Federal Court of Appeal | Cour d'appel fédérale

Date: 20250321

Docket: A-354-23

Citation: 2025 FCA 67

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

AIR CANADA

Appellant

and

TIMOTHY ROSE

Respondent

and

CANADIAN HUMAN RIGHTS COMMISSION,
COUNCIL OF CANADIANS WITH DISABILITIES and
CANADIAN ASSOCIATION OF THE DEAF

Interveners

Heard at Toronto, Ontario, on November 26, 2024.

Judgment delivered at Ottawa, Ontario, on March 21, 2025.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision (Decision 123-AT-A- 2023) of the Canadian Transportation Agency (the Agency) dated August 11, 2023 (the Final Decision). In the Final

Decision, the Agency ordered Air Canada to implement certain measures to accommodate persons with disabilities who use a power wheelchair and to specifically address certain matters in its accessibility plan under the *Accessible Canada Act*, S.C. 2019, c. 10 (the ACA).

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Mr. Rose has cerebral palsy. He uses a power wheelchair. In the summer of 2016, Mr. Rose wanted to fly from Toronto to Cleveland. However, the aircraft Air Canada used on this route could not accommodate his power wheelchair as it was too large to fit through the cargo area door. Air Canada informed him that there were no other flights that could accommodate him on this route.

[4] Mr. Rose filed an application with the Agency. Pleadings were opened on September 13, 2018. In the decision dated March 1, 2019 (LET-AT-A-28-2019), the Agency made the following findings:

> [22] … the Agency finds that Mr. Rose encountered an obstacle to his mobility because Air Canada exclusively assigns aircraft that cannot accommodate Mr. Rose's wheelchair on any of its flights between Toronto and Cleveland, thereby denying Mr. Rose access to this aspect of the federal transportation network.
>
> …
>
> [24] The Agency finds that Air Canada's decision to operate routes in its network that are only serviced by aircraft that cannot accommodate larger

> mobility aids that cannot be collapsed to a height of 31 or 32 inches or less creates an obstacle to the mobility of Mr. Rose and all persons who use mobility devices that cannot be carried on these aircraft.

[5] After finding that the use of only certain aircraft in particular routes by Air Canada creates an obstacle to the mobility of Mr. Rose and all persons who use mobility devices that cannot be carried on these aircraft, the next step in the proceeding was an oral hearing to determine whether these obstacles could be removed without Air Canada experiencing undue hardship.

[6] An oral hearing was held on December 2 and 3, 2019. At this hearing Air Canada provided evidence through various witnesses. Air Canada also provided certain undertakings (including responding to a request by the Agency to provide the number of spare aircraft in Air Canada's fleet that could accommodate mobility aids exceeding 31 inches in height when collapsed). Air Canada satisfied the undertakings and the parties submitted closing statements.

[7] As a result of the pandemic, the proceeding was suspended for a period of time in 2020. Following the period of suspension, Air Canada submitted a request to adduce new evidence of undue hardship and this request was granted. Mr. Rose was also given an opportunity to reply to Air Canada's new evidence.

[8] Following the filing of the new evidence and the additional submissions, the Agency issued its decision dated July 5, 2022 (LET-AT-A-25-2022) (the Show Cause Decision) in which it reviewed the evidence, considered the various accommodation options proposed by the parties and identified certain proposed corrective measures:

[184] Regarding the finding that Air Canada has not demonstrated that the *ad hoc* substitution of an aircraft on a transborder route to accommodate Mr. Rose, or any other person who uses a power wheelchair that cannot be collapsed to fit within the cargo door of the aircraft scheduled for the flight would not cause undue hardship, the Agency is of the preliminary opinion that, when provided with at least 10 business days' advance notice, Air Canada should take the following corrective measures:

(a) accommodate the passenger on the scheduled flight of their choosing;

(b) if this is not reasonably possible, accommodate the passenger on the day they wish to travel, at a time that reasonably compares to the time they wish to travel;

(c) if this is not reasonably possible, accommodate the passenger on the day before or the day after they wish to travel.

[185] Air Canada can choose what measures it will deploy to provide accommodation, but these should include, at a minimum, an attempt to find a similar flight or flights on a different but comparable route; to find a similar flight or flights with another carrier on the same route or on a different but comparable route; or to substitute an accessible aircraft on the chosen route where Air Canada cannot accommodate the passenger in any other reasonable way. If Air Canada chooses to provide accommodation through a flight or flights with another carrier, it is to pay for any price difference.

[186] Mr. Rose, or any other person who uses a power wheelchair that cannot be collapsed to fit within the cargo door of the aircraft scheduled for the flight, is expected to provide Air Canada with as much notice as possible, and a minimum of 10 business days, of his travel plans so that Air Canada has time to explore the accommodation alternatives. Should a passenger need to travel urgently and not be able to provide the minimum advance notice, Air Canada is expected to make its best effort to accommodate them.

[187] Further to its finding that Air Canada did not consider accessibility in its network planning, which has created an ongoing systemic obstacle in its transborder network for persons with disabilities who use larger mobility aids, the Agency is of the preliminary opinion that Air Canada should take the following corrective measure:

> (a) specifically address in its accessibility plan under the Accessible Canada Act, to be published no later than June 1, 2023, how it factors accessibility for persons with disabilities who use power wheelchairs into its:
>
> (i) acquisition of aircraft for its transborder network, either through lease or purchase;
>
> (ii) aircraft selection for its transborder routes; and
>
> (iii) design of its transborder services, including the selection of and contract negotiations with regional carriers.

[9] In paragraph 188 of the Show Cause Decision, Air Canada was directed to show cause why it should not be required to implement the proposed corrective measures as set out in the Show Cause Decision. Air Canada filed additional evidence and further submissions. In the Final Decision, the Agency considered the additional evidence and submissions, and found that Air Canada had not demonstrated that it would suffer undue hardship if the corrective measures proposed in the Show Cause Decision were implemented with some modifications to the advance notice period and deadline for addressing accessibility in its accessibility plan under the ACA.

[10] As a result, the Agency issued the following orders:

> [38] The Agency orders Air Canada to implement the following measures, and to confirm to the Agency's Director General, Determinations and Compliance, through the Agency's Secretariat, that its personnel have completed training on those measures, as soon as possible and no later than December 20, 2023:
>
> a) when provided with at least 21 calendar days' advance notice by Mr. Rose or any other person who uses a power wheelchair that cannot be collapsed to fit within the cargo

door of the aircraft scheduled for their flight, to transport the passenger, with their power wheelchair:

1. on the day they wish to travel, at a time that reasonably compares to the time they wish to travel;

2. if this is not reasonably possible, on the day before or the day after they wish to travel.

Air Canada can choose what measures it will deploy to provide accommodation, but these measures should include, at a minimum:

- to attempt to find a similar flight or flights on a different but comparable route within its network;

- to attempt to find a similar flight or flights with another carrier on the same route or on a different but comparable route; or

- to substitute an accessible aircraft on the chosen flight where Air Canada cannot accommodate the passenger in any other reasonable way.

If Air Canada chooses to provide accommodation through a flight or flights with another carrier, it must pay for any price difference.

When a person who uses a power wheelchair that cannot be collapsed to fit within the cargo door of the aircraft scheduled for the flight cannot provide the minimum advance notice, to make every reasonable effort to accommodate them, consistent with the *Accessible Transportation for Persons with Disabilities Regulations* for situations where any advance notice requirement is not met.

b) The Agency orders Air Canada to specifically address in the updated version of its accessibility plan under the ACA, to be published no later than June 1, 2026, how it factors accessibility for persons with disabilities who use power wheelchairs into its:

1. acquisition of aircraft for its transborder network, either through lease or purchase;

2. aircraft selection for its transborder routes; and

3. design of its transborder services, including the selection of and contract negotiations with regional carriers.

[11] In this appeal, the only measures in the Final Order that Air Canada is challenging are the last identified measure under paragraph a) "to substitute an accessible aircraft on the chosen flight where Air Canada cannot accommodate the passenger in any other reasonable way" and the requirement under paragraph b) to address in its updated accessibility plan under the ACA how, in relation to its transborder routes, it factors accessibility into its acquisition of aircraft, its aircraft selection and the design of its routes.

II. Issues and Standard of Review

[12] Subsection 41(1) of the *Canada Transportation Act*, S.C. 1996, c. 10, (the CTA) provides that leave to appeal a decision of the Agency to this Court must be obtained from this Court and restricts an appeal, where leave is granted, to questions of law or jurisdiction. Leave to appeal the Final Decision was granted by this Court.

[13] Air Canada, in its memorandum at paragraph 25, sets out three issues to be addressed in this appeal:

a) Whether the Agency erred in law by applying the incorrect analysis for what constitutes undue hardship in the Show Cause Decision and the [Final] Decision;

b) Whether the Agency erred in jurisdiction by violating procedural fairness in not reconsidering the impact of its reversed finding on the level of incident on its proper undue hardship analysis and not allowing Air Canada an opportunity to provide evidence and further explanation and context with respect to the evidence that the Agency desired from Air Canada; and

c) Whether the Agency erred in law and jurisdiction by making an order with respect to Air Canada's accessibility plan under the ACA.

[14] To the extent that Air Canada has raised any question of law or jurisdiction, the standard of review is correctness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 37).

III. Analysis

A. *Did the Agency Apply an Incorrect Analysis?*

[15] The first issue raised by Air Canada is whether the Agency applied an incorrect analysis to determine what constitutes undue hardship. Air Canada referred to both the Show Cause Decision and the Final Decision in its memorandum.

[16] Air Canada originally filed a notice of appeal that purported to appeal both the Show Cause Decision and the Final Decision. In the Direction issued by this Court on April 30, 2024, it was noted that Air Canada had only sought (and was only granted) leave to appeal the Final

Decision. Air Canada was invited to make submissions to address whether its notice of appeal should be removed, with leave to file a new notice of appeal.

[17] In the Order of this Court dated May 15, 2024, this Court refers to the acknowledgment by Air Canada that its appeal is limited to the Final Decision. The original notice of appeal was removed from the file and Air Canada was allowed to file a new notice of appeal for the Final Decision.

[18] In its memorandum, Air Canada:

(a) refers to the power of this Court "to vary the Show Cause Decision" (paragraph 29);

(b) includes a submission that "this is a proper case for this Court to vary the Show Cause Decision" (paragraph 39); and

(c) includes a request for an Order "varying the Show Cause Decision" (paragraph 71(a)).

[19] Air Canada's memorandum was filed before the Direction was issued by this Court noting that leave to appeal was not granted for the Show Cause Decision, but rather was only granted for the Final Decision. Air Canada did not amend its memorandum after it filed its new notice of appeal limiting its appeal to only the Final Decision. Air Canada confirmed during the hearing of this appeal that it was not challenging the Show Cause Decision.

[20] Since the Show Cause Decision is not under appeal, this Court does not have the power or authority to vary it.

[21] In paragraph 5 of the Show Cause Decision, the Agency noted that the Show Cause Decision "addresses whether Air Canada can remove these obstacles without undue hardship". The obstacles were those identified by the Agency in its decision dated March 1, 2019, as cited above in paragraph 4 of these reasons. The Agency then conducted its analysis, and in paragraph 182 set out certain proposed corrective measures. In paragraph 188, the Agency directed "Air Canada to show cause, by August 16, 2022, why it should not be required to implement the proposed corrective measures described above."

[22] The Final Decision sets out the Agency's analysis and conclusions addressing the additional evidence and submissions received from Air Canada following the Show Cause Decision.

[23] Air Canada's argument concerning the test applied by the Agency to determine if Air Canada would suffer undue hardship is essentially an argument that the Agency did not balance the interests of persons with power wheelchairs and the interests of Air Canada.

[24] Air Canada emphasized various references to the balancing of interests in the decision of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, 2007 SCC 15 (*VIA Rail*). In particular, in paragraphs 133, 136, 137 and 138 of *VIA Rail*, the majority of the Supreme Court of Canada stated:

[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* [*Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525], at p. 546, citing *Central Okanagan School District No. 23* [*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970)], at p. 984. 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.

…

[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*: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 46. 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.
>
> [Emphasis added by the Supreme Court.]

[25] The Supreme Court also noted in paragraph 139 that "[w]hat is 'practicable' within the meaning of s. 5(g)(ii) of the *Canada Transportation Act* is based on the evidence as to whether the accommodation of the disability results in an unreasonable burden on the party responsible for the barrier". Therefore, whether any particular accommodation would result in an unreasonable burden is a question of fact.

[26] In paragraph 34 of its memorandum, Air Canada submits:

> … the Agency fails to consider factors such as impact of an *ad hoc* substitution of an aircraft on overall safety and quality of service to all other passengers within Air Canada's network in its undue hardship analysis despite being provided evidence and submissions regarding these factors.

[27] It is far from clear what "impact … on overall safety … to all other passengers within Air Canada's network" should have been considered by the Agency. Air Canada, in its memorandum and in its oral submissions in this appeal, did not refer to any evidence to support a finding that overall safety to Air Canada's other passengers would be impacted if there was an *ad hoc* substitution of aircraft.

[28] In paragraph 35 of its memorandum, Air Canada refers to various factors that were considered by the Agency:

a) complexity arising from structural and logistical challenges to Air Canada's network from an *ad hoc* substitution of aircraft (including but not limited to the unavailability at the U.S. station (or airport) of ground equipment and trained personnel to service the replacement aircraft);

b) departure from optimal operations of a pure station (a spoke airport where one particular aircraft type is used for all flights in and out of that station to simplify its operations, control costs, ensure operational flexibility and help recuperate from irregular operations);

c) Air Canada's costs, its other passengers' inconvenience and expense; and

d) low level of incidence of obstacles on Air Canada's transborder routes (Mr. Rose being the only case in which a passenger with a mobility aid could not be accommodated by Air Canada on its transborder network).

[29] Although Air Canada stated, in paragraph 34 of its memorandum, that the Agency did not consider the "impact of an *ad hoc* substitution of an aircraft on overall … quality of service to all other passengers within Air Canada's network", in paragraph 35 c) of its memorandum, Air Canada acknowledged that the Agency did consider "Air Canada's … other passengers' inconvenience and expense". The inconvenience and expense of Air Canada's other passengers would be part of the "quality of service to all other passengers within Air Canada's network".

[30] Having acknowledged that the Agency did consider the factors identified in paragraph 35 of its memorandum, Air Canada submitted that the Agency erred by considering these factors individually and not collectively (paragraphs 36 and 38 of its memorandum).

[31] In paragraphs 158 to 166 of the Show Cause Decision, the Agency addressed the evidence related to the substitution of an aircraft and the various issues that would arise if an aircraft were substituted. These paragraphs demonstrate that the Agency did consider the

arguments of Air Canada concerning whether the substitution of an aircraft would result in Air Canada suffering undue hardship. However, the Agency concluded, based on the evidence presented by Air Canada including its own admissions that it regularly substitutes aircraft on little or no notice, that Air Canada had failed to establish that it would suffer undue hardship if Mr. Rose (or any other person who uses a power wheelchair that cannot fit through the cargo door of the aircraft scheduled for a particular flight) were to provide Air Canada with advance notice of their travel plans and the substitution of the aircraft was the only means by which that person could be accommodated.

[32] In paragraph 166 of the Show Cause Decision, the Agency noted:

> … in order to establish that the incremental financial cost to accommodate Mr. Rose would result in undue hardship, Air Canada must provide objective, real and quantifiable evidence that demonstrates that the new costs incurred by substituting an aircraft on an *ad hoc* basis would be so significant that the impact would create undue hardship. Air Canada has not provided this type of evidence.

[33] Since the Agency, in the Show Cause Decision, directed Air Canada to show cause why it should not be required to implement the Agency's proposed corrective measures, Air Canada submitted additional evidence, including a schedule showing the cost of substituting an aircraft that could accommodate Mr. Rose's wheelchair. The cost information that was submitted is confidential.

[34] In paragraphs 12 to 17 of the Final Decision, the Agency set out Air Canada's arguments with respect to why substituting an aircraft would result in undue hardship. In paragraph 24 of the Final Decision, the Agency stated:

> Air Canada presents numerous factors, considerations and impediments that it claims would make *ad hoc* aircraft substitution to accommodate a disability unfeasible. However, it does not explain how or why the factors presented as impediments to *ad hoc* aircraft substitution for disability-related accommodation do not prevent it from deploying spare aircraft in response to irregular operations, which it does on a daily basis. Similarly, because Air Canada regularly substitutes aircraft in the case of irregular operations, it is unlikely that doing so to accommodate a person with a disability would have a significant impact on the rights of other passengers or Air Canada's ability to provide customer service. Air Canada has not demonstrated that this would be the case.

[35] The Agency considered the evidence presented by Air Canada and concluded, based on this evidence, that Air Canada did not establish that it would suffer undue hardship if it had to substitute an aircraft. There is no merit to Air Canada's argument that the Agency considered the factors individually and not collectively. Air Canada is essentially arguing that, based on the evidence presented, the Agency should not have ordered, as the final alternative accommodation, the substitution of "an accessible aircraft on the chosen flight where Air Canada cannot accommodate the passenger in any other reasonable way". However, whether this final accommodation measure would result in undue hardship to Air Canada is a question of fact or mixed fact and law which cannot be the subject of an appeal to this Court. There is no basis to find that the Agency erred in law by applying an incorrect analysis.

[36] Air Canada, in its reply submissions, argued that the Agency should have redone the undue hardship analysis in the Final Decision as a result of the additional evidence submitted by Air Canada. Air Canada did not point to any legal error committed by the Agency in not redoing the analysis. Rather, Air Canada simply referred to the large volume of additional evidence it had submitted.

[37] The Agency, in the Show Cause Decision, had directed Air Canada to show cause why the proposed corrective measures should not be implemented. Absent any legal error (and none was identified by Air Canada), whether the additional evidence was sufficiently different from the evidence that had been previously submitted such that a *de novo* review of the undue hardship analysis was warranted in rendering the Final Decision, is a question of fact (or mixed fact and law) and, therefore, cannot be considered in this appeal.

B. *Procedural Fairness*

[38] Air Canada alleges that there were breaches of procedural fairness as a result of the Agency:

(a) expressing different views on the level of incidence of a person with a disability who uses a power wheelchair encountering an obstacle;

(b) not reconsidering section 44 of the *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244 (the ATPDR) in its Final Decision; and

(c) "shifting the goalposts" with respect to the financial information that Air Canada had to provide to establish undue hardship.

(1) Level of Incidence

[39] The first alleged breach is related to the Agency's finding in the Show Cause Decision that:

> [173] In this case, Air Canada argues that the incidence is so low (only Mr. Rose) that it should not be required to accommodate him at all. It implies that if there were greater demand for this accommodation, it might respond through its planning, but that to require it to accommodate only Mr. Rose would be disproportionate and constitute undue hardship.
>
> [174] In response to these submissions, the Agency finds that:
>
> (a) incidence is unreliable when service is inaccessible because persons with disabilities, once they are aware of the inaccessibility, may simply stop requesting accommodation, leaving the false perception that there is no need or demand for that accommodation. In particular, no system for tracking refusal to transport would capture a person who decides that, based on the size of the aircraft cargo doors published on the website, they cannot travel with Air Canada;
>
> (b) although Air Canada argues that Mr. Rose is the only person who could not be accommodated on its inaccessible transborder routes due to the size of the cargo doors of its aircraft, the IWG Final Report indicates that most adult power mobility aids have seat backs that are taller than 31 inches, the most constrained clearance height for cargo stowage areas in Air Canada's aircraft. The Agency therefore concludes that there are likely other persons with disabilities who are unable to travel on these routes because of the size of their power wheelchairs;
>
> (c) the fact that few people require a particular accommodation does not lessen the carrier's burden under human rights law to accommodate them to the point of undue hardship; and
>
> (d) incidence may be relevant to, but is not determinative of, undueness. It is not necessary to demonstrate any particular level of incidence to establish Mr. Rose's entitlement to accommodation.
>
> [Emphasis added.]

[40] Air Canada contrasted these statements with the following statement in paragraph 28 of the Final Decision:

> … While the Agency concluded in the Show Cause decision that there are likely other persons with disabilities who are unable to travel on the regularly scheduled aircraft for these routes due to the size of their power wheelchairs, the Agency is satisfied that, in light of the totality of Air Canada's evidence, Mr. Rose's situation is rare, and that, in most cases, Air Canada is able to accommodate passengers through alternate itineraries, as foreseen by the range of measures identified by the Agency.

[41] Stating that "Mr. Rose's situation is rare" in paragraph 28 of the Final Decision versus stating "there are likely other persons with disabilities who are unable to travel on these routes" and "the fact that few people require a particular accommodation" in the Show Cause Decision does not give rise to a breach of procedural fairness. The only evidence concerning the number of persons affected by the small cargo doors in certain aircraft was provided by Air Canada. There is no basis to conclude that Air Canada was somehow unable to present its case fully and fairly or that the decision was not made in a fair, impartial and open process as a result of the Agency first speculating that there may have been a few other individuals who were affected and later acknowledging that Mr. Rose's situation is rare.

[42] As well, the finding of the level of incidence in the Final Decision was made in the context of whether Air Canada had established that the proposed final alternate corrective measure (the substitution of an aircraft) would result in undue hardship to Air Canada. Since the Agency reduced the level of incidence from a "few people" to "rare", it would be less likely that a substitution of aircraft would result in undue hardship to Air Canada than if the number of incidences where this alternative corrective measure would be required was greater. Since the level of incidence is rare, the additional costs of substituting an aircraft (as identified by Air Canada in its confidential schedule) would only rarely be incurred. There was no breach of

procedural fairness arising from the Agency finding in the Final Decision that the level of incidence was lower than it had previously indicated.

(2) Section 44 of the ATPDR

[43] Air Canada also submitted, as part of its procedural fairness argument, that the Agency should have reconsidered section 44 of the ATPDR in its Final Decision.

[44] Section 44 of the ATPDR provides as follows:

An air carrier may refuse to transport a person's mobility aid if	Le transporteur aérien peut refuser de transporter l'aide à la mobilité si, selon le cas :
(*a*) the size of the door to the aircraft's baggage compartment or the size of the aircraft's baggage compartment is not large enough to accommodate the mobility aid;	*a*) la taille de la porte de la soute à bagages ou la taille de la soute à bagages de l'aéronef n'est pas assez large pour permettre le transport de l'aide à la mobilité;
(*b*) it would jeopardize aircraft airworthiness; or	*b*) la navigabilité de l'aéronef serait mise en danger;
(*c*) the weight or size of the mobility aid exceeds the capacity of the lift or ramp.	*c*) le poids ou la taille de l'aide à la mobilité dépasse la capacité de la plateforme élévatrice ou de la rampe.

[45] Section 2 of the ATPDR stipulates that nothing in the ATPDR limits a duty to accommodate:

For greater certainty, nothing in these Regulations is to be construed as	Il est entendu que le présent règlement n'a pas pour effet :

(*a*) limiting the duty to accommodate under the *Canadian Human Rights Act* or any other Act of Parliament; or	*a*) de restreindre quelque obligation d'adaptation sous le régime de la *Loi canadienne sur les droits de la personne* ou d'autres lois fédérales;
(*b*) requiring any person to do anything that jeopardizes security, public health or public safety.	*b*) d'obliger quiconque à faire quelque chose qui mettrait en danger la sûreté, la santé ou la sécurité publiques.

[46] In a decision dated October 18, 2019 (LET-AT-A-75-2019), the Agency responded to a request by Air Canada to dismiss or stay the proceedings commenced by Mr. Rose. In paragraph 7 of this decision, the Agency sets out Air Canada's argument:

> Air Canada filed its request on the grounds of mootness, arguing that once the *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244 (Regulations) come into force on June 25, 2020, the carrier will no longer be required to establish undue hardship in the matter of its refusal to transport the applicant's mobility aid if the mobility aid does not fit through the aircraft's baggage compartment door.

[47] The Agency referred to section 44 of the ATPDR in paragraph 17 of the October 18, 2019 decision:

> [17] The Agency notes that section 44 of the Regulations, which comes into force on June 25, 2020, provides a defence to a carrier in an individual complaint regarding a refusal to transport; however, this proceeding is considering systemic obstacles arising from Air Canada's aircraft allocation practices. The Agency's finding in the Decision on the obstacle refers to a system-wide failure in Air Canada's accommodation of *many* persons with disabilities who use larger mobility aids on *multiple* transborder routes.
>
> [Emphasis added by the Agency.]

[48] These comments concerning section 44 of the ATPDR were made in the context of the request made by Air Canada to dismiss or stay the proceedings. The Agency, at the end of paragraph 17 referred to above, concluded:

> The Agency, therefore, finds that consideration of the subject matters laid out in the Terms of Reference in order to determine whether Air Canada can remove the obstacles without undue hardship remains salient, satisfying the first part of the *Borowski* test.

[49] Air Canada, in paragraph 4 of its Reply to the memorandum filed by the Canadian Human Rights Commission, conceded that section 44 of the ATPDR does not "handcuff" the Agency. Rather, Air Canada submitted that the Agency ought to have reconsidered this provision in light of its finding in the Final Decision that the level of incidence is rare.

[50] Since the only issue decided in the Final Decision was whether Air Canada had established that the proposed corrective measures (as set out in the Show Cause Decision) would result in undue hardship, in my view the Agency did not err in law by not reconsidering a provision (section 44 of the ATPDR) that is not to be construed as limiting a duty to accommodate. Not reconsidering section 44 of the ATPDR in the Final Decision did not result in a violation of procedural fairness as alleged by Air Canada.

(3) Did the Agency "Shift the Goalposts"?

[51] Air Canada argues that the Agency "shift[ed] the goalposts" in relation to the financial information that would be sufficient for Air Canada to establish undue hardship, resulting in a breach of procedural fairness.

[52] Air Canada notes that the Agency, in its letter dated June 20, 2019 (LET-AT-A-46-2019), set out the terms of reference for the oral hearing to determine if Air Canada could remove the obstacles to Mr. Rose's mobility identified by the Agency in its decision dated March 1, 2019 (LET-AT-A-28-2019) (noted above in paragraph 4 of these reasons). The terms of reference do not specifically identify financial costs.

[53] As noted above, in paragraph 166 of the Show Cause Decision, the Agency commented on the lack of financial information submitted by Air Canada:

> … in order to establish that the incremental financial cost to accommodate Mr. Rose would result in undue hardship, Air Canada must provide objective, real and quantifiable evidence that demonstrates that the new costs incurred by substituting an aircraft on an *ad hoc* basis would be so significant that the impact would create undue hardship. Air Canada has not provided this type of evidence.

[54] Air Canada was given an opportunity to submit financial information following the Show Cause Decision and Air Canada did so. It provided, on a confidential basis, a schedule showing the additional costs it would incur if it substituted various aircraft on the Toronto-Cleveland-Toronto route (the particular route that Mr. Rose wanted to take in 2016 but was unable to do so).

[55] The Agency, however, in the Final Decision, found that this incremental cost analysis was not sufficient to establish undue hardship:

> [27] In the Affidavit, Air Canada provides confidential evidence of the costs of substituting the CRJ-200 aircraft with an accessible aircraft on the Toronto-Cleveland route. Incremental financial costs may demonstrate that an accommodation is not feasible, if the evidence shows that the new costs would be so significant that the impact would create undue hardship. In this case, Air Canada has not provided sufficient context to allow the Agency to evaluate whether the documented costs represent a significant or prohibitive incremental cost in comparison with the cost of *ad hoc* aircraft substitution in cases of irregular operations, or Air Canada's overall operating budget and financial standing. Without compelling evidence of economic impediments that could substantially affect the viability of Air Canada or its ability to absorb the incremental costs, the Agency finds that there is no reasonable basis for it to determine that the *ad hoc* substitution of an accessible aircraft would result in undue hardship.

[56] With respect to what financial evidence is relevant, the Supreme Court in *VIA Rail* confirmed that the size of the expenditure and the size of the enterprise are relevant factors to be considered:

> [131] Since the Governor in Council has not prescribed standards for assessing undue hardship as authorized by s. 15(3) of the *Canadian Human Rights Act*, assessing whether the estimated cost of remedying a discriminatory physical barrier will cause undue hardship falls to be determined on the facts of each case and the guiding principles that emerge from the jurisprudence. A service provider's refusal to spend a small proportion of the total funds available to it in order to remedy a barrier to access will tend to undermine a claim of undue hardship (*Eldridge* [*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624], at para. 87). The size of a service provider's enterprise and the economic conditions confronting it are relevant (*Chambly*, at p. 546). Substantial interference with a service provider's business enterprise may constitute undue hardship, but some interference is an acceptable price to be paid for the realization of human rights (*Central Okanagan School District No. 23*, at p. 984).
>
> [Emphasis added.]

[57] The Agency did not “shift the goalposts”. Rather, the “goalposts” were set by the Supreme Court.

[58] The Agency noted, in the Show Cause Decision, that Air Canada had not provided “objective, real and quantifiable evidence that demonstrates that the new costs incurred by substituting an aircraft on an *ad hoc* basis would be so significant that the impact would create undue hardship”. The onus was on Air Canada to determine what information would be required and to submit the necessary information. The Agency was following the decision of the Supreme Court in *VIA Rail* in confirming that the size of Air Canada’s enterprise and the impact that the incremental costs of an *ad hoc* substitution of aircraft would have on Air Canada are relevant factors. The Agency did not “shift the goalposts” with respect to the required financial information. Air Canada did not establish any breach of procedural fairness in this respect.

C. *Air Canada’s Accessibility Plan Under the ACA*

[59] Air Canada argued that the Agency exceeded its jurisdiction by ordering:

> Air Canada to specifically address in the updated version of its accessibility plan under the ACA, to be published no later than June 1, 2026, how it factors accessibility for persons with disabilities who use power wheelchairs into its:
>
> 1. acquisition of aircraft for its transborder network, either through lease or purchase;
> 2. aircraft selection for its transborder routes; and
> 3. design of its transborder services, including the selection of and contract negotiations with regional carriers.

[60] The Agency did not order Air Canada to adopt any particular strategy or plan in relation to the acquisition of aircraft, the selection of aircraft for its transborder routes or the design of its transborder services. Rather, it left the specific details to Air Canada.

[61] The Agency has general remedial powers under paragraph 172(2)(*a*) of the CTA:

(2) On determining that there is an undue barrier to the mobility of persons with disabilities, the Agency may do one or more of the following:	(2) En cas de décision positive, l'Office peut exiger :
(*a*) require the taking of appropriate corrective measures;	*a*) la prise de mesures correctives indiquées;
…	[…]

[62] In this case, the Agency found that there was an undue barrier to the mobility of persons who use power wheelchairs who want to take certain transborder flights. Since the Agency could require the taking of appropriate corrective measures (subject to Air Canada establishing that such corrective measures would result in undue hardship), there is no basis to find that the Agency could not require Air Canada to identify what appropriate corrective measures it will implement.

[63] Air Canada is simply being ordered to specifically address in its accessibility plan how it will factor accessibility for persons with disabilities who use power wheelchairs into its acquisition and selection of aircraft for its transborder network and its design of transborder services. In addressing how it will factor accessibility for persons with disabilities who use

power wheelchairs into these various decisions, Air Canada will presumably indicate what steps it will take or decisions it will make that will not result in undue hardship to Air Canada.

[64] The Agency did not exceed its jurisdiction by ordering Air Canada to address how it factors accessibility for persons with disabilities who use power wheelchairs into its acquisition of aircraft, its selection of aircraft for transborder routes or the design of its transborder services. How it will actually factor this into its operation will be determined by Air Canada.

IV. Conclusion

[65] As a result, I would dismiss this appeal with costs to Mr. Rose. As noted in the various orders granting leave to the Interveners to intervene, no costs are to be awarded to the Interveners. As well, as noted in the Order addressing the manner in which the Agency should exercise its statutory right to be heard, no costs are to be awarded to the Agency.

"Wyman W. Webb"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-354-23
STYLE OF CAUSE:	AIR CANADA v. TIMOTHY ROSE *et al.*
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 26, 2024
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. LASKIN J.A.
DATED:	MARCH 21, 2025

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