights the fact that Mr. Robinson ultimately reached his gate and boarded his flight on time and suggests that since he would have been required to wait in any event, it made little difference that he waited at a “pole” rather than at his gate.

[40] Air Canada submits that the Agency provided no analysis on whether or why the waiting period constituted an “undue obstacle” within the meaning of the CTA. It further says that the Agency cannot now bolster its reasoning by trying to argue, in the context of this appeal, that waiting in a seating area is more stressful than waiting at the gate. Finally, Air Canada argues that the only conclusion available when applying the correct legal test is that Mr. Robinson did not encounter any undue obstacle to his mobility.

[41] The Agency’s position is that the wait period was not a matter of mere inconvenience or a question of waiting in one area instead of another. The Agency specifically found in the decision under appeal that Mr. Robinson was left without any assistance and was placed “in a situation where he would not have known when another attendant would arrive and assist him, and would

have been concerned about making his connection" (Agency's Memorandum of Fact and Law at paras. 56-58).

[42] In my view, contrary to Air Canada's assertion, the Agency made no error of law in finding that the lack of assistance at the "pole" constituted an obstacle to Mr. Robinson's mobility. Air Canada's argument suggests that the Agency ought to have engaged in a separate analysis of whether the obstacle – here, the lack of wheelchair assistance and a 40 minute wait – was itself oppressive or placed an excessive burden on Mr. Robinson, as a person with a disability. However, this approach is incorrect as the "undueness" of the obstacle requires consideration of whether its removal would cause a carrier undue hardship. *Via Rail SCC* stands for the proposition that the "undueness" of the obstacle is essentially the flip side of the "undueness" of any hardship that would result from removing it.

[43] If an obstacle exists, it should be removed to the point of undue hardship; if it can be removed without undue hardship, it is by definition an undue obstacle. The onus is on the carrier to establish that an obstacle to the mobility of persons with disabilities created by the carrier's physical structures or policies is not an "undue" obstacle by persuading the Agency that it could not accommodate persons with disabilities without experiencing undue hardship: *VIA Rail SCC* at para. 142; see also, for example, *Sabbagh v. VIA Rail*, Decision No. 312-AT-R-2013 at para. 10 ("An obstacle is undue unless the service provider can justify its existence").

[44] This test is reflected in the Agency's approach to applications under section 172. As described in the Disability and Obstacle decision, the process by which the Agency dealt with the

application in the case at bar under section 172 involved determining (i) whether the applicant is a person with a disability, (ii) whether they encountered an obstacle to their mobility, (iii) and whether the carrier could remove this obstacle without experiencing undue hardship.

[45] The Agency subsequently in an interpretative decision, Decision No. 33-AT-A-2019, "recast […] its three-part approach as a two-part approach to better reflect the two-part analysis of the human rights jurisprudence" (para. 12). Under this slightly modified approach, during the first part of the proceedings, the applicant has the onus of demonstrating that they have a disability and faced a disability-related "barrier" (the term now used in the CTA), and during the second part, the onus shifts to the respondent to explain how it proposes to remove the "barrier" or to demonstrate that it cannot do so without experiencing undue hardship.

[46] An analogy may indeed be drawn between the Agency's inquiries and jurisprudence in the human rights context, where the burden is also placed on the employer or service provider to demonstrate that it cannot accommodate a person with a disability without experiencing undue hardship after a complainant has established a *prima facie* case of discrimination: see for example, *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, [2017] 1 SCR 591 at para. 23.

[47] The reasoning behind section 172 and the jurisprudence interpreting it is that no obstacle ought to be left unaddressed unless addressing it would cause undue hardship. Having found that the lack of assistance amounted to an "obstacle", no additional analysis was required from the Agency other than examining whether Air Canada could remove the obstacle without experiencing undue hardship.

[48] To the extent that Air Canada challenges the conclusion that the lack of assistance for a period of 40 minutes amounted to an "obstacle", I see no reviewable error in the Agency's finding on this point. In the present case, the issue of whether a given level of service hindered Mr. Robinson's mobility is one of mixed fact and law, and thus not reviewable in the context of an appeal under section 41. In any event, it seems eminently clear that leaving a senior passenger who uses a wheelchair to languish for 40 minutes, without informing the passenger of when assistance will become available or reassuring them that they will be assisted in reaching their gate on time, is unacceptable and a barrier or obstacle not faced by travellers who do not have a disability.

[49] I therefore see no reviewable error in the Agency's determination that Mr. Robinson faced an obstacle. It could not rule on whether such obstacle was undue, until it considered whether it could be removed by Air Canada, without undue hardship.

C. *Alleged violation of the audi alteram partem rule – The Agency erred in failing to provide Air Canada a meaningful opportunity to respond to the corrective measures the Agency considered and ultimately imposed*

[50] Air Canada next submits that the Agency erred in law and breached procedural fairness in ordering structural changes to Air Canada's procedures without first informing Air Canada that the Agency intended to order such measures and without affording Air Canada the opportunity to make representations on the Agency's jurisdiction to make such an order, the necessity for the order and on the order's impact in terms of undue hardship. Air Canada submits this failure violates the *audi alteram partem* rule.

[51] Air Canada more specifically says that what it characterizes as an invasive remedy was imposed "without any warning or even indication that this remedy was even a possibility, as it had never been requested by [Mr. Robinson]" (Air Canada's Memorandum of Fact and Law at para. 50). In Air Canada's view, the Agency was obliged to issue a "show cause" decision describing the remedy being considered and ask Air Canada to provide its views on that specific remedy before imposing it.

[52] The Agency responds that its Obstacle and Disability Decision clearly demonstrates that the Agency *did* give Air Canada the opportunity to make submissions explaining how it proposed to remove the obstacle or demonstrating that it could not remove it without undue hardship. Air Canada's response was contained in a brief email, in which it stated that its policies and procedures were already aligned to provide timely wheelchair assistance and indicated that it would be sending a policy reminder to its staff pursuant to a recent order of the Agency in an unrelated matter.

[53] I agree with Air Canada that the Agency breached procedural fairness by imposing the corrective measures it selected in this case without affording Air Canada the opportunity to make submissions on whether the Agency possesses jurisdiction to order these sorts of remedies, whether they were required to remedy the complaint and whether they would cause undue hardship. The breach is likely two-fold. First, as Air Canada argues, the manner in which the Agency proceeded violated the *audi alteram partem* rule. Second, the Agency may well have also breached Air Canada's legitimate expectations, given the procedure followed by the Agency in many previous cases.

[54] The *audi alteram partem* rule, which admonishes decision makers to "hear the other side" (*Canadian Cable Television Assn. v. American College Sports Collective of Canada, Inc.*, [1991] 3 F.C. 626, 81 D.L.R. (4th) 376 (C.A.) at para. 13 [*Canadian Cable*]), ensures that parties have an opportunity to present submissions on matters relevant to the disposition of the dispute. A breach may occur, for example, when the decision maker receives from one party, on an *ex parte* basis, evidence or submissions which contain fresh and prejudicial information and does not disclose it to the other party for comment: see *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, at paras. 51-64. The rule may also be breached if an adjudicator discusses the matter they are required to decide with other members of the administrative body, through a full-board meeting for example, and fails to notify the parties of new issues that came up during the discussion and caused them to change their view of the case: see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at paras. 32-33. In its essence, the *audi alteram partem* rule requires that parties know the case against them and be afforded an opportunity to answer it: see for example *Canadian Cable* at para. 13.

[55] While an administrative decision maker is not usually required to give a warning as to what remedy it considers granting (*Canada (Attorney General) v. Ennis*, 2021 FCA 95, 2021 CarswellNat 1428, at para. 75), in some circumstances the decision maker may need to provide a certain degree of information to a party to ensure it knows the case it has to meet. Such circumstances arose in this case: to have any meaningful opportunity to make relevant submissions on the remedial issues, Air Canada had to have sense of the sort of remedies that might be imposed. As there was no evidence of systemic breach and no request for a systemic

order, Air Canada had no way of knowing that a remedy of the sort imposed was in issue or how to cast its undue hardship submissions.

[56] Air Canada likely also had a legitimate expectation that the Agency would not impose a systemic remedy like that imposed here in the absence of evidence of a systemic issue having been filed and the issue of systemic breach being engaged without first being given an opportunity to make submissions regarding the systemic remedy being considered. The doctrine of legitimate expectations protects a party's participatory rights where an administrative decision-maker makes clear, unambiguous, and unqualified representations as to the process that it will follow that are within the scope of its authority, not incompatible with its statutory duty and procedural in nature: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para. 68.

[57] In my view, the Agency's prior practice with respect to ordering systemic remedies may well have given rise to such legitimate expectations so that Air Canada was entitled to expect notice of the systemic remedy being contemplated when no claim had been made that there was a systemic problem with Air Canada's treatment of requests for wheelchair assistance.

[58] As mentioned above, the CTA imposes on carriers the duty to remove undue obstacles to the mobility of persons with disabilities, that is, to remove all obstacles that can be removed without undue hardship: *Via Rail SCC* at paras. 120-121.

[59] In some cases, specific corrective measures are requested by the applicant and thus the carrier knows how to frame any submissions it wishes to make in respect of undue hardship. In other cases, the requisite measures are more or less self-evident from the nature of the complaint and the way in which the proceedings unfold. Sometimes, the Agency is satisfied with corrective measures proposed by the carrier, such that its order merely requires the carrier to carry out what it has offered to do; in those cases, it is admitted that no undue hardship would result from removing the obstacle.

[60] In other cases, however, the Agency has laid out a specific set of measures it considers necessary to address the obstacle and asks the carrier to explain, if necessary, why such measures would be inappropriate or excessively burdensome. The Agency has often issued this type of "show cause" decision laying out the proposed solution in unequivocal terms, sometimes in great detail: see for example *East v. Air Canada and Jazz Air LP*, LET-AT-A-30-2008; *Green v. OC Transpo*, Decision No. 200-AT-MV-2007; *Legault v. Air Canada*, Decision No. 450-AT-A-2005. More recently, it seems that the Agency may have shifted its approach to starting by asking the carrier to propose corrective measures. Nevertheless, when this occurs, the fact remains that, if this is done, the expected remedy must be clear from the proceedings or disclosed prior to being imposed.

[61] In the present case, the only remedy sought by the applicant was compensation in the form of damages or plane tickets, a remedy the Agency was not empowered to grant. Nothing in the proceedings hinted at the possibility that the Agency was considering a systemic remedy, involving policy changes, including a new service standard, an activity log, managerial review

and supervision by the Agency. On the contrary, the entire case focused on Mr. Robinson's specific experience, and much of Air Canada's submissions emphasized the unusual nature (and unlikeliness) of that experience. Given this, Air Canada had no way of knowing that the Agency was considering the adoption of an entirely new service standard and the other mechanisms that were imposed.

[62] This manner of proceeding stands in stark contrast to the extensive exchange that took place between the Agency and VIA in the *VIA Rail SCC* case regarding the undue hardship it might suffer if required to modify rail cars to render them accessible to persons using wheelchairs. In that case, the Agency issued a preliminary decision giving VIA the opportunity to provide evidence and submissions to show cause to the Agency why the obstacles it had identified were not undue and to provide feasibility and costing information: para. 49. The Agency also asked VIA to file answers to specific questions about what remedial measures were "structurally, economically and operationally possible": para. 50. Finding that VIA's response lacked detail, the Agency reissued its original show cause order and provided VIA additional time to prepare a response, and also made two additional requests for information: paras. 57-58. While the extent of the Agency's efforts to obtain the information relevant to its assessment of undue hardship was undoubtedly influenced by the significance of the potential expenses VIA faced (the rail car modifications were estimated to cost several million dollars), it is nonetheless relevant to note that the corrective measures under consideration were openly set out and that VIA was afforded multiple opportunities to provide evidence and submissions on the feasibility of the measures and the burden associated with them.

[63] In contrast, in the present case, Air Canada was not afforded an opportunity to show that the specific measures imposed would result in undue hardship or were an appropriate and available remedy. Among other things, it did not have the chance to argue that the measures imposed – including consequences in terms of resources, expenses, and interference with other initiatives being undertaken by Air Canada at the same time – might be disproportionate to the magnitude of any issue respecting the provision of wheelchair assistance, especially keeping in mind that there was no evidence to show that Mr. Robinson's problematic experience was typical or common. If the Agency was relying on evidence of a broader problem with wheelchair assistance at Air Canada gained through other files, that should have been made clear to Air Canada and it should have been provided an opportunity to respond. Air Canada was also deprived of the opportunity of making submissions on the jurisdiction of the Agency to impose the sorts of measures it imposed.

[64] While the Agency contends that it gave Air Canada the opportunity to "explain [...] how it proposes to remove the obstacle [...]; or demonstrate that it cannot remove the obstacle without experiencing undue hardship", this reliance on the Agency's generic formula is beside the point. Air Canada could not make meaningful remedial submissions without knowing what was at issue. It therefore replied by taking the position that the appropriate corrective measure was to issue a bulletin to its staff providing a reminder on the provision of wheelchair assistance, as the Agency had already ordered Air Canada to do in a recent, separate matter.

[65] The Agency often considers the issuance of a bulletin to be an appropriate remedy in cases where the obstacle arose from a failure to properly apply a carrier's existing and

satisfactory policy: see for example *Saghbini v. Air Canada*, Decision No. 30-AT-C-A-2018; *Akhtar v. Saudi Arabian Airlines*, Decision No. 78-AT-C-A-2019; *Pierre Bergeron v. WestJet*, Decision No. 40-AT-A-2019; *Lucin v. Air Transat*, Decision No. 24-AT-A-2019; see also *Iskander v. Royal Air Maroc*, Decision No. 21-AT-A-2021 where the corrective measure imposed essentially required the carrier to apply a newly adopted policy. Air Canada had every right to anticipate that, in the absence of more detail, this would have been the sort of remedy likely to be imposed.

[66] In order to respect Air Canada's procedural rights, the Agency should have proceeded in the following manner upon concluding that Air Canada's proposal to remove the obstacle through the issuance of reminder bulletin was inadequate: the Agency should have laid out the corrective measures it felt were required to remove the obstacle and asked for Air Canada to comment on them. The Agency's failure to do this breached the *audi alteram partem* rule as it prevented Air Canada from knowing the case it had to meet. It also likely breached Air Canada's legitimate expectations based on the Agency's past practice of indicating what corrective measures it might be considering, when this is not evident from the complaint or the proceedings.

[67] In light of this violation of procedural fairness, the Agency's decision cannot stand.

[68] As a result, I would remit the matter to the Agency for it to reconsider the appropriate remedy after providing Air Canada and Mr. Robinson the opportunity to make submissions in the manner discussed above.

[69] Given the foregoing, it is neither necessary nor appropriate for this Court to rule on the jurisdictional issue Air Canada has raised, as the Agency should first rule on it, after affording Air Canada and Mr. Robinson an opportunity to make submissions.

V. The Agency's Role in these Proceedings

[70] I cannot conclude without saying something about the nature of the submissions made by the Agency in this case.

[71] Subsection 41(4) of the CTA provides that "[t]he Agency is entitled to be heard by counsel or otherwise on the argument of an appeal". This sometimes may put the Agency in a difficult position, especially where, as here, no other party is actively contesting the appeal. The Agency may feel compelled to defend its own decision, but it is inappropriate for it to take an adversarial position or to embark on the merits in a way that would compromise its impartiality: see for example *Air Passengers Rights v. Canada (Attorney General)*, 2021 FCA 112 at para. 13, *Canada Pacific Railway* at para. 102. After all, the Agency may be called on to reconsider the matter (as is the case here) and to decide other matters involving the appellant in the future (as will undoubtedly be the case here as well).

[72] In the present appeal, the Agency's positions – and particularly some of those in its memorandum of fact and law – in my view crossed the line. It ought not have tried to defend against the procedural fairness allegations, other than by outlining its usual practice and procedure in similar cases, with reference to appropriate case law.

VI. Conclusion

[73] In light of the foregoing, I would allow this appeal, set aside the decision of the Agency and remit the matter to the Agency in order for it to reconsider its decision after allowing Air Canada to make submissions on the remedial and jurisdictional issues in the manner outlined above. While Mr. Robinson has not participated in the appeal, he should nonetheless be entitled to file a reply responding to Air Canada's new submissions should he wish to do so.

[74] I would make no order as to costs as none were sought by Air Canada.

"Mary J.L. Gleason"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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