

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

BETWEEN:

EDDY MORTEN

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

AIR CANADA

Respondent

DECISION

PANEL: J. Grant Sinclair
Kerry-Lynne D. Findlay, Q.C.
Wallace Gilby Craig

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I. INTRODUCTION

[1] Eddie Morten is the complainant in this case. He is in his mid-forties and very fit. Mr. Morten is profoundly deaf and blind in his left eye. He has very limited vision in his right eye.

[2] In August 2004, he booked a flight on Air Canada through his travel agent, to fly from Vancouver on September 29 to San Francisco return. His travel agent told the Air Canada reservations agent that Mr. Morten was deaf/blind and that he wanted to travel unaccompanied. Air Canada told his travel agent that he could not travel alone and would need an attendant to travel with him.

[3] Mr. Morten filed a complaint with the Canadian Human Rights Commission on September 19, 2005, alleging that Air Canada has discriminated against him because of his disability. He claims that by requiring that he travel with an attendant, Air Canada has singled him out and treated him adversely because of his disability. In this respect, he alleges that Air Canada has contravened s. 5 of the *Canadian Human Rights Act (CHRA)*.

[4] Earlier in February 2005, Mr. Morten had filed a complaint with the Canadian Transport Agency (CTA) that Air Canada's requirement that he travel with an attendant was an undue obstacle to his mobility (s. 172, *Canada Transportation Act*).

[5] The CTA decided that it was not an undue obstacle and dismissed his complaint. Sometime after this, Air Canada later filed a motion with the Tribunal on August 7, 2007, asking that the Tribunal permanently stay the hearing of Mr. Morten's human rights complaint on the basis that the CTA decision was *res judicata*. The Tribunal dismissed the motion.

II. DECISION

[6] We have concluded that Mr. Morten has established a *prima facie* case of discrimination against Air Canada. Air Canada has not met its obligation under s. 15(1)(g) of the *CHRA* to accommodate him to the point of undue hardship. Mr. Morten's complaint is substantiated.

[7] This decision has two parts, Part One - Discriminatory Practice and Part Two - Remedy.

III. PART ONE - DISCRIMINATORY PRACTICE

A. Mr. Morten's Medical Diagnosis

[8] Two medical experts, Dr. Arthur Pratt and Dr. Jon Waisberg, both specialists in ophthalmology, testified as to Mr. Morten's condition. They both agree that Mr. Morten has what is known medically as Ushers Syndrome.

[9] Dr. Arthur Pratt is Mr. Morten's treating ophthalmologist. He first consulted with Mr. Morten in May 2003 and last saw him in January 2008. He noted that people with Ushers Syndrome very often have retinitis pigmentosa, which is the case with Mr. Morten. Retinitis pigmentosa is a progressive, untreatable deterioration in the retina of the eye and it affects visual acuity. It is an inherited condition that generally manifests in adolescence and progresses to total blindness over a period of decades.

[10] Dr. Pratt's assessment of Mr. Morten is that he is completely blind in his left eye, i.e., has no light perception. In his right eye, he has some but severely limited central vision. His visual field is significantly constricted and he has no dark adaptation.

[11] Dark adaptation is the ability to adapt from a bright light environment to a dark environment. Initially it is difficult to see but very quickly, vision will return in that darkened environment. Those with Usher's Syndrome can not make that adaptation.

[12] Dr. Pratt noted that Mr. Morten also has nystagmus. Nystagmus is an ophthalmic condition where the patient develops involuntary oscillatory movement of one or both eyes, with the inability to fix on a specific object. It can happen at various frequencies and amplitudes. The result is that it further compromises visual acuity because the object is constantly moving. It can also affect balance and coordination.

[13] Persons who suffer from nystagmus often have increased amplitude of oscillation in stressful situations. In a normal or a non-stressful situation, often times patients can adapt by finding a specific head posture where the nystagmus can be significantly reduced.

[14] Dr. Waisberg did not do a clinical examination of Mr. Morten, but reviewed his medical records obtained from Dr. Pratt. His review of Mr. Morten's recent medical records indicates that he has advanced retinitis pigmentosa and nystagmus. His visual acuity at the present time is in the range of about 20/700 and his visual field of peripheral vision is severely restricted, probably in the range of 10 to 15 degrees.

[15] In comparison, the standard for legally blind is where the best eye has a visual acuity of 20/200 and the visual field is at least 20 degrees. These measurements compare the vision of the tested person to the standard of normal vision. This standard of 20/200 means the tested person can see at 20 feet what a normal visioned person can see at 200 feet.

[16] Dr. Waisberg summarized Mr. Morten's condition as:

- loss of vision and vision field in his left eye;
- limited vision in right eye;
- markedly restricted visual field in right eye;
- Nystagmus which further compromises visual acuity in his right eye.

B. Mr. Morten's Independent Lifestyle

[17] Mr. Morten's vision began to worsen when he was approaching his teen-age years. His first experience of flying was at age 13 when he travelled from his home in British Columbia to attend the Ross McDonald School for the Blind in Brantford, Ontario. He attended this school from age 13 to 20 when he returned home.

[18] While at this school, he was very active athletically as a member of the track and field and wrestling teams, often competing with other area high schools.

[19] When he returned home, he attended community college and travelled back and forth independently from his home to the college. He continued to be involved in wrestling and also later moved on to judo. He trained with the wrestling and judo teams at the University of British Columbia and Simon Fraser University.

[20] From 1987 to 1995, he worked full-time in Vancouver. He would travel from his home in Burnaby on the sky train. And he would also travel to his judo training sessions by bus and sky train.

[21] Mr. Morten said that he has always had some vision in his right eye but, around the age of 32, he noticed that he was having more difficulty seeing and reading.

[22] He decided to learn Braille, which he did. He also applied for and was approved for a guide dog by Canine of Canada, an organization that trains guide dogs. He now has a guide dog, Harmony, who accompanies him when he travels independently outside his home.

[23] Mr. Morten travels from his home to various destinations in the Vancouver area accompanied by Harmony. He says that when he is using cross walks or the traffic lights to cross the street, if the sun is in front and there is a glare on the traffic lights, he is not able to see them. What he does is watch the flow of traffic and waits until the traffic stops. He checks both sides,

makes sure it is clear, and with Harmony he walks across the street. He says that he can see the shape of the buildings.

[24] In terms of his family, Mr. Morten has two sons, aged eight and eleven. They are both hearing. He has taught them American sign language (ASL) so that he can communicate with them.

[25] Mr. Morten said that he has responsibility for his sons and is engaged in a full parenting role with them. He does not depend on his sons for anything. Like any other parent, he takes them to various activities such as bowling, mini golf and swimming.

[26] Mr. Morten uses a computer with two different programs, one that converts text to Braille. The other program is called Zoom Text, which amplifies the text. It is like a large print screen.

[27] He uses the arrow keys on the computer to navigate around the screen and is able to read the text with the larger font sizes. But because he wants to retain his vision, he converts most things to Braille if it is a longer document. If it is a short document, then he uses Zoom Text.

[28] Mr. Morten spoke of other methods that he uses to communicate when travelling outside his home. For quick communication when necessary, Mr. Morten would demonstrate to the person that he would like them to spell the words in block letters on his palm as if they were writing them. They seem to understand very quickly how to communicate with him.

[29] Mr. Morten travels with his backpack which has a large button indicating that he is deaf/blind. For example, if he is travelling on the sky train and is about to get off the train, a security officer may approach him thinking that he is not sure where he is. He said that they would tap him on the shoulder and put his hand on their shoulder badge. By this he could identify them as a security officer, and know that they work for sky train. He would let them know that he is not lost by writing O K on their hand.

[30] Another example of Mr. Morten's moving about independently is the procedures he has developed to travel by taxi. He communicates with the taxi company using the TTY system whereby he types the message to a hearing operator who relays this to the taxi company and then back to him.

[31] When he phones the taxi company, he explains that he is deaf/blind and he has a guide dog, so that the driver will know. He prepares a card on which he has written his destination address. He shows this to the taxi driver.

[32] When he arrives at his destination, Mr. Morten asks the driver to write the amount of the fare on his palm. He then pays the taxi driver that amount.

C. Mr. Morten and Air Canada's Requirement to Fly with an Attendant

[33] The events leading to Air Canada's decision that Mr. Morten could only fly with an attendant are recorded in his "Passenger Name Record" (PNR). The PNR records all the relevant information relating to a person's travel itinerary which is created when a reservation is made to travel on Air Canada.

[34] Mr. Morten's travel agent made his reservation on August 12, 2004. On August 17, 2004, his travel agent advised the reservation agent that he was deaf/blind and wanted to travel alone. His PNR records that the reservation agent advised that he could not travel alone. He would need an attendant and Air Canada could offer a discounted fare.

[35] The PNR records that the decision to deny Mr. Morten the ability to travel without an attendant was made by the reservation agent together with the Air Canada Meda desk who verified and confirmed the decision.

[36] The Meda desk is part of Air Canada's reservations department. They receive information from the passenger and from his/her medical provider relating to their special needs/disability as it may affect their ability to fly.

[37] The persons who work on the Meda desk are not medically trained. It is Air Canada's Occupational Health Services department (OHS) who reviews the medical information and determines whether the passenger can fly on Air Canada with or without conditions. The OHS is staffed by licensed physicians, occupational health nurses and medical officer assistants.

[38] Dr. Edward Bekeris is the Acting Senior Director of Occupational Health Services and Chief Medical Officer at Air Canada. He described the procedure used by the OHS in determining the fitness to fly of a person with a disability.

[39] The primary source of medical information is the "Fitness for Air Travel" (FFT) form which the Meda desk sends to the passenger's attending physician. The FFT form asks for information about the general health of the passenger, diagnosis, prognosis for the trip, any medical information that is relevant to the environment of air travel. If the information initially provided is not sufficient for this purpose, this process may involve the back and forth exchange of information with the passenger's medical advisor and the OHS.

[40] The possible outcomes of an assessment once all the information has been gathered are three: suitable for travel, unsuitable for air travel or suitable to travel but with conditions such as an attendant. It may happen that the assessment of fitness by Air Canada's OHS differs from that of the personal physician. If so, OHS attempts to reconcile any difference. If it's still not possible to resolve the difference, then the decision regarding suitability, non-suitability or suitability with conditions, is made by OHS.

[41] Dr. Bekeris said that OHS, in determining fitness for travel applies the criterion of self-reliance as it relates to travel by air. This involves considerations of cognitive functioning, communication and mobility.

[42] What is required for mobility to support a finding of self-reliance is whether an individual would be able to act on emergency instructions if there were a requirement for an emergency evacuation or sudden, rapid decompression of the aircraft cabin.

[43] The conditions that would give rise to concerns about mobility would be any impairment that precludes an individual from ambulating/walking. These may be chronic neurological problems or acute injuries that affect ambulation.

[44] If the result of an assessment was that the passenger was not self-reliant with respect to mobility, the likely outcome would be at least a condition of travel that the individual travel with an attendant.

[45] In a situation where the person is an elderly and ambulatory but only with a walker, they would be considered self-reliant. If there was an emergency evacuation, Dr. Bekeris said the possibilities would be to either present that individual with their walker or their mobility aid, or in the alternative, assist them with standing and walking. It would all depend if there was opportunity to do that. They may ask an able-bodied passenger to assist such a person at the time of evacuation.

[46] Or, Dr. Bekeris said, such a person conceivably could ambulate without assistance by supporting themselves with adjacent things such as seats, as an example.

[47] The other aspect of self-reliance and non self-reliance is cognitive including communication. The test of self-reliance that he applies is the ability of an individual to be able to receive and understand safety information in an emergency evacuation or a sudden or rapid cabin depressurization.

[48] Dr. Bekeris said they would be considered non self-reliant if they lacked one of those two abilities, either to receive or to assimilate/understand safety instructions. If on assessment, the individual was not able to make visual or auditory contact with the cabin crew sufficient to allow the communication of safety briefings in an emergency situation, that an individual would be considered non self-reliant for airline travel.

[49] Mr. Morten's PNR shows that on August 19, 2004, the Meda desk advised Mr. Morten's travel agent that Air Canada's policy requiring an attendant in his case is set out in Air Canada's

CIC 57/8 – Meda Desk – Impaired – Vision – Hearing. CIC 57/8 is part of the reservation system and is used as a reference tool by the reservation agents.

[50] CIC 57/8 deals with two types of passengers, those who are hearing impaired and those with vision impairments. They are considered to be self-reliant. CIC 57/8 does not deal with safety issues. There are no criteria in this document for deciding when a deaf/blind person requires an attendant.

[51] Air Canada agrees that the proper procedure was not followed in Mr. Morten's case. It was not for the reservations department or the Meda desk to decide that Mr. Morten required an attendant to fly on Air Canada. The appropriate procedure was that the reservation should have been referred to the Meda desk, an FFT to be sent and when completed, sent to the OHS for assessment.

[52] Mr. Morten's PNR records that on September 10, 2004, a friend called the Meda desk and provided contact information for Mr. Morten's family doctor, Dr. Marvin Lemke.

[53] OHS faxed a FFT form to Dr. Lemke on September 14, 2004. He completed the FFT on September 16 but did not fax it back to Air Canada until September 29, 2004.

[54] In the completed FFT, Dr. Lemke indicated that Mr. Morten "is fully independent – uses communication assist devices and a seeing-eye dog". He also indicated that Mr. Morten has "Usher's syndrome – deaf/mute and reduced vision since birth".

[55] Dr. Bekeris did not receive Dr. Lemke's completed FFT. But, he said, in this case he would have asked for more information from Dr. Lemke to assess Mr. Morten's functioning in air travel.

D. *Prima Facie* Case

[56] Has Mr. Morten made out a *prima facie* case of discrimination under s. 5 of the *CHRA*? The answer is yes and Air Canada concedes this.

[57] The evidence is clear that Air Canada imposed on Mr. Morten, as a condition of providing service, the requirement that he travel with an attendant. This requirement was not imposed on other passengers able-bodied or otherwise disabled. Its imposition was directly related to Mr. Morten's disability. It was adverse in that it affected his freedom to travel and increased his cost of travelling.

E. Has Air Canada Shown a *Bona Fide* Justification - s. 15(1)(g) of the *CHRA*?

[58] To determine whether the *prima facie* discriminatory practice (adverse differentiation) has a *bona fide* justification, it is necessary to identify the standard that Air Canada applied to Mr. Morten when he sought to travel with Air Canada which has been found to be *prima facie* discriminatory.

[59] It is clear that the standard applied was "a deaf/blind person can not fly on Air Canada without an attendant". Mr. Morten's PNR shows an entry indicating "Air Canada policy is that we will not allow him to travel alone..."

[60] What now must be determined for the purposes of s. 15(1)(g) is:

- (i) Whether the purpose or goal for which the standard was adopted is rationally connected to the function being performed – carriage by air;
- (ii) Whether the standard was adopted in the good faith belief that it was necessary for the fulfillment of the purpose or goal – passenger safety. (see *B.C. Superintendent of Motor Vehicle v. B.C. (Council of Human Rights)* [1999] 3 S.C.R. 868 at paras. 20, 25-26 ("*Grismer*"); *B.C. (Public Service Employee Relations*

Commission v. B.C. Government & Services Employee Union [1999] 3 S.C.R. 3 at para. 54 (“*Meiorin*”). Clearly the answer to these two questions is yes.

F. Has Air Canada Established that Accommodation of Mr. Morten’s Needs Would be Undue Hardship?

[61] Section 15(2) of the *CHRA* further stipulates that for the discriminatory practice to be a *bona fide* justification, Air Canada must establish that the accommodation of Mr. Morten’s request to travel alone would have imposed undue hardship on Air Canada, considering health, safety and cost.

[62] To establish this, Air Canada has the burden of demonstrating that its standard incorporates every possible accommodation to the point of undue hardship. The standard imposed on Mr. Morten, a blanket requirement that deaf/blind must fly with an attendant, creates the arbitrary category of deaf/blind without allowing for the possibility of differing degrees of visual and auditory impairment.

[63] This standard does not require individual assessment. On its own evidence, Air Canada acknowledges that individual assessment, which was not permitted by the standard applied to Mr. Morten and not offered to him, is not impossible. On the contrary, according to Dr. Bekeris, individual assessment in cases of a disability is the procedure that Air Canada’s medical staff uses to determine fitness to fly.

[64] The evidence does make it clear that the standard imposed on Mr. Morten when he bought his ticket and the absence of any individualized assessment at that time, does not represent every possible accommodation available to Air Canada short of undue hardship.

[65] Therefore, Air Canada’s *prima facie* discriminatory differentiation under s. 5 of the *CHRA* can not be considered to have a *bona fide* justification. Because the *prima facie* case has not been satisfactorily answered, Mr. Morten’s complaint is substantiated.

IV. PART TWO - REMEDY

A. The Positions of the Parties

[66] Under s. 53(2)(a) of the *CHRT*, where the Tribunal finds that the complaint has been substantiated, it can order that the respondent cease the discriminatory practice and take measures in consultation with the Commission to redress the practice or to prevent the same from happening in the future.

[67] The Commission seeks an order that Air Canada cease applying its present policy that requires a deaf/blind person to travel with an attendant and allow Mr. Morten to travel on Air Canada without an attendant.

[68] The Commission also asks for a monetary award for hurt feelings and special compensation for Mr. Morten and that designated employees of Air Canada receive sensitivity training.

[69] Mr. Morten asks that he be allowed to travel independently with Air Canada and that he receive compensation for hurt feelings as a result of the discriminatory practice. He also requests that the Air Canada staff be trained on how to communicate with deaf/blind people.

[70] Air Canada's position is that it has redressed the practice which will prevent its reoccurrence. It has developed a new attendant travel policy which provides for a self-reliance standard. Under this process, OHS is mandated to do individualized assessments in cooperation with the passenger's doctor.

[71] Air Canada also takes the position that, unfortunately, Mr. Morten still could not fly without an attendant as he would not pass even the new standard of self-reliance. Air Canada bases this conclusion on the evidence of Dr. Pratt and Dr. Waisberg relating to Mr. Morton's impaired vision and deafness.

[72] If the Tribunal does not accept this argument, Air Canada says that in formulating a remedy, the Tribunal should order monetary compensation only. This proposition is based on recent Supreme Court jurisprudence which Air Canada argues confers primary jurisdiction on the CTA to adjudicate on human rights questions that arise in the transportation by air of persons with disabilities. (*Council of Canadians with Disabilities v. Via Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 S.C.C. 15)

[73] For this proposition, Air Canada also argues that the *Canada Transportation Act* and the *Aeronautics Act* together constitute an integrated legislative regime regulating air carriers. It is the CTA that is assigned the responsibility to administer this legislation including any human rights remedy. Thus the Tribunal should defer to the CTA and decline to exercise its jurisdiction to grant any remedy other than a monetary remedy.

B. Mr. Morten's Air Travel Experience

[74] Mr. Morten has travelled by air internationally a number of times between 1980 and 2006 for both athletic and family reasons. He travelled to Amsterdam in 1980 where he participated in a wrestling competition and 5000 meter race. In 1987, he went to Paris for the European Open Blind Judo Championship. In 1990, he again travelled to Amsterdam for a judo competition. In 1991, he flew alone to Milan to visit relatives. He travelled to Rome in 1993 with his parents to visit family. And in 2002, he went to Rome with his judo team.

[75] In June 2004, Mr. Morten flew from Vancouver to San Francisco on Air Canada return. And on June 16, 2006, he flew from Vancouver to Baltimore return on Alaskan Airlines.

[76] In addition, he has prepared a set of index cards on various subjects. The cards are printed in English on one side and Braille on the other side. For example, one of his index cards reads "I am deaf/blind, to talk to me, please write on my palm in large block letters." Another card says "can I have a coffee please" etc. He uses the index cards to communicate with the flight attendants during the flight. He has laminated the cards for frequent use and first used them when he flew to San Francisco in June 2004.

[77] When he boards the plane, he counts the number of rows to his seat so that he knows where he is seated. The flight attendant gives him the safety briefing card in Braille which sets out the type of aircraft, the emergency procedures and the location of the exits.

[78] Once seated, Mr. Morten will write a note for the flight attendant asking how many rows are in the plane and where the emergency exits are. They can respond by writing the answers on his hand or by “tracking” i.e., leading him by the hand to the exits.

[79] Mr. Morten says that he is familiar with the pre-take-off safety instructions such as seats upright, luggage stowed securely in the overhead compartments, requirement for oxygen masks, etc.

[80] He says that he is very sensitive to movement of the plane; he knows when they are ready to take off. At take-off, he can feel the ascent of the airplane, when the plane is circling and where the plane is in the air by the popping in his ears.

(i) Emergency Procedures

[81] Mr. Morten said that from age 13 and later when he could see, he watched the flight attendants go through all of the procedures, the explanations about the decompression masks, about how to put on the life jackets and inflate them when necessary. He also became familiar with the emergency procedures on the safety cards, the emergency exits, and as he flew more, he became more knowledgeable.

[82] He said that he knows how to use the emergency chutes if they are deployed. If there were to be any problem in flight, such as turbulence, he would feel it and he would notice that the people around him were tensing or becoming nervous.

[83] He said that he can see the oxygen mask fall in front of him. In case of an emergency, he knows how to adopt the bracing position. He knows when to put the decompression mask on and when to activate it. He knows how to use the life vest if necessary.

(ii) The “X” Emergency Sign

[84] Mr. Morten believes that many flight attendants know the emergency sign that you give to a deaf/blind person. You draw an X on the shoulder or the back which means that there is an emergency situation. This means that you are to exit immediately. If someone drew an X on his back, he would be guided by that person to get out or he would follow the crowd. Mr. Morten said that he would smell any things that are connected with fire or heat. In the event of an emergency, he would be able to see the person next to him.

(iii) Reference to Dryden Crash Inquiry

[85] Mr. Morten was referred to an extract from the 1992 Report of the Commission of Inquiry into the Air Ontario crash at Dryden, Ontario. This report described the conditions in the aircraft cabin after the crash. The aircraft had broken into three parts, and there was cabin baggage strewn in the aisles, snow, mud and parts of trees had entered the cabin covering some of the passengers. Dark smoke permeated the cabin shortly after the crash, causing difficulty with visibility for the passengers in the central and forward areas of the cabin.

[86] A large number of seats had failed at their floor attachment points. These seats, along with their occupants, were strewn about, adding to the confusion. The accumulation of bodies, seats and debris was primarily concentrated in the left front side of the fuselage. In the centre section, there was an accumulation of debris varying in depth from two to three feet that in some cases totally covered the passengers and immobilized them.

[87] Portions of the overhead racks had also failed during the last stages of the impact sequence, spilling their contents onto passengers and into the aisle. These broken sections of overhead racks, some already in flames and dripping molten burning plastic, fell on a number of survivors.

[88] The interior lighting system was off, and the aircraft's emergency strip lighting, either malfunctioned or because of the debris was not visible. Passengers' evidence revealed that the

only guidance for survivors to exit the aircraft was the daylight entering the cabin through the windows and various openings.

[89] Mr. Morten's view was that you can never predict what's going to happen. But he does not believe that deaf/blind passengers are in more jeopardy in airline crashes such as the Dryden accident. An able-bodied person or a blind/deaf or any other person with a disability would be at the same risk.

[90] In a situation where there is heavy smoke or fire, he is no more at risk than an able-bodied person who would not be able to see or hear. In fact, he may be able to cope better because that is his every day life experience.

[91] Mr. Morten did agree that given the obstructions in the aisle, his ability to avoid obstructions may not be as good as that of a sighted person. But this environment would be foreign to them and they wouldn't know how to navigate safely. He, on the other hand, believes that he would be able to manage because he has done it his entire life.

[92] Mr. Morten said that no one can predict how they would react in such a situation. Each occurrence would be different and everybody would have to manage the situation as it arises.

[93] If he had an attendant with him, they could be injured or panic and would be of no use to him trying to exit the aircraft. He could not imagine that having an attendant is the one thing that would save him. He suggested that, as a deaf/blind person, he should be assessed so that he could demonstrate whether he is capable of exiting the aircraft effectively in an emergency evacuation.

[94] Mr. Morten agreed that in these circumstances (Dryden accident), there would be little opportunity to communicate. People would be panicking and are thinking of safety first. Everybody's priority would be to evacuate immediately. Everybody's going to be looking for a way out.

[95] Mr. Morten agreed that the various types of communication that he normally has on a flight, such as his communication devices and his index cards may not be useful in an emergency evacuation.

[96] He also agreed that the “survivability factors” to successfully evacuate an aircraft after a crash would depend upon a number of things. First, it will depend upon being able to identify the possible points at which exit may be made. Then it will be necessary to assess the safety of these exits. And in assessing the safety of an exit point, there are many factors that will be relevant to that assessment such as, if there is a fire at that particular point. Is there dangerous debris outside of the aircraft? What is the distance between the exit point and the ground? Mr. Morten also agreed that his ability to identify and assess the possible exit points may require more time than a person with average eyesight.

[97] Sylvie Lepage was a flight attendant for Air Canada from 1973 to 1995. She then became the flight attendant manager and held that position until 2004. She has been responsible for the development of policies and procedures relating to cabin safety.

[98] Ms. Lepage was asked to assume the following facts. A man in his forties, extremely fit, deaf and limited sight in one eye who will not be able to hear the emergency safety briefings or see with clarity the non-verbal briefing. But if you use your hands to trace an X on his back, he will know there is an emergency and must exit at once.

[99] Ms. Lepage’s opinion was that it would not be possible to relay the necessary safety instructions for emergency landing.

[100] The types of messages that she needs to convey in an emergency situation include moving quickly to an exit, releasing their seat belts in a timely fashion, putting on the life vest, leaving their luggage behind, all of this in a very quick and timely fashion.

[101] Further, exits from an aircraft which are useable at one time may no longer be useable in an emergency evacuation. This may occur during an evacuation. The evacuation may start at a certain exit but there may be a need to redirect the passengers to another exit.

[102] Ms. Lepage said in these circumstances they use non-verbal communication and verbal commands to redirect traffic flow away from an exit, which has become unusable.

[103] When using non-verbal communications, they would make gestures with their hands, gestures, "exit blocked, fire, go that way", and would demonstrate that by crossing her two arms in front of her chest.

[104] Another non-verbal gesture would be extending two arms perpendicular and pointing forward which means go that way or go that way or go to the other side or go, change your direction.

[105] Ms. Lepage agreed that an X is adequate non-verbal communication. But it would not be feasible for a flight attendant to go from her assigned position in an emergency and walk down the aisle to a passenger who is deaf and blind and trace that X on the passenger's shoulder.

[106] Ms. Lepage was asked whether in an emergency situation, a passenger next to a deaf/blind person could draw an X on his shoulder to communicate that there is an emergency, particularly if the person is able-bodied and briefed prior.

[107] Ms. Lepage's response was that time is very critical during an emergency evacuation. There is much more to the safety briefing that needs to be relayed than just an X.

[108] Ms. Lepage was asked when an attendant who is at their assigned station, how do they get a passenger who is experiencing behavioural inaction such as panic, fear, frozen, who perhaps is two rows, three rows away, to come to the exit.

[109] Ms. Lepage said it's difficult to answer that question. It depends on the environment, the conditions in the cabin. The flight attendants can not leave their station but could shout firmly, could ask another passenger to push. Do whatever is possible without jeopardizing or slowing down the evacuation.

[110] Ms. Lepage said she would never leave her assigned station. The procedures are developed to ensure maximum survival. So they will use whatever techniques necessary to successfully evacuate the plane, which would include asking other passengers to help if that's what it takes.

C. Anthony Broderick

[111] Anthony Broderick is the former Associate Administrator for Regulations and Certification in the Federal Aviation Administration (FAA) of the U.S.A. As such, he was the senior aviation safety official in the United States government. He retired from the position in 1996.

[112] The FAA is the organization in the United States that is primarily responsible for the safety and certification of all airlines, airplanes, pilots and support staff and the operation and maintenance of the air traffic control system in the United States.

[113] Part of his official responsibilities involved reviewing aviation accidents including the conditions that were observed in the cabins of aircraft involved in accidents. He also studied the impact of those conditions on the ability of occupants to successfully evacuate an aircraft.

[114] During Mr. Broderick's tenure at the FAA, the FAA examined the question of whether persons with disabilities on commercial flights should be subject to any conditions by reason of safety related considerations.

[115] Mr. Broderick referred to a number of investigation reports involving the emergency evacuation of aircraft. These included the 1991 Dryden accident, the 1983 Cincinnati accident,

the 1991 Los Angeles accident and the 2005 Air France accident in Toronto. These investigation reports described the state of the aircraft and conditions in the cabin after the emergency landing, how many passengers survived the crash, the presence of smoke or fire in the cabin and access to the exits.

[116] Mr. Broderick said that the accident investigators of these accidents were not able to identify the ability or the capabilities of the passengers who died as opposed to those who survived to evacuate the aircraft. He said that it was impossible to do so unless you can interview the families of victims and find out if they had any particular disability.

[117] These investigation reports demonstrated that speed in evacuating the aircraft is critical. Further, all accident conditions are different. They are unpredictable and unique. Precisely what conditions will exist during an emergency evacuation are unpredictable. Conditions may change rapidly and continuously throughout an evacuation.

[118] Mr. Broderick also referred to the 1992 study of the Transportation Safety Board of Canada, "*A Safety Study of Evacuations of Large Passenger-Carrying Aircraft*". The objective of this Study was to examine the Canadian experience with respect to the evacuations of large passenger carrying aircraft and it reviewed 21 evacuations from 1978 to 1991.

[119] This Study reported that from 1978-1991, there were 21 evacuations which involved 2,305 passengers and 135 crew. There were 91 fatalities and 78 serious injuries of which 36 fatalities and eight serious injuries occurred during the evacuation process.

[120] The Study noted a number of factors that adversely affected a successful evacuation. These included:

- the presence of fire, smoke or toxic fumes in the cabin which severely restricted or totally obscured visibility or reduced the number of available exits.

- passengers had difficulty releasing seat belts which impeded egress for passengers who were trapped inside the aircraft.
- debris in the cabin was also a significant obstruction to the evacuation process. As a result of debris, the escape path and access to exits were blocked, passenger movement was hindered and the evacuation process was prolonged. In some evacuations, some of the primary exit doors were completely blocked by debris. Overhead bins collapsed on top of people, injuring and trapping many of them.
- there were difficulties operating emergency exit doors in a number of evacuations. There were problems related to the slides, the two most common problems were the angle of the slides and deployment.
- in a number of the evacuations, the crew and/or passengers were unable to hear the initial evacuation command and subsequent directions. Public address systems were inaudible and inoperable during the evacuations. Communication difficulties between the flight and cabin crew also jeopardized the evacuation process.
- what is particularly notable from this Study is the inappropriate passenger behaviour. Faced with an unexpected life-threatening situation, passengers typically reacted in one of two ways: panic (screaming, crying, hysteria, aggressiveness) or negative panic (inaction and freezing). Passengers often insisted on exiting the aircraft by the same door they entered. There were also several occasions when passengers seem to be fixated on a particular exit and made no attempt to look for an alternative escape route.
- as the chance for survival decreases, passenger motivation for survival increases, resulting in competitive behaviour. One evacuation reported passengers pushing and several people climbed over the back of the seats to get to their exits ahead of others already in the aisle.

[121] The Study noted that the main objective which governs passenger behavior is their own survival. In a situation where the primary survival instinct takes over, people do not work collaboratively. The evacuation can become very disorganized with individuals competing to get through the exits.

[122] Given the conditions that prevail in an emergency evacuation, can it be said that deaf/blind passengers would be a greater safety risk than other passengers?

[123] According to Mr. Broderick, there is very little research about passengers with disabilities and how they perform in an evacuation. The only study he could find was the 1977 Civil Aeromedical Institute (CAMI) study. The purpose of CAMI was to provide data for the FAA to assist it in developing regulations relating to the types of disabled passengers who could travel by air without undue impairment to overall passenger safety.

[124] CAMI was a simulated study that measured the evacuation time of persons with various disabilities in a simulated aircraft emergency. The Study grouped the disabilities into four categories, neurological, muscular, orthopedic and other – obesity and unimpaired. The neurological category included blind, deaf and mental deficiency.

[125] In our view, the information derived from CAMI is of little use. First, it did not include the category of deaf/blind, only deaf or blind. Second, it was a simulation only and in no way replicated the varied and unpredictable conditions that would prevail in an emergency evacuation. If it has any value, it is that it indicated that passengers with sensory disabilities i.e. blind or deaf caused the least delay in evacuation times of persons with disabilities.

[126] Mr. Broderick also gave evidence of the Attendant Rule adopted by the U.S. Department of Transportation (DOT). This is found in 14 CFR Part 32, “Non-discrimination on the Basis of Disability in Air Travel”. This Rule became operative in 1990 after considerable debate and input from various interest groups in the U.S. representing the disabled communities.

[127] Air Canada, in putting forth this evidence does not argue that the DOT Rule should be adopted by the Tribunal. Rather, Air Canada asks the Tribunal to use it as a basis for assessing the reasonableness of its attendant policy.

[128] Paragraph 382.7 prohibits discrimination in the provision of air transportation against an individual with a disability by reason of such disability. Paragraph 382.35(b)(4) deals with the question of attendants and lists four categories whereby a carrier may require that an individual with a disability travel with an attendant, if the carrier determines that an attendant is essential for safety.

[129] It is the fourth category that is relevant. It provides that a carrier may require an attendant, if essential for safety, for a person who has both severe hearing and severe visual impairments, if that person cannot establish some means of communication with the carrier personnel adequate to permit transmission of the safety briefing required by 14 CFR 121.571(a)(3) and 14 CFR 135.117(b). It is very important to note that these two latter provisions require communication of safety and emergency information only at the pre-flight or pre-take-off stage.

[130] 14 CFR Part 382 derives from the DOT's 1987 *Southwest Airlines Co. Enforcement* decision. Southwest Airlines had a blanket requirement that all deaf/blind passengers must travel with an attendant. The complainant, Rosaleen Peres who was deaf/blind, filed a complaint that Southwest Airlines had on two occasions refused to transport her unaccompanied and had declined to consider her mobility, communication skills or her previous record of flying without incident.

[131] Like Mr. Morten, when Ms. Peres traveled by air, she would bring an interpreter to assist her in pre-boarding. She would demonstrate to the flight attendants simple emergency communications which could be used to communicate quickly with her and answer any questions the flight attendants may have.

[132] She would count the number of seats from the exit to her seat. She would instruct the flight attendants to make an "X" on her back if there is an emergency and told them she would

remain seated until someone motioned to her toward the exit. She also instructed that messages may be written in her palm.

[133] The DOT concluded that Southwest Airlines' blanket requirement was overbroad because it unjustly discriminates against those deaf/blind individuals who can demonstrate an ability to understand general safety instructions. The DOT considered that many deaf/blind individuals who can communicate effectively on these matters with Southwest Airlines personnel in advance of the flight could meet such a test. It disagreed that sighted or hearing passengers, solely because of their sensory abilities, are likely to respond appropriately to safety instructions in an unplanned emergency evacuations; whereas all deaf/blind passengers will be unable to conduct themselves appropriately in these circumstances.

[134] Instead, the DOT found that the conditions surrounding emergencies are varied and their corresponding effects on the cabin, on passengers and on the crew are unpredictable. Because of this, one cannot conclude that these disabled persons will pose any more substantial a safety risk than other categories of passengers who are routinely allowed to fly without companions.

[135] The DOT panel noted that rapid evacuation may often be difficult because of smoke or because of conditions largely outside the control of airline crew and the passengers, such as deterioration of the plane cabin, inoperable exits. A crew member charged with overseeing an emergency evacuation may suffer injury and accidents or may be killed.

[136] The DOT panel also examined Southwest Airlines treatment of similarly situated passengers. By similarly situated, the panel meant passengers who may need assistance in emergency evacuations and who may therefore pose a safety risk. These would include persons with severe mobility problems who may have trouble exiting exits and may therefore delay the speedy evacuation of other passengers.

[137] Those suffering from severe obesity may not be physically able to escape through a window exit or climb over seat backs to exit through a cabin door which may hinder others in their attempts to evacuate. Elderly persons who have impairments associated with advanced age

may move slowly and need extra attention in deplaning. But Southwest Airlines had no rule requiring companions for these categories of passengers similarly situated to the deaf/blind passengers in these particular respects.

[138] There was no consideration given by Southwest to the remote probability that an airline accident will occur with a deaf/blind person on board or the lack of any historical evidence that deaf/blind passengers have caused injuries in airline accidents.

[139] As was also noted by Mr. Morten, able-bodied passengers may be rendered deaf-blind by the conditions of an accident. Smoke, darkness and irritating fumes could interfere with vision. Further compliance with the flight attendant's instructions in an emergency is often unpredictable. Many passengers display inappropriate responses such as panic, freezing, hesitating or opening wrong exit doors.

[140] Finally, the DOT pointed out that even if this standard is interpreted as acquiring the ability to comply with instructions during an emergency evacuation, the deaf/blind passengers who are able to communicate will meet the standard. They do not need to hear commands of "brace" or "this way out" in order to comply with them. They can respond appropriately to environmental cues such as violent movements, jarring of the aircraft, smoke or rushing air.

[141] Movements of other passengers will also assist the deaf/blind in coping with an emergency. Another passenger appropriately instructed before takeoff could trace the international signal, an "X" on the deaf/blind passenger.

[142] The Panel ordered Southwest Airlines to permit deaf/blind travelers to travel unaccompanied if they are able to establish some means of communications with Southwest Airlines personnel.

[143] It is from this reasoning that DOT adopted 14 CFR Part 32. It is this Rule that Air Canada has urged the Tribunal to give serious attention when considering Air Canada's attendant policy and when fashioning the remedy in this case.

D. Craig Langston

[144] Mr. Langston was called as a witness by the complainant. He is a passenger who can be considered similarly situated to Mr. Morten in terms of the safety risk in an emergency evacuation.

[145] He is 42 years old and lives in Burnaby B.C. He has cerebral palsy and, up to October 2003, he was able to get around outside his home with the use of a three wheel scooter. In that year, he dislocated his knee and from that time on he has been in a power wheelchair full time.

[146] In terms of his mobility, Mr. Langston has not been able to walk since his knee injury. He can stand and pivot and transfer in and out of his wheelchair but needs to hold on to something to support himself when doing that. He said that he is not really able to take a step on his own.

[147] Mr. Langston's most recent travels by air were in March 2007 and September 2007 on Air Canada and in August 2007 on Westjet. He was able to fly independently without an attendant. He made the reservations through his travel agent who advised that he was a customer with a disability with special needs and that he travelled with an electric wheelchair.

[148] Air Canada produced a number of PNR's for Mr. Langston for the years 2005 and 2006. These PNR's indicate that he or his travel agent advised Air Canada that he is a special needs passenger, that he travels with an electric wheelchair and that he is a big man and can only take a couple of steps. There is also an indication in one of the PNR's that he would have to be assisted by the ramp crew to his seat. Also another of the PNR's indicates that Mr. Langston is WCHP, a designation of self-reliant without an attendant. At no time did Air Canada require Mr. Langston to travel with an attendant.

[149] Mr. Langston described the procedures he follows when flying. When he arrives at the airport, he checks in. When pre-boarding is called, he proceeds down the ramp to the door of the aircraft in his electric wheelchair accompanied by two Air Canada ramp crew, who he describes

usually as bigger guys. Just outside the door to the aircraft, he transfers from his wheelchair to another wheelchair, an Air Canada skychair, which has no side arms so that it can fit in the aisle of the aircraft.

[150] Mr. Langston does the transfer holding onto the railing and lifting himself out of his wheelchair. The Air Canada personnel move his chair out of the way and bring the skychair behind him and he sits down.

[151] Then the two Air Canada ramp crew navigate the skychair down the aisle, one in front and the other behind. Once there, he grabs the back of the seat in front, stands and pivots and sits down in his seat.

[152] Mr. Langston always has an aisle seat and when available he will be seated in business class which is closer to the front exit. When he arrives at his destination, he waits until all the other passengers have deplaned, waits for the two Air Canada attendants to come to the aircraft and the procedure is reversed.

[153] Mr. Langston said that in the case of an emergency evacuation, he could not exit the aircraft on his own. He would ask for assistance from the people sitting next to him and failing that from the flight attendants.

E. The Air Canada Tariff

[154] Under s. 67(1) of the *Canada Transportation Act*, a licensed air carrier must display its tariffs including terms and conditions in a place accessible to the public. Tariff means a schedule of fares, rates charges and terms and conditions of carriage applicable for the provision of air transportation.

[155] The tariff must include the name of the carrier, the tariff number, its effective date. It must set out clearly the terms and conditions of carriage including the carrier's policy relating to the

carriage of persons with disabilities. The same regime applies to tariffs for international transportation although under different sections of the *Act* and regulations.

[156] If the carrier applies a fare or a term or condition that is not set out in its tariff, on a complaint to the CTA, the CTA can order the carrier to apply the tariff provisions.

[157] Air Canada's current tariff relating to the carriage of persons with disabilities is "Canadian General Rules Tariff No. CGR-1 - Transport of Passengers with Disabilities." It provides that passengers shall be considered disabled when their physical, medical or mental condition requires individual attention on embarking, during flight or in an emergency evacuation which is not normally extended to other passengers.

[158] The tariff goes on to provide that persons with the following disabilities will be accepted for transportation without an attendant: blind, deaf, person with a mental disability/cognitive disability/self-reliant, and ambulatory/self-reliant.

[159] In the tariff, ambulatory means a person who is able to move around the aircraft unassisted. Non-ambulatory means a person who is not able to do so. Self-reliant is a person who is independent, self-sufficient and capable of taking care of all of his/her physical needs during flight, during an emergency evacuation or on decompression. He/she requires no special or unusual attention beyond that offered to the general public. Non self-reliant is a person who is not self-reliant.

[160] As to the determination of self-reliance, the tariff says that Air Canada will accept the determination of a person with a disability as to self-reliance. Except for deaf/blind persons for whom there is a blanket requirement under the tariff, they must travel with an attendant.

[161] Dr. Bekeris was clear that the current Air Canada tariff relating to the transport of passengers with disabilities is not relevant to or referenced by OHS in assessing whether a passenger who identifies as blind/deaf is or is not self-reliant.

F. The ACpedia

[162] Louise H el ene S en ecal is the Assistant General Counsel, Litigation for Air Canada. She was first contacted by the Meda desk on August 24, 2004, and has been directly involved in all aspects of Mr. Morten’s case since that time.

[163] Ms. S en ecal referred to what she says is Air Canada’s new attendant travel policy. The policy is part of Air Canada’s web based program called ACpedia which is a new reservation system being developed by Air Canada and which will be accessible to reservation agents, the Meda desk, the call center and the airport.

[164] The attendant policy is titled “Attendant Travel-Policy”. The policy begins by providing that customers who are non-ambulatory and non self-reliant must be accompanied by an attendant during flight.

[165] Non-ambulatory and non self-reliant means visual and hearing impairments *so severe* as to make it impossible to *relay* safety related messages to the customer at critical stages of flight including abnormal or emergency situations.

[166] Ambulatory, as used in the policy, means can move about the aircraft cabin without assistance. Those with mobility restrictions or who are blind or deaf or who have an intellectual disability are considered to be ambulatory.

[167] It would appear from the words of the policy that deaf/blind persons with severe visual and hearing impairment such that it would be impossible to *relay* safety messages to them at critical phases of flight are considered to be not ambulatory i.e., not able to move about the aircraft cabin without assistance.

[168] But if a passenger with visual and hearing impairments has some *residual* (not defined) vision or hearing and wish to travel unattended, a FFT form is to be completed by the passenger’s

physician and submitted to Air Canada's Occupational Health who will make the final determination.

[169] The policy then goes on to specify that passengers with impairments *affecting* vision and hearing and those with cognitive impairments require an attendant unless they can *receive* safety related messages at critical stages of flight.

[170] Arguably, a person who wears glasses and a hearing aid would be caught by this provision. But elsewhere in the policy, under the definition of non-ambulatory, self-reliant, it provides that customers who, despite a disability, are self-reliant (not defined) and capable of self-care (not defined) during flight do not require an attendant.

[171] We could go on and point out the many other difficulties with this document. Suffice it to say that in our opinion, the policy as written is convoluted, circuitous and inconsistent.

[172] In any case, Ms. Senecal said that the ACpedia attendant policy has not yet replaced CIC 57/8. The latter is still in place unmodified. Ms. Senecal did not know which policy the reservation agents or the Meda desk are to reference when dealing with persons who self declare as deaf/blind when making a reservation.

G. Should Air Canada be Ordered to Permit Mr. Morten to Fly Unaccompanied on Air Canada?

[173] For the Tribunal, the answer is no. Section 53(2)(b) of the *CHRA* grants the Tribunal the jurisdiction to order the discriminator to make available to the victim the rights, opportunities or privileges that were or are being denied as a result of the discriminatory practice.

[174] The evidence indicates that even though Air Canada claims it does an individual assessment (through OHS) and this is now in the ACpedia, Mr. Morten was never assessed under this procedure and still has not been assessed.

[175] The real opportunity which the discrimination denied him was not the right to fly unaccompanied *per se*, but the right to have his level of self-reliance (and concomitant safety risk) assessed in a fair and accurate manner.

[176] It is impossible to say with sufficient certainty that if he were assessed properly, his communications and mobility capabilities would be sufficient to put him on a par with the risk profiles of other passengers whom Air Canada currently allows to fly unaccompanied.

[177] In addition, the substantive standard against which he is to be measured has not yet been finalized. In view of the foregoing, the only remedy (other than monetary compensation) that can be granted to Mr. Morten is that he be assessed under the policy, once it has been revised.

H. What Order should issue against Air Canada?

[178] It appears from the evidence that Air Canada has at least four policies that deal with whether a deaf/blind person must travel with an attendant on Air Canada. They are:

- CIC 57/8 which was the policy referred to in Mr. Morten's PNR and apparently applied in his case;
- the ACpedia attendant policy which Air Canada says is the current policy but which has not yet replaced CIC 57/8;
- Air Canada's General Rules Tariff relating to the transportation of persons with disabilities (but Air Canada has taken the position throughout that the tariff is not relevant in this case, but has offered no explanation why this is so), and;
- the criteria according to Dr. Bekeris, used by OHS to assess fitness for travel of persons with disabilities. He also disavows the relevance of the tariff for this purpose with no explanation.

[179] There is a very big question that remains unanswered and it is this. If the tariff is the document that legally defines the terms and conditions of carriage between the passenger and Air Canada, how can Air Canada adopt an attendant policy (ACpedia) that is inconsistent or conflicts with the provisions with its tariff? Air Canada did not address this and has been particularly vague on this question.

[180] Air Canada's attendant policy should be one and should be formalized so that there are no more misunderstandings as occurred with Mr. Morten. It should be formalized in a legal document by revising the current tariff.

[181] The tariff is mandated by the *Canada Transportation Act*. It constitutes the legal contract of carriage between Air Canada and the passenger. It must be accessible to the public. If the source of the attendant policy is in one document it should be made readily accessible to reservation agents, the Meda desk and OHS.

[182] But Air Canada argues that its tariffs and amendments to its tariffs are for the CTA, not this Tribunal. For this, it relies on the range of statutory powers with respect to tariffs conferred on the CTA under the *Canada Transportation Act* and the *Air Transportation Regulations (ATR)*. These include relief from unreasonable fare charged in monopoly conditions; relief from the imposition of fares, rates or terms and conditions of carriage not set out in the tariff; relief from application of terms and conditions of carriage that are unreasonable or unduly discriminatory.

[183] While it is clear that the CTA exercises extensive regulatory control over tariffs, the legislative scheme does not appear to require CTA's prior approval of tariffs. In fact, Ms. Senecal did not refer the Tribunal to any provision of the *Canada Transportation Act* or the *ATR* that show otherwise.

[184] Rather she gave the example of a recent CTA decision relating to the carriage by Air Canada of animals as checked baggage. According to the CTA decision, (no. 155-C-A-2008) Air Canada revised its tariffs to terminate the carriage of pets and animals as checked baggage.

An individual complained under s. 67.2 of the *Canada Transportation Act* claiming that this tariff revision was unreasonable. The CTA agreed and disallowed the revision.

[185] There is nothing in this decision that suggests CTA approval is required for a tariff or a tariff amendment. If there is no legal impediment to Air Canada unilaterally amending its tariff, there should be no impediment to the Tribunal making an order that Air Canada amend its tariff.

[186] Air Canada also relies on the *Aeronautics Act*, the *Canadian Aviation Regulations (CAR)* and the *Commercial Air Service Standards (CASS)* (both under the Act). As we understand the argument, the Tribunal should not order that Air Canada permit Mr. Morten to fly without an attendant. To do so could cause Air Canada to be in breach of its legal obligations under this legislative regime and could put its operating certificate in jeopardy.

[187] The focus here is Air Canada's obligation imposed under both s. 705.43 of the *CAR* and under s. 725.43 of the *CASS* for the cabin crew to provide safety related briefings for passengers at the various phases of flight.

[188] Air Canada takes the position that to comply with these obligations, it must adopt a policy which requires in an emergency situation, that each passenger must be able to receive the safety briefings visually or orally. If not, they must travel with an attendant. But this argument is not particularly relevant as the Tribunal has not ordered that Mr. Morten be able to fly independently without a prior assessment.

[189] Finally, Air Canada argues, based on the Supreme Court decision in *Via Rail*, that it is the CTA that has primary jurisdiction to decide questions of human rights in the context of the transportation of passengers by air. Although it conceded that the Tribunal can decide whether in this case, there has been a *prima facie* case of discrimination and whether the discriminatory act of Air Canada is justified under s. 15(1)(g) of the *CHRA*, the Tribunal should confine itself to ordering a monetary remedy.

[190] In support of its argument of primary jurisdiction for the CTA, Air Canada relies on ss. 5 & 172 of the *Canada Transportation Act* and certain paragraphs in the *Via Rail* decision. Section 172 confers on the CTA the power to determine whether there is an undue obstacle to the mobility of persons with disabilities. If CTA so determines this is the case, it can order corrective action.

[191] Section 5 of the *Act* declares Canada's National Transportation policy. Section 5(g) provides that each carrier or mode of transportation, shall, *as far as is practicable* carry traffic under fares, rates and conditions that do not constitute . . . an undue obstacle to the mobility of persons including persons with disabilities (s. 5(i)).

[192] In the *Via Rail* case, the *Council of Canadians with Disabilities* filed a complaint with the CTA that its passenger rail cars were inaccessible to persons with disabilities who used wheelchairs. In coming to its decision, that this constituted an undue obstacle, the CTA took into account the human rights jurisprudence associated with an "undue hardship analysis".

[193] The case ultimately reached the Supreme Court of Canada. The Court dealt with two preliminary issues before deciding the merits. First, what is the standard of review applicable to the CTA's decision, patent unreasonableness or correctness; and secondly, was the CTA's decision entitled to deference to the extent that it dealt with human issues. It is within this context that the Court's reasons must be viewed.

[194] The Court noted that the mandate of the CTA and the issue it had to decide in this case was how to make the transportation systems more accessible for persons with disabilities. This undoubtedly has a human rights aspect. The Court went on to explain why the CTA's decision was entitled to deference and was not subject to a correctness standard.

[195] It is two particular paragraphs in the Court's reasons that Air Canada has fixed upon for its "primary jurisdiction" proposition. When interpreting the *Act*, including its human rights component, the Court noted that the CTA brings its transportation knowledge and experience to bear on its interpretation of its statutory mandate (para. 98).

[196] Parliament has given the CTA the public responsibility for assessing barriers – not the CHRC. The CTA *uniquely* has the specialized expertise to balance the requirements of those with disabilities with the practical realities – financial, structural and logistic of the federal transportation system (para. 138).

[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 (*Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, *per* Lamer J., at pp. 157-158; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at para. 8; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, at para. 81). 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.

[200] *Via Rail* argued that the duty to accommodate arising under s. 5(g) of the *Canada Transportation Act*, imposes a lesser standard than under human rights legislation. The Court did not see it this way. It reasoned that this language does not import a higher or lower standard than in human rights jurisprudence. The limiting words “as far as is practicable” in s. 5(g) is the statutory acknowledgement of the undue hardship standard in the transportation context.

[201] What is “practicable” requires the same analysis as is required to assess “undue hardship” under the *CHRA*. No difference in approach is justified by the different context. Particularly since Parliament has directed the CTA to foster complementary policies and practices with those of the CHRC (s. 17, *Canada Transportation Act*).

[202] Section 5 of the *Canada Transportation Act* was amended in 2007. This section is considerably shorter and more importantly, no longer contains the words “as far as is practicable”. Air Canada referred to this amendment in passing but did not discuss the possible implications of the amendment.

[203] The Supreme Court of Canada in *Via Rail* relied on the words “as far as is practicable” as the articulation of the undue hardship standard, but in the transportation context. With this amendment, it could now be argued that the absence of these words means that the obligation of the duty to accommodate to the point of undue hardship is no longer the human rights standard in the transportation context.

[204] Thus, less protection would be offered to persons with disabilities than under human rights legislation. This result argues against the CTA having primary jurisdiction in deciding human rights issues.

V. THE ORDER

[205] We now come to the content of the order. Air Canada urged the Tribunal to use the DOT attendant Rule as a model for assessing its attendant policy. As pointed out above, the DOT policy was formulated or derived from the *Southwest Airlines* decision. Air Canada has failed to establish why it cannot use this standard.

[206] The ACpedia standard that flight attendants be able to communicate safety-related instructions at all critical times in flight has not been proven to be reasonably necessary, given

that the DOT Rule only requires that the passenger possess some means of communication with carrier personnel adequate to permit transmission of the pre-takeoff safety briefing.

[207] In this regard, the DOT's decision in *Southwest Airlines* noted that deaf/blind persons do not have to hear commands of "brace" or "this way out" in order to comply with them. They can respond appropriately to environmental cues such as the violent movement or jarring of the aircraft, smoke or rushing air. Movements of other passengers would also assist the deaf/blind in coping with an emergency. A passenger could be instructed before takeoff to trace the international emergency sign "X" on the deaf/blind passenger. These are all things that Mr. Morten referred to in his evidence.

[208] The DOT Rule and the *Southwest Airlines* case strongly suggest that greater accommodation is still possible. Air Canada has failed to show why it cannot use the standard adopted in the United States.

[209] Further, as was pointed in *Grismer*, in fulfilling its duty to accommodate, the service provider is proving that its standard is necessary to accomplish its purpose or goal. There, as in the present case, the goal is not perfection or absolute safety but reasonable safety.

[210] Air Canada's current standard as found in ACpedia does not tolerate the level of safety risk posed by this class of individuals (Mr. Morten and those like him). Yet on the other hand, the standard quite arguably tolerates the equal or higher risk posed by other passengers similarly situated, for example, Mr. Langston. Other examples noted in the *Southwest Airlines* decision would be obese passengers, elderly passengers whose age requires them to move more slowly or only with assistance, pregnant women or passengers who require supplemental oxygen on the flight.

[211] Decisions not to accommodate the needs of disabled persons must be founded on their actual capacities and the real risks posed thereby, rather than on discriminatory assumptions based on stereotypes of disability. (*Grismer*)

[212] Air Canada needs to work with the CHRC and Mr. Morten to develop an attendant policy that takes into account the communication strategies utilized by people like Mr. Morten, the inherent risk posed by passengers with comprised mobility who are currently allowed to fly unaccompanied, and the fact that in emergency situations, many able-bodied passengers are unable to receive, process and act on safety-related emergency instructions.

[213] It is only after doing this that Air Canada can truly and fully redress the discriminatory practice it visited upon Mr. Morten and prevent its recurrence, within the meaning of s. 53(2)(a) of the *CHRA*.

[214] Given the parties familiarity with the issues as revealed in this case and Air Canada's recent attempts to develop an attendant policy in the ACpedia, a time frame of four months from the date of this decision would be appropriate for this purpose.

[215] If the parties are unable to reach agreement within this time frame, the Tribunal retains jurisdiction, on further evidence and on submissions from the parties, to determine an appropriate attendant policy.

A. Hurt Feelings – Pain and Suffering

[216] Mr. Morten testified that Air Canada's decision that he travel with an attendant was very disempowering. He was very emotional when stating that it was very destructive to his independence and what he has achieved in his life. It affected him deeply and very emotionally.

[217] He believes that he is capable and able to manage his life independently. He is very proud of having achieved this. The decision of Air Canada that he needs an attendant to travel negatively affected his sense of self and his pride.

[218] He says that he has suffered with this for four years, has experienced headaches, tight muscles, stomach problems, sleeplessness, and the inability to just put this away and forget about it. Given the impact that this discriminatory practice has had on Mr. Morten's sense of

accomplishment, his efforts to develop his independence over the years and the effects on his physical well-being, we consider that an award of \$10,000 is an appropriate amount for pain and suffering. Interest is payable on this amount in accordance with s. 9 of the Tribunal's Rules of Practice.

"Signed by"

J. Grant Sinclair, Chairperson

"Signed by"

Kerry-Lynne D. Findlay, Q.C., Member

"Signed by"

Wallace Gilby Craig, Member

OTTAWA, Ontario
January 26, 2009

CANADIAN HUMAN RIGHTS TRIBUNAL

PARTIES OF RECORD

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