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F I L E D	FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE  May 22, 2024 22 mai 2024  Mary Sansone
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Court File No.: A-354-23

**FEDERAL COURT OF APPEAL**

BETWEEN:

AIR CANADA

Appellant

- and -

TIMOTHY ROSE

Respondent

- and -

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

Interveners

**NOTICE OF APPEAL**

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears below.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellant. The Appellant requests that this appeal be heard at **Toronto, Ontario**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the Appellant's solicitor, or, if the Appellant is self-represented, on the Appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: May 22, 2024

Issued by: \_\_\_\_\_  
(Registry Officer)

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## APPEAL

**THE APPELLANT APPEALS** to the Federal Court of Appeal from the order and decision of the Canadian Transportation Agency (the “Agency”) dated August 11, 2023 and bearing decision no. 123-AT-A-2023 (the “Decision”) by which the Agency:

1. Erred in law, in the Decision, by failing to apply the proper analysis for what constitutes undue hardship in Air Canada implementing corrective measures in paragraph 38(a) of the Decision in the circumstances and failing to consider all of the factors in its analysis based on the evidence before it;
2. Acted outside of its jurisdiction and violated procedural fairness, in the Decision, by not allowing Air Canada an opportunity to provide further explanation or further context on its evidence to questions raised by the Agency in its Decision;
3. Erred in law and acted outside of its jurisdiction, in the Decision, by making an order in paragraph 38(b) of the Decision which is in essence a structural order that is exceedingly onerous, overly broad, vague and of insufficient clarity;
4. Erred in law and acted outside of its jurisdiction, in the Decision, by making an order in paragraph 38(b) of the Decision imposing content in Air Canada’s accessibility plan made pursuant to the *Accessible Canada Act*, S.C. 2019, c. 10 (the “ACA”) where the Agency has no such power under the ACA and/or the *Accessible Transportation Planning and Reporting Regulations*, SOR/2021-243 (the “ATPRR”); and

5. Erred in law and acted outside of its jurisdiction, in the Decision, by making an order in paragraph 38(b) of the Decision that the Agency is precluded from making and which improperly applies only as against Air Canada when such broad measures should be examined and if necessary, implemented and applied evenly through the *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244 (the “ATPDR”).

**THE APPELLANT ASKS** that:

6. The Appeal be allowed, the Decision and the order therein be set aside and this Honourable Court grant the decision and order that should have been made, including but not limited to holding that:
  - a) when applying the proper analysis for undue hardship, implementing the corrective measures in paragraph 38(a) of the Decision imposes undue hardship on Air Canada;
  - b) Air Canada be provided an opportunity to provide further evidence to address the questions raised by the Agency in the Decision with respect to the operation of the Airbus A319 aircraft at two U.S.A. spoke stations and the costs of an *ad hoc* substitution; and
  - c) the order to implement the corrective measures in paragraph 38(b) of the Decision is in essence a structural order and outside the jurisdiction of the Agency;

7. Alternatively, the Appeal be allowed, the Decision to be set aside and the matter to be remitted to the Agency for re-determination;
8. This Honourable Court award the Appellant costs on this Appeal; and
9. This Honourable Court grant such further and other relief as counsel may advise and this Honourable Court may deem appropriate.

**THE GROUNDS OF APPEAL** are as follows:

10. In August 2018, the Respondent, Timothy Rose filed an application with the Agency claiming that he is a person with a disability born with cerebral palsy who uses a power wheelchair and was unable to purchase a ticket from Air Canada for a flight between YYZ and CLE September 18, 2016 because his custom power wheelchair which collapses to a minimum height of 36” could not fit through the 31” tall cargo door opening of the Bombardier CRJ aircraft scheduled to operate the flight and, there were no other flights that could accommodate him on the YYZ-CLE-YYZ route;
11. Air Canada acknowledged Mr. Rose is a person with a disability who encountered an obstacle to his mobility when he was unable to travel on Air Canada’s YYZ-CLE-YYZ route because his custom power wheelchair could not fit into the aircraft scheduled to operate this flight;
12. In the decision dated March 1, 2019 and bearing decision no. LET-AT-A-28-2019 (the “Obstacle Decision”) and the Show Cause Decision, the Agency concluded Mr. Rose is a person with a disability for the purposes of Part V of

the *Canada Transportation Act*, S.C., 1996, c. 10 (the “Act”) and, Mr. Rose and all other persons with a disability who use a power wheelchair encounter an obstacle to their mobility for the purposes of Part V of the Act on Air Canada’s transborder routes exclusively operated on aircraft with a maximum cargo door height less than the minimum height of the passenger’s power wheelchair;

13. In the Show Cause Decision, the Agency held that an *ad hoc* substitution of an aircraft with a cargo door which could fit Mr. Rose’s custom power wheelchair to operate the flight(s) between Toronto, Canada and Cleveland, U.S.A. is an accommodation measure that would not have amounted to undue hardship and proposed a corrective measure (a revised version of which became the corrective measure in paragraph 38(a) of the Decision) requiring Air Canada to make an *ad hoc* substitution for an aircraft with a cargo door which could fit a passenger’s power wheelchair to operate all flights;
14. In the Decision, the Agency further held that implementing a proposed corrective measure (a revised version of which became the corrective measure in paragraph 38(a) of the Decision) requiring Air Canada to make an *ad hoc* substitution for an aircraft with a cargo door which could fit a passenger’s power wheelchair to operate all flights does not amount to undue hardship for Air Canada;
15. However, in doing so, the Agency erred in law by applying its own interpretation of the undue hardship analysis as set out in its decision dated June 21, 2019 and bearing decision no. 33-AT-A-2019 (the “Interpretive Decision”),



not the proper undue hardship analysis in the context of the federal transportation system as set out by the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail*, 2007 SCC 15 (*VIA Rail*);

16. Accordingly, the Agency erred in law in the Decision by failing to apply the proper undue hardship analysis to determine whether implementing a proposed corrective measure requiring Air Canada to make an *ad hoc* substitution of an aircraft with a cargo door which could fit a passenger's power wheelchair to operate all flights would constitute undue hardship for Air Canada;
17. In the Decision, the Agency states, "Procedural fairness in this case dictated that Air Canada have the opportunity to comment on the corrective measures proposed by the Agency in the Show Cause [D]ecision, recognizing that its operations are complex and dynamic, and that the COVID-19 pandemic had, and continues to have, an impact on it";
18. In the Decision, the Agency raises further questions but, without providing Air Canada the opportunity to further address those questions on the complex and dynamic nature of the issues, made conclusions based on the admittedly incomplete information on the operation of the Airbus A319 aircraft at two U.S.A. spoke stations and on the costs of an *ad hoc* substitution; and
19. In the Decision, the Agency orders Air Canada to implement corrective measures in paragraph 38(b) of the Decision which:

- a) is in essence a structural order that is exceedingly onerous, overly broad, vague and of insufficient clarity;
- b) is imposing content in Air Canada's accessibility plan (made pursuant to the ACA) where the Agency has no such power under the ACA and/or the ATPRR; and
- c) the Agency is properly precluded from making and which improperly applies only as against Air Canada when such broad measures should be examined and if necessary, implemented and applied evenly through the ATPDR.

**Statutes and Regulations Relied On:**

- 20. *Canada Transportation Act*, S.C. 1996, c. 10;
- 21. *Accessible Canada Act*, S.C. 2019, c. 10;
- 22. *Federal Courts Act*, R.S.C. 1985, c. F-17;
- 23. *Air Transportation Regulations*, SOR/88-58;
- 24. *Accessible Transportation Planning and Reporting Regulations*, SOR/2021-243;
- 25. *Accessible Transportation for Persons with Disabilities Regulations*, SOR/2019-244;
- 26. *Federal Courts Rules*, S.O.R./98-106; and

27. Such further and other grounds as counsel may advise and this Honourable Court may permit.



May 22, 2024

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**FEDERAL COURT OF APPEAL**

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**NOTICE OF APPEAL**

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