

## The End (Beginning?) of a Long Journey: Disability and Air Travel

By Linda McKay-Panos

### Cases Considered:

[McKay-Panos v. Air Canada, Decision No. 519-AT-A-2008 \(Canadian Transportation Agency\)](#)

Sometimes it takes a very long time (eleven years) to receive a legal remedy, but my case illustrates tenacity can be beneficial. The situation in which I found myself, although very personal, resulted in setting a legal precedent and hopefully in helping to protect the dignity and humanity of many disabled air travelers.

The precipitating incident is nicely summarized in the recent decision of the Canadian Transportation Agency ("Agency"):

[10] On June 14, 1997, Ms. McKay-Panos contacted Air Canada to book a return ticket for travel between Calgary and Ottawa, leaving Calgary on August 21, 1997 and returning on August 24, 1997. She informed the Air Canada agent of her weight and size and asked whether the seats would accommodate her; she also offered to purchase two economy class seats or one business class seat. The reservation agent, after consulting with her colleagues, told her that there was no need for her to purchase two seats as a bulkhead seat would provide more room than any other economy class seat. The Air Canada agent also confirmed that bulkhead seats are assigned to larger people. Ms. McKay-Panos stated that the agent was not sympathetic, made off-hand remarks and laughed about her situation.

[11] When Ms. McKay-Panos boarded the aircraft in Calgary on August 21, 1997, she discovered that bulkhead seats were not appropriate as they did not have liftable armrests and she had great difficulty forcing herself into her passenger seat. She said that neither she nor the person seated beside her could access the chair tables because her hips spread onto the armrests, which is where the chair tables are located on bulkhead seats.

[12] Although Ms. McKay-Panos reports being practically in tears and very embarrassed, the flight attendants did not offer any suggestions or express any concerns; rather, Ms. McKay-Panos states that they "regarded [her] as an inconvenience and kept bumping [her] with their service carts." During a stop-over in Toronto, Ms. McKay-Panos had to stand for the whole hour as, by then, she was in extreme pain. She was offered an available business class seat on the Toronto-Ottawa portion of her outbound trip at no additional cost.

[13] The next day, she was in terrible pain and was unable to get out of bed for several hours. As a result, on August 22 - that is, two days prior to her return to Calgary - she asked Air Canada to change her seating assignment for her return flights. She was told that this was not feasible as both flights were oversold but that

she could purchase a business class seat for an additional \$972 for the Toronto-Calgary segment. She was advised that, alternatively, she could ask upon arrival of her flight in Toronto whether alternate accommodation was available for the remainder of her return trip to Calgary.

[14] On August 24, she arrived early at the airport in Ottawa, but was unable to have her seat assignment changed. In Toronto, when she asked for a seat reassignment for the remainder of her trip, the agent - who, throughout the exchange, was allegedly rude, abusive and inhumane - refused to move Ms. McKay-Panos into the business class at no extra charge, saying it was against Air Canada policy. Consequently, she was forced to purchase a business class ticket for the Toronto-Calgary portion of her flight for the additional sum of \$972.

[15] Ms. McKay-Panos contends that she was subjected to stereotyping and discrimination, and that she endured rude and judgmental treatment. She is of the view that, because of her obesity, she was not treated with dignity; she experienced physical pain, extreme humiliation and embarrassment. As a result, Ms. McKay-Panos is seeking an apology. She also proposes that Air Canada provide alternative seating for obese passengers at a reasonable cost, and suggests that alternative eating trays - that is, portable trays - be made available for people who cannot use fold-down or armrest trays.

[16] Air Canada states that, at the time Ms. McKay-Panos travelled, its policy relating to persons who require additional seating space was to offer those passengers the option of purchasing a second seat at 50 percent of the full adult fare or at 100 percent of the applicable excursion fare. Alternatively, a single seat in the executive class could have been purchased or, when possible and on an *ad hoc* basis, the use of two seats for the single applicable fare was granted.

At first, I complained to the Canadian Human Rights Commission about discrimination in the provision of a public service on the ground of disability. The complaint was transferred to the Agency because it deals with disability in travel situations under the accessible transportation provisions of its legislation, the *Canadian Transportation Act*, S.C. 1996, c. 10 ("CTA").

In order to provide a corrective measure under Part V subsection 172(3) of the *CTA*, the Agency must be satisfied that:

1. there is a person with a disability;
2. this person has encountered an obstacle; and
3. this obstacle is undue.

The Agency decided that it needed information about whether obesity was a disability and assigned an inquiry officer in 1998, who produced a report in 1999, which concluded that obesity *could* be a disability. The Agency determined that the Interim Report was inconclusive as to whether obesity should be considered a disability and, accordingly, the Agency decided that it would not adopt the recommendations and conclusions contained in the Interim Report.

The Agency next decided to hold hearings into the preliminary jurisdictional issue of whether obesity constitutes a disability for the purposes of Part V of the *CTA*. Two weeks of hearings were conducted in Calgary during 2001 at which many experts provided evidence as to whether obesity was a disability. During these proceedings, the Agency received expert evidence on

models of disability, including the World Health Organization's *International Classification of Functioning, Disability and Health* (the "ICF model"), which identifies three elements for determining whether a person has a disability: impairment, activity limitations, and participation restrictions. In a two to one majority, the three member Panel of the Agency concluded that obesity per se was not a disability for the purposes of the CTA (see [Decision No. 646-AT-A-2001](#) (*McKay-Panos v. Air Canada*)).

I decided to appeal the decision and was fortunate to receive Court Challenges funding, based on the implications of the issue on interpretation of disability under the *Canadian Charter of Rights and Freedoms* s. 15(1). Court Challenges was a non-profit organization set up by the federal government in 1994 to provide financial assistance for important court cases that advance language and equality rights under Canada's constitution. The federal government discontinued the Court Challenges program in 2006 (although funding was restored to its language rights arm in June 2008).

We argued that the CTA was legally incorrect in not taking the context of the discrimination into account, and context is critical in human rights cases. That is, each case must be based on its own circumstances. Obesity might not be a disability for me in my workplace, but it would be one when trying to fit into an airplane seat. Thus, we believed the blanket finding that obesity *per se* is not a disability did not result from a correct legal analysis of the issue.

With the assistance of two lawyers, Ritu Khullar and Jo-Ann Kolmes, I applied for leave to appeal and then appealed the Agency's ruling to the Federal Court of Appeal. See: [McKay-Panos v. Air Canada, 2006 FCA 8](#).

The Council of Canadians with Disabilities intervened in the Federal Court of Appeal case. This was because they were involved in the Joanne Neubauer and Eric Norman case, arguing for "one person one fare" for disabled passengers, and wanted to submit a brief on disability. The Federal Court of Appeal ruled that I was disabled by obesity and that "[I]n light of the concession [of Air Canada] that the applicant suffers from an impairment, and the fact that she has encountered an activity limitation on account of this impairment, the only conclusion open to the Agency was that the applicant is a person with a disability under the CTA" (para 42). In 2006, the matter was remitted back to the Agency to decide my case once again.

In the meantime, the Neubauer and Norman case was being heard by the Agency. The Agency decided to add the issue of obesity to the consideration of whether paying additional flight fares to accommodate disability was an undue obstacle under the CTA. We intervened in the matter to represent the specific issue of undue obstacle in the case of obesity. In this regard, the Agency found that the fare policies of Air Canada, Air Canada Jazz and WestJet related to domestic air services:

constitute undue obstacles to persons who require additional seating to accommodate their disabilities to travel by air insofar as these policies require these persons with disabilities to pay additional fares and charges for transportation services that are over and above what other passengers pay for the same transportation services to have their disability-related needs accommodated (at para. 21).

The Agency ordered that:

[25]....The carrier respondents shall not charge a fare for additional seats provided to the following persons with disabilities:

- those persons who are required, under the terms of the carriers' tariff, to be accompanied by an Attendant;
- those persons who are disabled as a result of obesity; and
- those other persons who require additional seating for themselves to accommodate their disability to travel by air.

[26] With respect to the implementation of corrective measures, in recognition of the need for the respondents to, in the case of the carrier respondents, develop new or modify existing eligibility screening mechanisms so that they can properly apply the new policies, and, in the case of the Gander Airport Authority, establish a procedure to determine how to identify those persons with disabilities who are required by air carrier domestic tariffs to travel with an Attendant, the Agency determined that a twelve-month period is reasonable for the finalization and implementation of the corrective measures ordered (see [Decision No. 6-AT-A-2008 \(Estate of Eric Norman, Joanne Neubauer and the Council of Canadians with Disabilities v. Air Canada et al\)](#)).

The airline was denied leave to appeal this decision to the Federal Court of Appeal (Federal Court of Appeal, Number 08-A-11, May 5, 2008) and the Supreme Court of Canada further denied leave to appeal that decision (see: [Air Canada, Jazz Air LP, as represented by its general partner, Jazz Air Holdings GP Inc., carrying on business as Air Canada Jazz and West Jet v. Canadian Transportation Agency, Estate of Eric Norman, Joanne Neubauer and Council of Canadians with Disabilities](#)).

In the meantime, the Agency released a favourable decision on my particular case on October 18, 2008 (Decision No. 519-AT-A-2008, *supra*). This time the Agency found that the manner in which Air Canada personnel treated me constituted an undue obstacle to my mobility under the CTA and ordered that Air Canada modify its policies regarding, *inter alia*, persons who are disabled by obesity. At para 50, the Agency stated:

The Agency directs Air Canada to ensure, if it has not already done so, that its training program and related materials include information on providing services to, and interacting with, customers who are disabled due to obesity. It should be clear in that information that obesity can be a disability and that it may require accommodation in the same sense that passengers with other disabilities may require accommodation to meet their particular needs. Finally, training information must cover such aspects of sensitivity and awareness as the importance of treating with dignity those passengers who are disabled as a result of their obesity.

I am looking forward to the day the policies are implemented and people with disabilities can then fly with dignity.