VIA Rail Canada Inc. v. National Transportation Agency et al.

[Indexed as: VIA Rail Canada Inc. v. Canada (National Transportation Agency)]

Court File No. A-507-96

Federal Court of Appeal
Linden, Sexton and Evans JJ.A.

Heard: September 25, 2000 Toronto
Judgment rendered: October 10, 2000

Administrative law — Natural justice — Reasons — National Transportation Agency having duty to give reasons — Duty not satisfied by reciting submissions and evidence and stating conclusion — Agency had to set out findings of fact and principal evidence — Agency's reasons had to address major points in issue, set out reasoning, and reflect consideration of main relevant factors — National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 3(1) — National Transportation Agency General Rules, SOR/88-23, s. 39.

Railways — Regulation — Disabled persons — National Transportation Agency holding that a railway's tariff providing that attendant capable of providing assistance to disabled person could travel free was an undue obstacle to mobility of persons with disabilities because railway had responsibility to board and deboard passengers — Agency's decision did not define "obstacle" or "undue", did not undertake contextual analysis of "undueness", and did not balance interests of disabled passengers and railway — Agency's decision set aside — National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 3(1)(g)(ii).

Section 3(1)(*g*)(ii) of the *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3rd Supp.), states that the various goals of transportation policy "are most likely to be achieved when all carriers are able to compete . . . under conditions ensuring that . . . each carrier or mode of transportation, so far as 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 those persons who are disabled". A railway had a tariff providing that an attendant who was capable of providing assistance to a disabled person who is unable to travel alone was entitled to travel free. Following a complaint by a disabled person, the National Transportation Agency issued a decision stating that it was the railway's responsibility to board and deboard passengers, that an attendant's responsibility was to provide assistance of a personal nature during a trip, and that the railway's tariff was an undue obstacle to the mobility of persons with disabilities. Section 39 of the

National Transportation Agency General Rules, SOR/88-23, required the agency to provide reasons for its decision. The railway appealed.

Held, the appeal should be allowed, the agency's decision set aside and the matter referred back to a differently constituted panel of the agency to conduct a new inquiry with respect to the tariff.

The agency had a duty to provide adequate reasons for its decision. The duty would not be satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker had to set out its findings of fact and the principal evidence upon which those findings were based. The reasons had to address the major points in issue, set out the reasoning process and reflect consideration of the main relevant factors. The adequacy of the agency's reasons had to be measured with particular reference to the extent to which they provided the railway with sufficient guidance to formulate its tariff without running afoul of the agency and to the extent to which they gave effect to the railway's right of appeal by providing the court with sufficient insight into the agency's reasoning.

The agency erred in law by failing to provide adequate reasons for its decision that the tariff was an obstacle. The agency neither articulated any definition of "obstacle" nor engaged in any reasoned consideration of the tariff provisions. The agency erred in law by not addressing the question of how the requirement that an attendant be capable of assisting a disabled person to board and deboard constituted an obstacle to the mobility of the disabled person.

The agency erred in law by failing to provide sufficient insight into the reasoning it followed or the factors it considered in determining that any obstacle provided by the tariff was undue. The proper approach to determining whether something was undue was a contextual one. "Undueness" had to be defined in light of the aim of the relevant enactment. Assessing the consequences or effect if the undue thing were allowed to remain in place could be useful. The term also implied a requirement to balance the interests of the various parties. The agency undertook no contextual analysis of the issue. It looked only to the railway's ability to avoid the obstacle. That was not sufficient. The agency should first have considered the aim of the Act, which was that the nation's transportation network should be, *inter alia*, economic, efficient, viable and effective, and should serve all travellers, including those with disabilities. The agency should have considered the interests of disabled passengers and the interests of the railway.

Cases referred to

Baker v. Canada (Minister of Citizenship and Immigration) (1999), 174 D.L.R. (4th) 193, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 243 N.R. 22, 89 A.C.W.S. (3d) 777 — **refd to**

Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990), 72 D.L.R. (4th) 417, [1990] 2 S.C.R. 489, 33 C.C.E.L. 1, 12 C.H.R.R. D/417, 90 C.L.L.C. ¶17,025, [1990] 6 W.W.R. 193, 76 Alta. L.R. (2d) 97, 111 A.R. 241, 113 N.R. 161, 22 A.C.W.S. (3d) 1003 — **refd to**

Desai v. Brantford General Hospital (1991), 87 D.L.R. (4th) 140, 13 Admin. L.R. (2d) 312, 52 O.A.C. 221, 30 A.C.W.S. (3d) 918 — **refd to**

Northwestern Utilities Ltd. v. Edmonton (City) (1978), 89 D.L.R. (3d) 161, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 23 N.R. 565, [1978] 3 A.C.W.S. 214 — **refd to**

Ontario (Minister of Transportation & Communications) v. Imperial Roadways Ltd. (1974), 52 D.L.R. (3d) 473, [1974] 2 F.C. 164 *sub nom. Ontario (Minister of Transportation & Communications) v. Reimer Express Lines Ltd., sub nom. Ontario (Minister of Transportation & Communications) v. Canada (Canadian Transport Commission)* — **refd to**

R. v. Aetna Insurance Co. (1977), 75 D.L.R. (3d) 332, 34 C.C.C. (2d) 157, 30 C.P.R. (2d) 193, [1978] 1 S.C.R. 731, 20 N.S.R. (2d) 565, 15 N.R. 117 — **refd to**

R. v. Container Materials Ltd., [1942] 1 D.L.R. 529, 77 C.C.C. 129, [1942] S.C.R. 147 — **refd to**

R. v. Howard Smith Paper Mills Ltd. (1957), 8 D.L.R. (2d) 449, 118 C.C.C. 321, 29 C.P.R. 6, [1957] S.C.R. 403, 26 C.R. 1 — **refd to**

R. v. Nova Scotia Pharmaceutical Society (1992), 93 D.L.R. (4th) 36, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1, [1992] 2 S.C.R. 606, 15 C.R. (4th) 1, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 34 A.C.W.S. (3d) 1092, 16 W.C.B. (2d) 460 — **refd to**

Suresh v. Canada (Minister of Citizenship and Immigration) (2000), 183 D.L.R. (4th) 629, [2000] 2 F.C. 592, 18 Admin. L.R. (3d) 159, 5 Imm. L.R. (3d) 1, 252 N.R. 1, 94 A.C.W.S. (3d) 731 [leave to appeal to S.C.C. granted 185 D.L.R. (4th) vii, 258 N.R. 197*n*] — **refd to**

Weidman v. Shragge (1912), 2 D.L.R. 734, 20 C.C.C. 117, 46 S.C.R. 1, 2 W.W.R. 330 — **refd to**

Statutes referred to

Competition Act, R.S.C. 1985, c. C-34

Criminal Code, R.S.C. 1985, c. C-46

Lord's Day Act, R.S.C. 1970, c. L-13

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.) — repealed by s. 183 of *Canada Transportation Act*, S.C. 1996, c. 10 (in force July 1, 1996)
s. 3(1) [am. 1992, c. 21, s. 33]
s. 22(1)(*b*)
s. 63.1(1)(*c*) [enacted R.S.C. 1985, c. 19 (4th Supp.), s. 2]
s. 63.3(1) [enacted R.S.C. 1985, c. 19 (4th Supp.), s. 2]

Rules referred to

National Transportation Agency General Rules, SOR/88-23
s. 39

Authorities referred to

Concise Oxford Dictionary, 7th ed. (Oxford: Clarendon Press, 1983)

Evans, J.M., H.N. Janisch and David J. Mullan, *Administrative Law*, 4th ed. (Toronto: Emond Montgomery, 1995)

APPEAL from a decision of the National Transportation Agency holding that a portion of a railway's passenger tariff constituted an undue obstacle to people with disabilities.

John A. Campion and *Yvonne B. Chisholm*, for applicant.
Elizabeth C. Barker, for respondent.

The judgment of the court was delivered by

[1] SEXTON J.A.:—This is an appeal from a decision[1] of the National Transportation Agency (the "Agency") dated November 28, 1995 that held that a portion of VIA Rail's Special and Joint Passenger Tariff (the "tariff") constitutes an undue obstacle to the mobility of persons with disabilities.

Facts

[2] In December, 1993, a team of wheelchair basketball athletes travelled from Saint-Hyacinthe to Toronto using VIA Rail. Eight members of the group were physically disabled persons travelling in wheelchairs. Each was accompanied by an attendant to assist them with their basic needs during the trip. In accordance with the provisions of the tariff, the attendants travelled for free. The group encountered a number of difficulties related to the accessibility of VIA's services to the disabled passengers.

[3] Upon application by M. Jean Lemonde, the party's leader for the trip, the Agency conducted an investigation into a number of specific complaints. The Agency concluded that certain actions and practices of VIA constituted obstacles to the mobility of the persons with disabilities in the party and that those obstacles "were undue because they could have easily been avoided by the carrier". In a decision communicated by letter dated November 4, 1994, it ordered VIA to take a number of corrective measures. VIA subsequently complied with those orders to the satisfaction of the Agency.[2]

[4] In the same November, 1994 decision, the Agency called attention to Section 13-D of VIA's Special and Joint Passenger Tariff 1, NTA 1, the relevant portions of which are reproduced below:

> Section 13-D DISABLED PERSON AND ATTENDANT
>
> 1. CONDITIONS
>
> A ticket may be sold for the transportation of a disabled person and one adult attendant (at the fare authorized in 3) upon [a list of conditions follows]
>
> . . . . .
>
> The attendant must be capable of assisting the disabled person to get on and off trains and of attending to his/her personal needs throughout the trip.
>
> . . . . .

> 3. FARE BASIS
>
> One fare (any fare which the disabled person would pay if travelling alone) will apply for the transportation of both passengers

[5] Thus, the tariff provides that an attendant who is capable of providing assistance to a disabled person who is unable to travel alone is entitled to travel for free.

[6] With respect to the provisions of the tariff, the Agency made the following statements:

> The Agency specifies that the presence of an attendant is no excuse not to provide assistance to a person during boarding and deboarding.
>
> The Agency supports the principle pursuant to which the attendant must be capable of meeting the basic needs of the person s/he is accompanying and of offering the services which are not usually offered by a carrier. However, providing assistance during boarding and deboarding is the carrier's responsibility. Consequently, this assistance should not be imposed on the attendant. The obligation imposed on the latter to board and deboard a disabled person constitutes an obstacle to the mobility of the person and the Agency believes that disabled persons are entitled to receive the same level of service whether they are travelling alone or with an escort.

[7] As a result of this finding, the Agency required VIA to show cause that the Agency should not find the obstacle "undue" and order VIA to remove the requirement from its tariff.

Decision Appealed From

[8] Following the receipt of VIA's submissions, the Agency issued a further order and decision on November 28, 1995. It ordered that the words "[t]he attendant must be capable of assisting the disabled person to get on and off trains" be struck from the tariff and that a provision be added to clearly indicate VIA's responsibility to board and deboard all of its passengers. It indicated that VIA could add to the amended tariff a proviso allowing it to inquire, at the time of booking, whether the passenger's attendant would be able to assist VIA personnel, if necessary. It also ordered VIA to issue a bulletin to its employees informing them of the changes and to make consequential amendments to various printed materials.

[9] The Agency's main finding with respect to the tariff was reported as follows:

> The Agency remains of the opinion that it is the responsibility of VIA to board and deboard its passengers. Under normal conditions and with sufficient advance notice, the carrier should be in a position to control the quality and

level of services — both personnel and equipment — to accommodate the boarding and deboarding needs of passengers with disabilities. As a general principle, attendants are there to provide assistance of a personal nature to the person during the trip. To put the onus on the attendant that "the attendant must be capable of assisting the disabled person to get on or off trains . . ." as found in VIA's Special Local and Joint Passenger tariff, is an undue obstacle to the mobility of persons with disabilities.

[10] This Court granted VIA Rail leave to appeal the decision by order dated June 3, 1996. The Agency opposes the appeal. The initial complainant, M. Lemonde, did not appear.

Relevant Legislation

[11] The legislation relevant to this appeal is found in the *National Transportation Act, 1987*:[3]

3(1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,

. . . . .

(*g*) each carrier or mode of transportation, so far as practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

. . . . .

(ii) *an undue obstacle to the mobility of persons, including those persons who are disabled,*

. . . . .

63.3(1) The Agency may, of its own motion or on application, inquire into a matter in relation to which a regulation could be made under subsection 63.1(1),[4] regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of disabled persons. [Emphasis added.]

[12] Also relevant is the following provision of the *National Transportation Agency General Rules*:[5]

39. The Agency shall, in any proceeding where it does not grant the requested relief or where an opposition has been expressed, give orally or in writing the reasons for its order, decision, ruling, direction, leave, sanction or approval.

Issues

[13] The written submissions of the parties were primarily directed toward the Agency's interpretation and use of the term "undue obstacle" and the standard of review. During oral argument, counsel for both parties agreed that the appropriate standard of review was reasonableness. As it is unnecessary for us to do so, I do not propose to consider this matter. Also during oral argument, it became clear that the adequacy of the Agency's reasons was a major issue. In particular, VIA argued that in determining whether or not an "undue obstacle" existed, the Agency was required to undertake a balancing of interests as between the disabled person and the carrier and that the Agency had failed to indicate in its reasons why it had struck the balance as it did.

[14] It is necessary, therefore, to deal with the questions of whether or not the Agency erred in law by failing to articulate adequate reasons for:

1. Its finding that s. 13-D of the tariff constituted an obstacle to the mobility of disabled persons; and
2. Its finding that such obstacle is "undue".

[15] For the reasons which appear below, I believe that the reasons given by the Agency were inadequate.

Analysis

The Duty to Give Reasons

[16] Although the *Act* itself imposes no duty on the Agency to give reasons, s. 39 of the *National Transportation Agency General Rules* does impose such a duty. In this case, the Agency chose to provide its reasons in writing.

[17] The duty to provide reasons is a salutary one. Reasons serve a number of beneficial purposes including that of focusing the decision-maker on the relevant factors and evidence. In the words of the Supreme Court of Canada:

> Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision.[6]

[18] Reasons also provide the parties with the assurance that their representations have been considered.

[19] In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide a basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision-maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review.

[20] Finally, in the case of a regulated industry, the regulator's reasons for making a particular decision provide guidance to others who are subject to the regulator's jurisdiction. They provide a standard by which future activities of those affected by the decision can be measured.

[21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "Any attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons."[7]

[22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion.[8] Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based.[9] The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out[10] and must reflect consideration of the main relevant factors.[11]

[23] In my view, the general propositions stated above are all applicable in the circumstances of the case at bar. However, in this case, I believe that the adequacy of the Agency's reasons must be measured with particular reference to the extent to which they provide VIA with sufficient guidance to formulate their tariff without running afoul of the Agency and to the extent to which they give effect to VIA's right of appeal by providing this Court with sufficient insight into the Agency's reasoning process and the factors that it considered.

[24] Therefore, I believe that for this Court to hold that the Agency's reasons are adequate, we must find that those reasons set out the basis upon which the Agency found that the existence of the tariff constituted an obstacle, that they reflect the reasoning process by which the Agency determined that the obstacle was undue and include a consideration of the main factors relevant to such a determination.

[25] I now turn to the questions posed above.

Issue 1: Did the Agency provide adequate reasons for its finding that Section 13-D of the tariff constitutes an obstacle to the mobility of passengers with disabilities?

[26] In the words of the tariff, did the Agency's reasons provide sufficient indication of the reasoning process by which it determined that it is an obstacle to the mobility of a disabled passenger to require that an attendant, travelling on the same ticket as the passenger, be capable of assisting the passenger in getting on and off the train?

[27] The Agency determined that the tariff was an obstacle in its November, 1994 decision. The decision under appeal treats this earlier finding as a given. The only portion of the 1994 decision dealing with the reasons for the Agency's determination is reproduced in paragraph 6 above. It is worth noting that the tariff was not a subject of the original complaint filed by M. Lemonde. Its provisions seem to have come before the Agency only as a result of VIA's reference to it in its submission responding to the complaint.

[28] In my view, the conclusion that the tariff was an obstacle is not supported by sufficient indication of the reasoning process engaged in by the Agency. The reasons provide no intimation of what constitutes an obstacle to the mobility of a disabled passenger nor are they sufficiently clear.

[29] The Concise Oxford Dictionary[12] defines "obstacle" as a "thing that obstructs progress". Not only has the Agency failed to articulate any definition but it also does not appear to have engaged in any reasoned consideration of the tariff provisions. How does the requirement that an attendant be capable of assisting the disabled person with whom they are travelling to board and deboard a train constitute an obstacle to the mobility of the disabled person? This is a question which the Agency did not answer and hence it erred in law.

[30] There are a number of other inconsistencies on the face of the reasons that provide support for my view that the reasons with respect to the finding that the tariff was an obstacle were inadequate. In both its 1994 and 1995 decisions, the Agency accepted that an attendant must be capable of meeting the basic needs of the person he or she is accompanying and of offering services which are not usually offered by the carrier. One example of this would be in assisting the disabled passenger to travel to and from the washroom. Presumably, therefore, the attendant would be required to be capable of providing such assistance. This activity, like boarding or deboarding a train, involves physically assisting the disabled person in moving from one place to another and potentially into and out of a wheelchair. The Agency does not explain why the obligation of the attendant in respect of personal needs on board the train does not constitute an obstacle while any obligation in respect of being capable of providing help in boarding or deboarding does.

[31] Another inconsistency is apparent in relation to an error made by the Agency in describing the condition imposed by the tariff. In the 1994 decision, it said: "The obligation imposed on the [attendant] to board and deboard a disabled person constitutes an obstacle to the mobility of the person . . .". This is not the obligation imposed by the tariff. The tariff merely provides that the attendant *be capable* of providing such assistance. While it implies the possibility that an attendant might be requested by VIA to provide physical assistance in boarding and deboarding disabled passengers, the condition does not impose a general obligation that the attendant do so in all circumstances. Indeed, the Agency accepted in its 1995 decision that, in general, VIA did provide such assistance to disabled passengers.

[32] The Agency did use the proper wording when requiring VIA to show cause why the condition should not be removed and again in its 1995 decision. However, both of these references were made in contexts that arose after the Agency had reached the conclusion that the tariff was an obstacle.

[33] I conclude, therefore, that the Agency erred in law by failing to provide adequate reasons for its decision that the tariff was an obstacle. Its reasons did not provide sufficient insight into the reasoning process followed. Moreover, they were not sufficiently clear with respect to the conclusion that is in issue.

Issue 2: Did the Agency err in law by failing to provide adequate reasons for its conclusion that any obstacle posed by the tariff was "undue"?

[34] While there seems to be no jurisprudence dealing with what constitutes an undue obstacle to the mobility of disabled persons, the Courts have had ample opportunity to consider the use and interpretation of the term "undue" in other legislative contexts.[13]

[35] While "undue" is a word of common usage which does not have a precise technical meaning the Supreme Court has variously defined "undue" to mean "improper, inordinate, excessive or oppressive"[14] or to express "a notion of seriousness or significance".[15] To this list of synonyms, the Concise Oxford Dictionary adds "disproportionate".

[36] What is clear from all of these terms is that "undueness" is a relative concept. I agree with the position expressed by Cartwright J., as he then was:

> "Undue" and "unduly" are not absolute terms whose meaning is self-evident. Their use presupposes the existence of a rule or standard defining what is "due". Their interpretation does not appear to me to be assisted by substituting the adjectives "improper", "inordinate", "excessive", "oppressive" or "wrong", or the corresponding adverbs, in the absence of a statement as to what, in this connection, is proper, ordinate, permissible or right.[16]

The proper approach to determining if something is "undue", then, is a contextual one. "Undueness" must be defined in light of the aim of the relevant enactment.[17] It can be useful to assess the consequences or effect if the undue thing is allowed to remain in place.[18]

[37] The Supreme Court has also recognized that the term implies a requirement to balance the interests of the various parties. In a case dealing with whether an employer had accommodated an employee's right to exercise his religious beliefs up to the point of undue hardship, Wilson J., writing for the majority, found it helpful to list some of the factors relevant to such an appraisal. She concluded by stating: "This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case."[19]

[38] In the case at bar, the Agency's reasons do not reveal sufficient indicators of the reasoning process it followed in interpreting the term "undue". They include no definition of the term "undue" or

any indication of a "rule or standard defining what is 'due'". In its submissions to this Court, the Agency argued that the definition that it had applied was that articulated in its November 1994 reasons: ". . . the obstacles . . . were undue because they could have easily been avoided by the carrier." Even if this could be said to be true, the statement can only lead me to conclude that the Agency undertook no contextual analysis of the issue. It looked only to its perception of VIA's ability to avoid the obstacle. In my opinion, this was not sufficient.

[39] In determining whether the obstacle was undue, the Agency should have first considered the aim of the *National Transportation Act, 1987*. This is found in s. 3(1), which provides that the nation's transportation network should be, *inter alia*, economic, efficient, viable and effective. The network must serve the needs of all travellers, including those with disabilities. In my opinion, the possibility that the economic and commercial objectives of the *Act*, the needs of non-disabled passengers and those of disabled passengers might be inconsistent in some circumstances was contemplated by Parliament and addressed by s-s. 3(1)(*g*). This provision provides that each carrier, *so far as practicable*, should conduct its business under conditions which do not constitute an undue obstacle to the mobility of disabled persons. The use of the words "so far as practicable", in addition to the use of the term "undue" provides further support for my view that the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest.

[40] In its decision the Agency made no mention of s. 3 of the *Act*. I am forced to conclude that it did not have regard to it. Nor do the reasons indicate that the Agency engaged in any consideration of the impact upon VIA and all of its passengers of leaving the tariff in place as compared to removing it.

[41] The Agency was required to consider all of the relevant factors and to balance them against each other. With respect to the interests of the disabled passengers the following factors might be relevant:

1. The difficulty of providing an escort who is capable of assisting the disabled person in boarding the train;
2. The difficulty of providing an escort who is willing to assist the disabled person in boarding the train;

3. The importance to the dignity of the individual that they be able to travel with as much independence as possible and their right to accessible travel.

[42] With respect to VIA, the relevant factors may be collectively termed operational factors and commercial or economic factors. They might include the following:

1. The reasonable availability of personnel and equipment to assist in the boarding and disembarkation from trains;
2. The time required for providing assistance in boarding and deboarding;
3. The effect on scheduling of trains which are required to spend time boarding disabled persons in excess of that scheduled;
4. The impact of delays incurred as a result of boarding disabled persons on all passengers;
5. The impact of unscheduled delays on passenger confidence and the continued viability of VIA's passenger rail service;
6. VIA's ability to contract occasional workers to assist in boarding and deboarding, having regard to any collective bargaining agreements to which VIA is a party;
7. The requirement that such occasional workers be properly trained and insured to carry out their duties; and
8. The expense of providing additional personnel for boarding disabled persons, especially at small stations where only a modest complement of staff is available.

[43] I note that the Agency did refer to some of the factors impacting upon VIA's operational requirements and its commercial viability. It did so mainly in the context of simply reciting VIA's submissions. The Agency agreed with VIA's position that it had an obligation to provide a timely and effective service to all of its passengers and accepted that, in general, VIA does provide assistance in boarding and deboarding to all of its passengers, whether disabled or not. It also recognized that scheduling constraints, large numbers of disabled passengers and insufficient personnel at some stations might impact upon VIA's ability to provide services to disabled passengers. Unfortunately, rather than dealing with those submissions in a reasoned manner, it simply expressed the belief that with sufficient advance notice and consultation between VIA and disabled passengers, problems of accessibility could be avoided.

[44] In summary, the Agency failed to provide sufficient insight into the reasoning process that it followed or the factors that it considered in determining that any obstacle provided by the tariff was undue. In so doing, it erred in law.

Conclusion

[45] In my opinion, the reasons provided by the Agency in its 1994 and 1995 decisions with respect to whether the tariff constituted an undue obstacle to the mobility of disabled persons were inadequate. Specifically, they fail to provide sufficient indication of the reasoning process which the Agency might have followed or of what factors the Agency might have considered relevant.

[46] The decision of the National Transportation Agency with respect to Section 13-D of the tariff is set aside. The matter is referred back to a differently constituted panel of the Agency to conduct a new inquiry with respect to the tariff in accordance with these reasons. The Agency is required to provide the parties an opportunity to lead evidence and make submissions on the issue.

Appeal allowed; matter remitted to National Transportation Agency.

ENDNOTES

1 Order No. 1995-R-491, Decision No. 791-R-1995. Orders and Decisions of the Agency are available at the Canadian Transportation Agency's Web site, on-line: <http://www.cta-otc.gc.ca/eng/toc.htm >.

2 *Ibid.*

3 R.S.C. 1985, c. 28 (3rd Supp.), as amended.

4 The matters falling under s-s. 63.1(1) include:

(*c*) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of disabled persons or services incidental thereto . . .

5 SOR/88-23. The rules are made pursuant to s. 22(1)(*b*) of the *NTA, 1987* which provides:

22(1) The Agency may, with the approval of the Governor in Council, make rules respecting

. . . . .

(*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which *in camera* hearings may be held . . .

6 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 845, 174 D.L.R. (4th) 193.

7 J.M. Evans et al., *Administrative Law* (4th ed.) (Toronto: Emond Montgomery, 1995) at 507.

8 *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161.

9 *Desai v. Brantford General Hospital* (1991), 87 D.L.R. (4th) 140 (Ont. Div. Ct.) at 148.

10 *Northwestern Utilities*, *supra*, note 8, at 707.

11 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 at 637 and 687-688, 183 D.L.R. (4th) 629 (C.A.).

12 (7th ed.) (Oxford: Clarendon Press, 1983).

13 These include undue prevention or lessening of competition (*Combines Investigation Act*, now the *Competition Act*, R.S.C. 1985, c. C-34), undue exploitation of sex (the *Criminal Code*, R.S.C. 1985, c. C-46), undue delay in movement of freight (*Lord's Day Act*, R.S.C. 1970, c. L-13) and undue hardship (human rights legislation).

14 *Weidman v. Shragge* (1912), 46 S.C.R. 1 at 42-43, 2 D.L.R. 734.

15 *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 647, 93 D.L.R. (4th) 36.

16 *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403 at 425, 8 D.L.R. (2d) 449. The statement was made in the context of minority, concurring reasons but was approved of by the majority in *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731 at 746, 75 D.L.R. (3d) 332.

17 *Container Materials Ltd. v. The King*, [1942] S.C.R. 147 at 152, [1942] 1 D.L.R. 529, *per* Duff C.J.C. The judgment of the majority expressed the same principle in other words. See *R. v. Howard Smith Paper Mills Ltd.*, *supra*, *per* Kellock J. (for the majority) at 409.

18 *R. v. Aetna Insurance Co.*, *supra*, at 747-748. *Ontario (Minister of Transportation and Communications) v. Canada (Canadian Transportation Commission)*, [1974] 2 F.C. 164, 52 D.L.R. (3d) 473 (C.A.).

19 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 521, 72 D.L.R. (4th) 417.

Maciorowski v. Liberty Mutual Insurance Company*

[Indexed as: Longo v. Maciorowski]

Court File No. C33357

Ontario Court of Appeal
Catzman, Abella and Rosenberg JJ.A.

Heard: September 5, 2000
Judgment rendered: October 3, 2000

Insurance — Automobile insurance — Statutory conditions — Duty to defend — Insured causing damage in collision — Operating motor vehicle

* Application for leave to appeal to the Supreme Court of Canada filed December 4, 2000 (Court File No. 28301).